

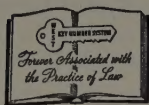
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CALIFORNIA REPORTER

Covering Cases Reported in
PACIFIC REPORTER



221 P.—224 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

Thus:

221 P. 191

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

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Pacific Reporter, Vol. 221, Nos. 1-4; Vol. 222, Nos.
1-4; Vol. 223, Nos. 1-4; Vol. 224, Nos. 1-5.

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STEWART v. SILVA. (S. F. 10415.)

(Supreme Court of California. Nov. 19, 1923.
As Modified Dec. 19, 1923. Rehear-
ing Denied Dec. 19, 1923.)

1. Deeds — 194(2)—Possession of deed prima facie evidence of delivery.

A presumption of delivery arises from the fact that grantee actually had possession of it and produced it in court.

2. Deeds — 194(2)—Presumption of delivery from grantee's possession of deed not overcome by evidence of nondelivery.

Notwithstanding grantor of land continued to deal with it, pay taxes, insurance, and live on it with his goddaughter, the grantee, after alleged delivery of deed thereto to her, such fact did not show deed was not delivered, and inferences arising therefrom of nondelivery were not sufficient to overcome grantee's prima facie case from possession of deed.

3. Deeds — 56(2)—Misapprehension by grantor of effect of deed does not affect fact of delivery.

Under Civ. Code, § 1056, a misapprehension by the grantor of the effect of his deed does not affect the fact of delivery, if made with the intention to deliver.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action to quiet title by Mamie Silvia Stewart, as administratrix of the estate of John J. Silvia, deceased, against Maria Filomena Adelaide Silva, also known as Mary F. A. Silva. Judgment for plaintiff, and defendant appeals. Reversed.

Jordan & Brann, of San Francisco, for appellant.

H. L. Hagan, of San Francisco, and T. J. Ledwich, of Oakland, for respondent.

WILBUR, C. J. The sole question at issue in this case is whether or not certain deeds executed by John J. Silvia as grantor to the defendant were delivered and thus vested the title, theretofore in said decedent, in the defendant. The question arises in an action to quiet title brought by the daughter of John J. Silvia, deceased, acting as the administratrix of his estate to quiet title to the land described in the conveyances. The trial

court found that the conveyances were not delivered, and therefore that the title was in the decedent at the time of his death, and therefore entered a judgment quieting such title. The defendant appeals from this judgment.

The decedent made three deeds of the property in compliance with his promise to the defendant that if she came to San Rafael and worked for him during the rest of his life he would give her the property. Upon arriving in California in 1913 or 1914, decedent made a deed of this property to the defendant, which deed was placed in escrow with Thomas P. Boyd, his attorney. Later this deed was taken from the attorney by the grantor and delivered to the grantee and she was in actual possession thereof until 1919. In this deed the first name of the defendant was written as Mary instead of Maria. For that reason the deed was returned to the grantor and taken by him to his attorney, who prepared a new deed and the first deed was destroyed by the grantor. On August 20, 1919, the grantor and grantee both went to the office of the attorney. This attorney and the grantee both testify as to what occurred, and from this testimony, if believed, it is clear that the deed was delivered at that time. The grantee testified as follows with reference to what occurred at that time:

"Q. Will you repeat his identical language at the handing over of the second paper? A. He gave me the paper. 'This is the deed of your property that I give you. From now on this property is yours, but during the time I live I will receive all the interest and I shall pay the taxes, and then, after I die, send this paper to the recorder.' * * * Q. What was done with that deed after it was handed to you on that occasion in 1919 in Mr. Boyd's private office? A. I took it and put it into a little hand bag I had in my hand, took it home, and kept it in my trunk. I saw it every time I would open my trunk; I would see it in the bottom of the trunk, underneath my clothes."

The witness also testified that the deed remained in her possession until after the death of the grantor, whereupon she took it to the recorder's office and had it recorded.

The attorney, Thomas P. Boyd, was also called as a witness with reference to the delivery of the deed, and testified as follows:

"A. I got the deed from the desk of Miss Essie Boyd, my sister. It had been signed and acknowledged by Mr. Silvia, and I brought it into the office. I then told Mr. Silvia that he should hand this deed to Miss Silvia himself, and I told him the effect of handing that deed to her would be to deprive himself of title to the property. I asked him in fact if he knew what he was doing, if he understood it, and he said he did. So I then told him to hand the deed to her and tell her the property was hers. He took the deed from my hand, handed it to her in my presence, said something to her in

Portuguese, which I did not understand, and she took that deed, put it into her handbag, and left."

This witness also testified that during the grantor's last illness he visited the grantor, and that the grantor then asked about the deed. "He asked me," the witness testified, "if she would be safe in her property. I said, 'Yes, you can make the thing doubly sure by making a will if you want to.' He said he would not bother making a will as long as I was satisfied she had the property. It was hers."

Mrs. Eva L. Osborn, who was employed by Mr. Boyd as stenographer and clerk, testified that the deed had been prepared at the instance of the grantor. With reference to the delivery, she testified that Mr. Boyd took the deed into the room where the grantor and grantee were at the time in his office, and then testified as follows:

"Q. Then what took place, if you know? A. He left the door open when he went in so I saw everything that went on. He had the deed. Mr. Boyd had the deed, and he said to Mr. Silvia: 'Now, John, I hope you know what, you realize what you are doing; when this deed passes to this lady, the property becomes hers. It is no longer yours; you are making no mistake about this?' And he said: 'No, that is all right; I know, I trust her, and I want her to have it.' Q. And then what happened? A. Then Mr. Boyd said: 'Well, then you take the deed and hand it to her personally and tell her that.' Q. And then what happened? A. Then Mr. Boyd handed it to Mr. Silvia, and he handed it to Miss Silvia and said something to her but it was in Portuguese; I do not know what it was. Q. What did she do with the instrument, if anything? A. She had a little hand satchel and she put in there."

The trial court found that on August 20, 1919, the decedent signed and acknowledged before a notary public a certain grant, bargain and sale deed, sufficient in form to convey the real property described in the action to the defendant, but found that the deed was never delivered, but that the deed was secured by the grantee after the death of the grantor and recorded.

Six witnesses testified that the grantor told them that he had deeded the property to the grantee. Some of these statements were made previous to the acknowledgment and delivery of the second deed and for that reason undoubtedly referred to the first deed.

The evidence relied upon by the respondent to overcome the direct testimony of these witnesses as to the delivery of the deed relates largely to the dealing of the parties after the making of the deed with the property therein described. The insurance policy upon the house was retained in the name of the grantor. Taxes were paid by the grantor. On January 1, 1916, the store was leased for

five years by a written lease entered into by John J. Silva and John V. Cardoza and Manuel V. Cardoza. The property was therein described as owned by Silva. It is argued:

"If the 1914 deed was not regarded by the parties as a valid conveyance, it is a reasonable inference that they did not intend the 1919 conveyance to have any greater validity."

[1] The respondent's argument is in effect that the trial court was justified in disbelieving the testimony of the grantee because she had made contradictory statements; that the trial court was justified in disbelieving the attorney who testified for the reason that the attorney had executed the lease of the property in 1916, after the deed of 1914, showing that although the two deeds were said to have been delivered under somewhat similar circumstances, the attorney did not believe that title had passed. In this connection, however, it should be observed that the first deed was deposited with the attorney in escrow to be delivered upon the death of the grantor; the legal effect of this arrangement being that the grantor would retain a life estate. Under these circumstances, of course, the making of the lease was perfectly proper. Even if we assume that the trial court believed and intended to find as a fact that the attorney, his clerk, and stenographer, and the defendant deliberately testified falsely as to the delivery of the deed, we still have the presumption of delivery arising from the fact that the grantee in the deed actually had the possession of the deed and produced it in court. This alone constituted prima facie evidence of delivery. *Ward v. Dougherty*, 75 Cal. 240, 242, 17 Pac. 193, 7 Am. St. Rep. 151. It was there said:

"Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is prima facie evidence of its delivery.

"The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of nondelivery should prevail against the presumption. (*Devlin on Deeds*, § 294.)

"In *Tunison v. Chamblin*, 88 Ill. 379, it was said: 'When a deed duly executed is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land.' * * *

"In *Branson v. Caruthers*, 49 Cal. 374, it was said: 'The production of the deed of gift by the attorneys of the wife [the grantee] was sufficient evidence of its delivery and acceptance.' (*Barr v. Schroeder*, 32 Cal. 609.)"

[2] If we not only disregard the testimony of the witnesses who were present at and participated in the delivery of the deed to the grantee and also disregard the declarations made from time to time by the grantor that he intended to deed the property to the grantee and that he had deeded the property to the grantee, what have we left in the evidence to overcome the presumption of delivery arising from the possession of the deed by the grantee? There is nothing substantial. The evidence of the continued dealing with the property by the grantor was not necessarily in conflict with the actual situation disclosed by the evidence as offered by the defendant. The grantor was her godfather, who had brought her to this country to keep house for him. They lived together, and it was quite natural that the godfather, the grantor of the property, should continue to deal with it, pay taxes, insurance, and live upon the property with his goddaughter, the grantee, as he in fact did. This would not show that the deed was not delivered and the inferences arising therefrom of nondelivery would not be sufficient under the circumstances to overcome the prima facie case arising from the possession of the deed by the grantee. The fact that the grantor at the time of the delivery expressed a desire that the deed should not be recorded until after his death and intended to exercise acts of ownership thereover during his life, if we accept the testimony of the grantee that such statements were made by him at the time of the delivery of the deed, would not prevent the delivery from being effective if the grantor in fact intended to deliver the deed.

[3] A misapprehension by the grantor of the effect of the deed would not affect the fact of delivery, if made with the intention to deliver. See section 1056, Civ. Code; *Whitney v. Dewey*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572.

The situation presented by this appeal may be summed up as follows: If the trial court disbelieved all the witnesses who testified on behalf of the defendant with reference to the delivery of the deed, there is no evidence to overcome the presumption of delivery derived from the fact that the grantee had possession of the deed. If the trial court believed the testimony of these witnesses, it could not escape a finding of fact that the deed was delivered. In either event the finding of the trial court was erroneous.

Judgment reversed.

We concur: WASTE, J.; SEAWELL, J.; MYERS, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

LENNON, J. I concur in the conclusion of Mr. Justice WILBUR, which results in a reversal of the judgment in this case, primarily

ly for the reason that it is the general rule that the uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial court. *Hayward v. Rogers*, 62 Cal. 348, 372; *Gage v. Billing*, 12 Cal. App. 688, 108 Pac. 664; 10 Cal. Jur. p. 1143. To the contrary, such testimony must be accepted as proof of the fact which it is offered to establish, unless it can be said that such testimony is so inherently incredible and improbable as to amount to no evidence at all. *Hutchison v. Holland*, 47 Cal. App. 710, 190 Pac. 1072; *Hynes v. White*, 47 Cal. App. 549, 190 Pac. 836. In the instant case the testimony of several witnesses concerning the issue of the execution and delivery of the deed in controversy is not inconsistent with the circumstances which admittedly preceded, attended, and followed the making and alleged delivery of said deed, and prima facie no good reason appears why the testimony of said witnesses may not be said to reasonably harmonize with said circumstances. In the absence of circumstances tending to support a conclusion opposite to that deducible from the testimony of those witnesses, the trial court was not privileged to reject their testimony. *Williams v. Covillaud*, 10 Cal. 419; *In re Sullivan's Estate* (Cal. Sup.) 211 Pac. 458.

(192 Cal. 426)

DONAT v. DILLON. (L. A. 7269.)

(Supreme Court of California. Nov. 27, 1923.)

Municipal corporations ☞ 706(6)—Negligence of automobile driver turning at street intersection held question of fact.

Where defendant, a motorist driving north, attempted to turn a corner to the left, and passed beyond the center of the intersection, and gave a proper arm signal, he was not free from negligence as a matter of law, in regard to a guest riding south in an automobile going at an unlawful speed, if on seeing the approaching car, 100 feet away, he failed to proceed across the intersection in a careful and prudent manner, and to make sure that he had sufficient space to make the turn in safety as required by Motor Vehicle Act, § 20 (n), as amended by St. 1919, p. 214, § 12, since the right of way given by subdivision (f) to the driver first reaching the crossing is subject to the limitations prescribed by subdivision (n) in respect to one turning into another street.

In Bank.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by L. W. Donat against H. T. Dillon. Judgment for plaintiff, and defendant appeals. Affirmed.

Emmons, Aldrich & Heck, of Bakersfield, for appellant.

Kaye & Siemon, of Bakersfield, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment entered against him for \$1,401.90, in an action brought by plaintiff to recover damages for personal injuries caused by a collision between an automobile driven by the defendant and another automobile in which the plaintiff was riding as the guest of one H. C. Riddle.

The facts of the case, as shown by the findings, which are supported by the evidence, are as follows: Plaintiff was riding as a guest of Riddle, who was driving his automobile in a southerly direction on the westerly side of Chester avenue in the city of Bakersfield. The defendant was driving in a northerly direction on the same avenue, and both were approaching its intersection with Twenty-Fourth street. On arriving at this point the defendant undertook to make a left turn in order to proceed westerly on Twenty-Fourth street. Before turning he extended his left hand in a horizontal direction outwardly from the left side of his car, thereby giving the proper signal of his intention to make the change of course mentioned. He thereupon ran beyond the center of the intersection and, proceeding at a slow rate of speed, completed the turn. His automobile had just cleared the car tracks on Chester avenue when it collided with that of the plaintiff. The defendant, as he testified, first observed the car driven by Riddle approaching from the north as he was "just ready to make the left-hand turn." At this time Riddle's machine was about 100 feet north of the intersection, and was approaching said intersection at an excessive and unlawful rate of speed, exceeding 30 miles per hour. The defendant did not again observe the oncoming automobile until it was in such a position that a collision was inevitable.

The trial court, in addition to a finding substantially to the foregoing effect, found that "the said defendant so carelessly and negligently operated and drove his said automobile that he caused the same to divert from the easterly side of said avenue to the westerly side thereof and to enter the path of the automobile being driven by the said Riddle in such manner as to collide with great force and violence against the left side of the automobile being driven by the said Riddle, and thereby caused the same to overturn." The court further found that defendant negligently attempted to make said turn "without first seeing that there was sufficient space for such movement to be made in safety," in this that, when about to commence making the turn, the defendant observed the approach of the Riddle car, which at that moment was a distance of approximately 100 feet north of the northerly boundary of Twenty-Fourth street, "but that the said defendant failed at said time to observe the speed at which the said car being driven by Riddle was approaching, and further failed to observe the movement of the said car

being driven by Riddle, and did not again see said car until his own car was about to collide against the left side of the automobile so being driven by the said Riddle."

The principal contention of defendant upon this appeal is that the evidence is not sufficient to establish the fact of negligence upon his part, or to prove that such negligence was the proximate cause of plaintiff's injuries. It was conceded at the trial that the negligence of Riddle in driving at an excessive rate of speed was not imputable to the plaintiff, so that if defendant's negligence was the proximate cause of the accident, plaintiff could recover notwithstanding the contributory negligence of Riddle.

As we see it, this case falls within the general rule that negligence is a question of fact for the trial court or jury. Here it was peculiarly a question for the court trying the cause to decide as a matter of fact whether or not the defendant was negligent in executing this left turn in the manner in which he did. The defendant seeks to take the case out of the operation of this rule, and would, in effect, have us decide as a matter of law that one having reached the intersection and having given the signal indicating his intention to turn has then relieved himself of all further care in the matter. But it is obvious that such is not the law. A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. He could not close his eyes so far as south-bound traffic on Chester avenue was concerned. To the contrary, having observed Riddle's car approaching at an exceedingly fast rate of speed for that vicinity, the defendant was no longer entitled to rely upon the presumption that the driver of this machine would comply with the rules of the road, and he was bound to take such reasonable measures as he could under the circumstances to prevent the injury. It was, therefore, a question for the trial court to determine upon all the evidence and the reasonable deductions therefrom whether the defendant, after having seen the approaching machine, continued to exercise the care and prudence which a reasonable man would have exercised under the circumstances. And, as we cannot say that the trial court reached an unreasonable conclusion, we are bound by its finding of the ultimate fact which determined the proximate cause of plaintiff's injury.

Furthermore, there is nothing in the provisions of the Motor Vehicle Act which spe-

cifically gave the defendant the right of way under the circumstances of this case. Subdivision (n) of section 20 of this act provides that—

"The person in charge of any vehicle in or upon any public highway, before turning, stopping, or changing the course of such vehicle, and before turning such vehicle when starting the same, shall see first that there is sufficient space for such movement to be made in safety, and if the movement or operation of other vehicles may reasonably be affected by such turning, stopping or changing of course, shall give plainly visible signal to the persons operating, driving or in charge of such vehicles of his intention so to turn, stop, or change his course. * * *" Stats. 1919, pp. 191, 216.

And in subdivision (f) of the same section it provided that—

"Excepting where controlled by such traffic ordinances or regulations as are permitted under this act the operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right unless such vehicle approaching from the right is further from the point of the intersection of their paths than such first-named vehicle."

Although a machine first reaching the intersection may have the right of way, it does not follow that one who changes his course at the intersection of a street is entitled to the full protection of this rule, for common sense tells us that he is bound to exercise great care to avoid colliding with machines that are on the street, and across whose path he must travel. *Clark v. Fotheringham*, 100 Wash. 12, 170 Pac. 323. It seems to us that this was what the Legislature had in mind when it provided that a vehicle, before starting to turn, "shall see first that there is sufficient space for such movement to be made in safety," so that the practical effect of this provision is to cast upon motorists intending to turn the duty of exercising greater care than is ordinarily required of them.

In accordance with the above-expressed views, we are of the opinion that the judgment of the trial court was proper, and should be, and is hereby, affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.; RICHARDS, Justice pro tem.

(192 Cal. 472)

SCHOOLER v. WILLIAMSON. (Sac. 3403.)

(Supreme Court of California. Dec. 5, 1923. Rehearing Denied Jan. 4, 1924.)

I. Trusts —43(1)—Statements indicating knowledge of effect of indorsements admissible in action to establish trust.

Statements made by the owner of bonds to his attorney at the time of drawing his will,

relative to the effect of indorsement on the envelope containing the bonds, indicating knowledge of its legal effect, held admissible in an action to establish a parol trust in favor of indorsee.

2. Evidence —231(3)—Declarations subsequent to transfer of interest inadmissible.

Declarations made subsequent to a transfer of bonds or an equitable interest therein by the transferer adverse to that interest are inadmissible in an action to establish title.

3. Evidence —121(1)—Declarations made between the dates relied on to establish a parol trust part of *res gestæ*.

Where declarations made on the 19th, 20th, and 31st of the same month are relied upon as part of a parol declaration of trust, intermediate adverse statements made on the 26th are under Code Civ. Proc. § 1850, part of the *res gestæ* and admissible in an action to establish such trust.

4. Gifts —28(2)—Intent of owner not given effect if acts did not constitute valid transfer.

That one indorsing the name of another on an envelope containing bonds did so under the bona fide belief that a valid transfer was thereby effected would not warrant the court in giving effect to such intent.

5. Evidence —233—Declarations as to title and character of possession of bonds held admissible.

Where the owner of bonds indorsed the name and address of another on the envelope containing them, after expressing an intent to make a gift of them to the indorsee, declarations subsequently made by him, while retaining possession of the bonds, concerning his title and the character of his possession, are admissible in an action by the indorsee to establish a parol trust.

6. Trusts —44(1)—Evidence held to negative parol trust in bonds.

Evidence held to sustain findings negating parol trust in bonds.

7. Trial —374(2)—Court in action to establish trust may disregard jury's findings.

An action to establish a parol trust in personality being equitable and the findings of a jury in an equitable action being merely advisory, the court may disregard the jury's findings.

In Bank.

Appeal from Superior Court, Butte County; Ernest Weyand, Judge.

Action by Nellie E. Schooler against Edward Thomas Williamson, as executor of the last will of Joseph Richardson Houghton, deceased, and individually. Judgment for defendant, and plaintiff appeals. Affirmed.

Bond & Delrup, of Chico, and William H. Schooler, of San Francisco (Charles A. Shurtleff, of San Francisco, of counsel), for appellant.

Charles P. Gale, of San Francisco, and George F. Jones, of Oroville, for respondent.

WILBUR, C. J. In this action the plaintiff seeks to establish her right to ten \$1,000 bonds of the Pacific Telephone & Telegraph Company, now in the possession of the defendant as executor of the last will of Joseph Richardson Houghton, deceased. These bonds first came into possession of the defendant in October, 1920, when he was appointed guardian of Joseph Houghton, who had been on the 25th of October, 1920, declared an incompetent. They were at that time in a safe deposit box in the vaults of the Union Trust building in an envelope, on the outside of which was indorsed the following: "Mrs. Nellie E. Schooler, No. 3859 21st Street, San Francisco, Cal." And upon the back of the same envelope in the same handwriting, but in pencil, was the following: "10 bonds Pac. Telephone & Tel. Company. Interest payable Jan. 2d and July 2d—5 per cent. per annum."

Guy R. Kennedy, an attorney at law, who drew the will of the decedent, testified that between the 1st day of August, 1918, and the 15th day of April, 1919, he had a conversation with Mr. Houghton in Chico in which the latter said that he had an envelope on which there was the name of Mrs. Schooler written together with her address in his safe deposit box; that at that time he stated that he had not given them (the bonds) to her and had not given possession of them to her, and they were a part of his estate the same as the other bonds, and that Mr. Houghton then asked the witness if under the circumstances she would get the bonds after his death, and the witness told him that she would not. On April 15, 1919, the witness drew the will of Mr. Houghton and at that time had a conversation with him about an envelope in his safe deposit box in the Union Trust Company which contained ten \$1,000 bonds on which the name of Nellie E. Schooler was written, together with her address. The witness testified:

"I asked him about the envelope again, and asked him if he had given those bonds that it contained to Mrs. Schooler, and he said, 'No;' and I asked him if he had delivered possession of them to her, and he said, 'No;' and I asked him if they were part of his estate, and he said, 'Yes;' and I said, 'They go the same as the rest under the terms of the will,' and he said 'Yes.'"

On July 26, 1920, this witness and Mr. Houghton visited the safe deposit vaults of the Union Trust Company and opened his safe deposit box. At that time the witness saw the envelope containing the ten \$1,000 bonds of the Pacific Telephone & Telegraph Company with the name and address of the plaintiff written thereon. He then examined the envelope and identified it as the same envelope offered in evidence, and testified that at the time the same was exhibited to him by Mr. Houghton the witness asked:

"Major, is this the envelope you talked about in Chico, and he said 'Yes;' and I said, 'Have you ever given these bonds to Mrs. Schooler,' and he said, 'No;' and I asked him if he ever delivered possession of them to Mrs. Schooler, and he said, 'No;' and I said, 'Are they part of your estate,' and he said, 'Yes;' and I said, 'Just the same as the other bonds,' and he said, 'Yes.'"

This witness also testified that, in the first will executed by the deceased, \$10,000 in bonds was left to Mrs. Schooler and that the conversation concerning the envelope arose in connection with the execution of the new will in which the legacy to Mrs. Schooler was reduced \$5,000.

The coupons on the bonds due January 1, 1920, and July 1, 1920, were not clipped from the bonds and were still thereon at the time of the death of the decedent.

It is clear that upon this evidence the judgment of the trial court in favor of the defendant was amply justified, but the appellant contends that the evidence of the declarations of the deceased hereinbefore stated were improperly received in evidence because they were self-serving declarations and hearsay.

Before disposing of the question thus raised by the appellant the evidence upon which she relies to establish her rights to the bonds will first be stated. Appellant alleges that on the 19th day of July, 1920, the decedent informed her that he intended to go at once to the Union Trust Company and that he had some bonds there that "I shall fix for you, and then that will make it right." That on the next day he told her that he had "fixed it for me and that he felt very much better over it; he said, 'Those bonds were there.' I said, 'Perhaps I will not get them;' and he said, 'Oh, Ed is honest; Ed will give them to you.'"

Frederick William Clements testified that he was with Major Houghton on the 19th day of July, 1920; that at the request of the decedent he accompanied him to the safe deposit vaults in the Union Safe Deposit and Trust Company at the corner of Market and Grant avenue; that at that time and in his presence the bonds were counted, the numbers written down, and that at that time the bonds were taken from one envelope and placed in another upon which the deceased wrote the name and address of the plaintiff, which envelope was identified as the one introduced in evidence containing the bonds at the time they came into the possession of the defendant. The envelope containing the bonds was replaced in the safe deposit box, and the decedent stated, "I am glad I done that," and pointing to the box he said, "There is \$5,000 more for her there." As they were leaving, the following conversation occurred between the witness and Mr. Houghton:

"I said, 'Joe, you are not doing that right,' I said, 'Supposing that envelope gets lost?' He said, 'Ed will give them to her,' meaning Mr. Williamson; and I said, 'That is all right; if you could come back the day after you are dead and see that she gets them, it will be all right;' and he said, 'You see that she gets them; they are hers, and for her, and you see that she gets them.'"

The witness testified that he repeated the statement later and said that he had told the plaintiff what he had done. The witness testified that afterwards he had a number of conversations of similar import and that the witness repeatedly stated to Mr. Houghton, "You are not doing this right, Major."

On the 31st of July, 1920, the witness testified that he again accompanied Mr. Houghton to the safe deposit vaults; that the box was again opened and Mr. Houghton made a search among his papers, apparently looking for a will and during the course of the search picked up the envelope and said, "These are Nellie's; I am glad I done that."

The deceased was about 74 years old at the time of his death. He left no near relatives, and his estate was valued at about \$160,000, most of which was bequeathed by his will to his friends.

[1] These conversations between Mr. Houghton and his attorney with reference to the effect of an indorsement upon the envelope containing bonds were admissible to show that the decedent knew at the time he is alleged to have written the name of the plaintiff upon the envelope containing the bonds that such writing would not have the effect of transferring title to the appellant, and that notwithstanding such indorsement, if there was no delivery of the bonds, he would still have full power of disposition over such bonds as a portion of his estate. The declarations of 1918 and 1919 of the donor that he had theretofore placed the bonds in an envelope so indorsed were wholly immaterial for any other purpose, for it is conceded that the decedent owned the bonds when he made these declarations tending to show his ownership, and, in so far as they tended to confirm title in the decedent at that time, such declarations conform to the theory of the appellant, namely, that he was at that time the owner of the bonds. A week after the time fixed by the appellant's witnesses as the time of the placing of her name and address upon the envelope Mr. Houghton stated to his attorney that the envelope and the indorsement thereon were the same referred to by him in the conversation two years earlier as having been made by him without any intention of making a gift of the bonds. This declaration concerning the indorsement clearly tended to show the purpose and intent of the owner in making such indorsement, whenever it was made.

[2] It may be conceded that the declarations of the deceased made after the trans-

action of July 19, 1920, concerning the title to the bonds, would not be admissible against a person to whom he had transferred the bonds, or an equitable interest therein, if such declarations were in derogation of that interest. *Keese v. Beardsley* (Cal. Sup.) 213 Pac. 500. But the sole question here is whether or not there was a transfer of such equitable interest. If the transfer be conceded, the subsequent declarations would have no probative value, because such declarations are only material upon the issue of transfer. The question here in issue is the motive and intention of the owner of the bonds in holding them in his own safe deposit box without delivery of them to the plaintiff, and without any indorsement thereon indicating an intention to so deliver said bonds and without any evidence of a transfer of title or interest in the bonds other than the somewhat equivocal remarks made by the owner at the time the witness Clements was present, and immediately before and after that occasion. The most definite statement indicating a present intent to pass a beneficial interest in the bonds is the statement of Mr. Houghton to the witness Clements on July 31, 1921, "These are Nellie's; I am glad I done that." It is only on the theory that on July 19 or July 31, 1920, the donor then and there intended to surrender to the plaintiff the entire beneficial interest in the bonds and also intended to retain the title and possession thereof for her, that the plaintiff can succeed in this case. *Thornton on Gifts, etc.*, p. 423, § 419. It is conceded that if the evidence merely establishes an intention on the part of Mr. Houghton to make a testamentary disposition of the bonds, or that he intended to make a gift of the bonds, the transaction was ineffective.

[3, 4] Plaintiff's whole case turns upon the significance of the statement of Mr. Houghton to the effect that he had "fixed" the bonds so that plaintiff would get them when he died and that he subsequently stated, "These are Nellie's." If this last-mentioned statement of July 31st is a part of the parol declaration of trust relied upon by appellant, it is clear that the intermediate declaration of July 26th is a part of the *res gestæ* and therefore admissible (*Jones on Evidence*, § 347; section 1850, *Code Civ. Proc.*), and that the introduction of the declaration of July 31st made the decedent's declarations of July 26th also admissible. We do not, however, place our decision wholly on that ground. In considering the evidence bearing upon his intention, it is clear that if he believed that under the law the effect of writing her name on the back of the envelope constituted the bonds her property of writing her name on the back of the transaction of July 19, 1920, was to bequeath the bonds to her, or if he believed that the transaction amounted to a gift of the bonds,

he was mistaken, but the court cannot give effect to such gift or bequest because of his bona fide belief that title to the bonds had passed or would pass by reason of his acts. It is significant that nothing was said or done concerning the interest coupons attached to the bonds then due or as to the interest which would accrue during the lifetime of the deceased.

[5] In this state of the case the declarations made by the deceased, while in the possession of the bonds, concerning his title to the bonds and character of his possession of the bonds, was proper evidence.

The rule is thus stated in Thornton on Gifts and Advancements, *supra*, p. 200, § 225:

"* * * When the circumstances are equivocal and it is doubtful whether the donor intended a gift or a loan, explicit declaration of intention made after the transaction has taken place is admissible for the purpose of removing the ambiguity. Thus where a donor deposited money in a savings bank in the name of the donee without his knowledge, and retained possession of the passbook until he died, letters between the bank and the donor with reference to the deposit, and his declarations relating to the deposit while holding the book were admitted to show the character of the act. So any declarations of the donor while in possession of the subject-matter of the gift is admissible in evidence as part of the *res gestæ*, to prove the character of his possession."

See, also, *Id.*, pp. 198, 199, § 224. See, also, Williams v. Kidd, 170 Cal. 631, 151 Pac. 1; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708; Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Ruiz v. Dow, 113 Cal. 490, 497, 45 Pac. 867; Estate of Hall, 154 Cal. 527, 532, 98 Pac. 269.

[6] The evidence complained of was properly admitted, and the findings of the court were amply supported by the evidence.

[7] Appellant raises another point based upon the fact that the case was tried before a jury and a verdict was rendered in favor of the plaintiff which was ignored by the trial judge, who entered a judgment on findings made in favor of the defendant. Appellant claims that the trial judge had no right to make findings, thus ignoring the verdict of the jury, but it cannot be questioned that the findings of a jury in an equity case are merely advisory. Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540; Davis v. Judson, 159 Cal. 121, 113 Pac. 147. This is an equity case. The appellant never acquired the legal title to the bonds in question. Upon her own theory of the case she is merely the beneficiary of a trust created by the testator. Her action is to secure a judgment declaring that the defendant holds the bonds in trust for her and that the purpose of the trust had been so far accomplished that the bonds may be delivered to

her. Several other incidental points are advanced by the appellant, but the case is fully disposed of by what has been heretofore stated, and no other point requires further consideration.

Judgment affirmed.

We concur: MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

192 Cal. 412

PEOPLE v. POMPA. (Cr. 2570.)

(Supreme Court of California. Nov. 28, 1923.
Rehearing Denied Dec. 24, 1923.)

1. Homicide $\S$ 329—Matters presented only by denied motion for new trial reviewed, though appeal was technically only from judgment.

In cases of capital crime, the law is reluctant to deny a defendant a full consideration of his points because of technical errors or omissions of his counsel, and so, on appeal technically only from the judgment, the court will consider matters relative to a view by the jury, presented by the denied motion for new trial; the entire record being before the court, and it appearing from papers filed with the trial court clerk at the time of the appeal that defendant desired and intended to have alleged errors in respect to the view and in the denial of the motion included in the record and presented for review on the appeal.

2. Criminal law $\S$ 651(1), 1152(1)—Change in physical condition of premises does not preclude the granting of view by jury, and order reviewable only for abuse of discretion.

That physical conditions on or about the premises have to a degree been changed does not prevent the court, under Pen. Code, § 1119, from granting a view by the jury, but is merely a fact to be considered by it in exercising its discretion, its conclusion in regard to which will be disturbed only on a clear showing of abuse of discretion.

3. Courts $\S$ 74—Sessions may be held outside courtroom.

Sessions of court may be held in places other than the courtroom, if otherwise the forms of law governing the trial of causes are observed.

4. Criminal law $\S$ 660—Defendant held precluded by acquiescence from objecting to informalities in procedure during view by jury.

Defendant, by his acquiescence and the acquiescence and active participation of his counsel in the taking of testimony and receiving of evidence by the jury, during a view of the premises, is precluded from objecting to informalities in procedure of the trial court during the view.

5. Criminal law $\S$ 660—Objection to shower for view by jury to be made at time of designation.

Any objection by defendant to the shower for a view by the jury should be made at the time of his designation by the court, and, not being then made, is waived.

6. Criminal law §660—Objection to questions by judge to shower during view to be made at time.

Any objection by defendant to the trial judge, during a view by the jury, putting questions to the shower, intended to clarify and expedite the proceedings, should be made at the time.

7. Criminal law §651(2)—Evidence may be received on a view by the jury.

Evidence may be received on a view by the jury, under Pen. Code, § 1119, if the forms of law are otherwise being observed.

8. Criminal law §651(1/2)—Shower for view by jury need not be sworn as such, where previously sworn as witness.

The shower for a view by the jury need not be sworn at or after his designation; he having been sworn as a witness at an earlier stage of the case, and so being under oath as witness in whatever statements he makes to the jury in the course of his duties as shower.

9. Criminal law §660—Omission to swear bailiff for view by jury an irregularity, to be objected to at time.

Omission to swear the bailiff in charge of the jury for a view by them is at most an irregularity, to be objected to at the time.

10. Criminal law §1166 1/2(1)—In absence of failure of bailiff in charge of jury to perform duties, failure to swear him not ground for reversal.

Failure to swear the bailiff in charge of the jury for a view is not ground for reversal, in the absence of a showing of failure by him to perform his duties.

11. Criminal law §656(3)—Remark of court in correctly excluding statement at most misconduct, not to be taken advantage of as error of law.

For the court, in sustaining defendant's objection to admission of a statement by him, to intimate that the statement would have been admissible if the interpreter could have been produced to testify what defendant did say, a matter on which it was not then required to make a ruling, was at most misconduct, which cannot be taken advantage of as an error of law.

12. Criminal law §1166 1/2(12)—No injury from intimation that statement, not shown, would under certain circumstances be admissible.

No injury is shown from any misconduct of court, on correctly excluding defendant's statement, in intimating that it would have been admissible if the interpreter could have been produced to testify what statement was made; whatever statement defendant made not being before the jury during the trial.

13. Criminal law §1170 1/2(1)—No prejudice from absence of fuller explanation of claimed discrepancy, in view of witness' statements at trial and previously.

Witness' testimony on the trial clarifying, but not contradicting, his statements on the preliminary hearing, defendant was not prejudiced by a fuller explanation not being given by

witness of claimed inconsistency in his statements, opportunity for which the court on his cross-examination stated would be given later, but for which no request was made.

In Bank.

Appeal from Superior Court of Los Angeles County, Russ Avery, Judge.

Aurelio Pompa was convicted of murder, and he appeals. Affirmed.

Frank E. Dominguez and W. T. Helms, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

RICHARDS, Judge pro tem. The defendant herein was convicted of murder in the first degree, consisting in the killing of one Wm. D. McCue, on October 19, 1922, in a building in the city of Los Angeles, intended for a post office, then in course of construction, and in which the deceased and the defendant were, at the time of said homicide, employed. Upon this appeal the defendant does not contend that the evidence in the case was insufficient to justify the verdict of conviction, but rests his demand for a reversal upon three points, which are: (1) That the jury received evidence outside of court other than that resulting from a view of the premises; (2) that the court misdirected the jury in matters of law arising during the course of the trial; (3) that the verdict is contrary to law.

The first of the foregoing contentions is predicated upon the action of the trial court in permitting a view of the premises where the homicide occurred and upon what transpired during the course of that particular proceeding. The facts leading up to and attending the view of the premises by the jury are undisputed and are these: At an early stage in the trial the district attorney moved the court that the jury be taken to the scene of the crime. The defendant's counsel objected to this procedure upon the ground that the physical features of the building had changed through its completion, and on the further ground that, since the defendant had introduced no evidence, the motion was premature. The court at that time reserved its ruling on the motion until after the evidence was closed, but at a later stage of the trial, when the prosecution had closed and when all of the defendant's witnesses, except himself and one Joe Leon, had been fully examined and when the cross-examination of the witness Leon was in progress, the district attorney, apparently becoming impatient at the witness' lack of understanding of the plot of the premises, which was being used as an exhibit in the case, renewed his motion that the jury be taken to view the premises. To this defendant's counsel offered no objection, whereupon the court proceeded to direct the bailiff to make arrangements for

conveyance on the following morning of the jurors, the respective counsel, the judge, the clerk, the interpreter, and the defendant to the scene. The court also directed that one Elmer Long, who had been the chief witness offered by the prosecution as to the facts preceding and attending the homicide, also attend for the purpose chiefly of showing and explaining to the jury the state of the building as it was in its incompleeted condition on the date of the tragedy, and the location of the parties to the crime in relation thereto at the time of its commission, and where the deceased fell. To these directions the defendant's counsel offered no objection and even went so far in his concurrence therein as to suggest that the exhibit may be taken along. The court replied:

"That will be done. Now, I will say, for the benefit of the jury, that there will be no argument and no taking of testimony while there; and the court must designate some one to point out the particular things; and if there should be any other objects down there, physical objects that the jury desire to have pointed out, bring it to the attention of the court, who will take it up with counsel, and probably the counsel will stipulate that the question either is or is not a proper question; and if it is a proper question, by stipulation it can be also asked of Mr. Long to point out."

"Mr. Hopkins: It might be well, if I might suggest, that the jurors also have in mind that pointing this out is not evidence."

"The Court: No; the only purpose of this visit is to give the jury a better understanding of the location where the witnesses have testified various things happened, so that the jury may understand the testimony of the witnesses with reference to the physical facts, as they existed on the 19th of October."

On the following morning the court, including the bailiff and clerk, the jury, the defendant, the interpreter, the respective counsel, and the selected shower, repaired to the scene of the crime, whereupon the court directed Mr. Long "to proceed to explain the various points to the jury as suggested by the court yesterday." This the latter proceeded to do, beginning at the outside of the building indicating its exits and entrances as they were on the date of the homicide, and thence entering the building and explaining the changes that had occurred in its interior at or about the immediate spot where the shooting had taken place. In so doing he was frequently assisted by questions put to him by the judge of the court, which had the effect of clarifying his explanations. Certain of the jurors also asked questions having the same object and effect. To this procedure the defendant's counsel offered no objection at the time but, on the contrary, expressly assented thereto, only objecting once or twice during the entire course of the proceedings when one or other of the jurors asked a question which went to the immediate occurrence of the

crime itself, as, for example, a juror asked this question: "How far was the defendant when he shot McCue?" to which the court promptly sustained the objection. Again, just as the tour of inspection was closing, a juror referring to a certain opening in the wall, asked: "Was it open all the time for the workmen to get their tools?" to which Mr. Long replied: "We had a man there to take care of the tools." "The Court: Any objection to that question and answer?" "Mr. Hopkins: Yes, we object to all this evidence;" to which the court replied, "The question and answer stricken out as not being part of the physical part." We cite these instances to show the extent of the defendant's concurrence in the proceedings which actually took place at the scene of the homicide, at the close of which the court, giving its usual admonition to the jury, took a recess until the afternoon.

When the court reassembled at its courtroom in the afternoon, counsel for the defendant announced that he intended to formulate a number of objections to what took place during the course of the inspection when the transcript of the proceedings was written up. The trial then proceeded with the further cross-examination of the witness Leon and with the taking of the defendant's testimony. At the close of the defendant's case his counsel presented his foreshadowed objections to the proceedings had in relation to and during the viewing of the scene of the crime. These embraced an objection to any view at all, upon the ground that it was not required by the state of the evidence in the case and was not conducted in the manner agreed upon at the time of the court's order directing the view, and on the further ground that the conditions of the post office building had been so far changed as to render improper the order for their inspection, and on the further ground that the jury had not been placed in charge of any official in the manner required by law, and on the further ground that the shower had not been confined to his duties as a shower in a legal or lawful manner, and on the further ground that the taking of testimony, both mute, demonstrative, verbal, and by actions and conduct, was permitted; that the taking of such testimony was out of court and was not given by any witness or by any one sworn to give testimony; that the court did not charge the jury before going to view the locus in quo as to their duties not to communicate with each other, and other duties as required by law; that persons other than the shower were allowed to and did speak and converse on the subject of the trial in the presence of the jury; that the jurors discussed the case as between themselves at the time of this showing, and that the jurors discussed the case out of the presence of each other; that the jurors were allowed to and did separate, and were not kept in hearing of each

other and the hearing and sight of the shower; that the trial judge commented on the evidence in the presence of the jury; and that comments were made by the shower, by the court, and by other persons while the jurors were not all together and within sight and hearing. The defendant's counsel further objected to the selection of Mr. Long as the shower, upon the ground that he was not the best qualified person to be selected for such duty, and on the further ground that he was one of the principal witnesses for the prosecution. In support of these various objections there was no other evidence proffered except the reporter's transcript of the proceedings during the view, and it will be obvious that as to some of the aforesaid objections the reporter's transcript would shed no light upon them. The court, in passing upon said objections, stated:

"Section 1119 of the Penal Code of the State of California provides as follows [reading]: 'View of premises, when ordered and how conducted. When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any * * * material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court, without unnecessary delay or at a specified time.'

"Now the district attorney made a motion in the first instance, to have the jury see the premises, and the court took the matter under advisement. I think the court denied the viewing of the premises at that time. Later the motion was again called to the attention of the court, and from certain expressions that were made in court, certain evidence taken, it became clear to the court, and the court then formed an opinion that it was at that time, and the court now thinks that it was proper that the jury should view the premises in which the offense is charged to have been committed.

"The court did order the jury to go to the place in the custody of the sheriff. The jury was admonished before the jury left the courtroom not to discuss the case amongst themselves, or with any one else, or to suffer any one else to approach them on the subject of the case, or to form or express any opinion on the cause until the cause should be finally submitted to them. The jury then was conducted to the place in question, being the place in which the offense was alleged to have been committed, otherwise known as the Post Office building at Third and Central avenues, city of Los Angeles, county of Los Angeles, state of California; and the sheriff, or deputy sheriff, was directed to conduct them to that place; and the deputy sheriff who conducted them to the place, to the observation of this judge, was very careful to keep the jury in a body; and the court observed that the deputy sheriff so in charge of the jury did order other people away from the jury—he did that upon several

occasions—so that the court now finds as a fact that the deputy sheriff in charge of the jury did keep the jury together in a body, in so far as that was humanly possible for twelve people to be kept in a body when they move from one place to another, walking around; but the court finds no one discussed the case with the jury at that time, and no one was given an opportunity to discuss the case with the jury; and the court did not observe that the jury, or the jurors, were discussing the facts among themselves; and, so far as the court was able to observe, that the jurors did in fact and in good faith obey the admonitions heretofore given them on that occasion, and that there was no misconduct on the part of the jury, or the jurors, or, so far as that matter has been brought to the attention of this court, by any counsel in the case.

"The deputy sheriff who accompanied the jury has been bailiff in this courtroom for a long time, and is a thoroughly trusted officer, who knows his business, and, so far as this court knows, performed his duty in the usual excellent manner that he has always done, in this instance, and as he has been accustomed to do upon numerous occasions.

"The person selected by the court to point out the place in which the offense charged to have been committed, or in which any other material fact occurred, was a witness in this cause, had worked for the construction company in the construction of the buildings; had shown by his evidence under oath that he knew the condition of the buildings at the time of the occurrence of the offense charged to have been committed; he was there in the building at that time; his recollection was at least reasonably accurate on the witness stand here as to the condition then, as compared with the condition now; and, in the opinion of the court, Elmer Long, so appointed by the court, was the best person that the court knew to be appointed for the purpose, and who could most faithfully and accurately point out the place and the physical objects as they existed on the 19th of October, 1922.

"So far as certain questions being asked by the court, those questions were asked for the purpose of drawing out more particularly the attention of the person, Elmer Long, who was appointed to show the place, so that the accuracy of the conditions could be pointed out in the building as they existed on the 19th of October, 1922.

"The court finds that the conditions had not changed to such a material extent as that the same could not be pointed out with accuracy as to the actual conditions as they existed on the 19th of October, 1922. In other words, that the conditions are not changed to such an extent as to make the viewing of the premises unwarrantable or improper.

"The jury did not separate while they were in the conduct of the sheriff or the deputy sheriff. So far as the jury is concerned, and so far as the deputy sheriff is concerned, I think that everything was properly done.

"The objections as made specifically are overruled."

[1] After the trial court had thus made its ruling, the defendant's counsel undertook to point out specific portions of the transcript of said proceedings which he claimed

supported his objections, and also undertook to point out portions of the statements made by the shower which were in the nature of evidence, which, according to his contention, could not properly be taken in the course of the viewing of the premises provided for by law. The court, however, adhered to its former ruling and overruled each and all of the defendant's said objections. In so doing, and in answer to a statement made by the defendant's counsel that he had not been given an opportunity to cross-examine Mr. Long during the view, the court stated that it would give defendant's counsel the opportunity to call Mr. Long to the stand and to interrogate him as to anything pointed out by him, any remark made by him, or any statement made by him in answer to any question which was there propounded, either by the court, or by the prosecution, or by the counsel for the defendant, or by any juror. The defendant's counsel declined to avail himself of this opportunity and stood upon his objections. The trial then proceeded to its close, resulting in a verdict finding the defendant guilty of murder in the first degree. Upon his motion for a new trial, the defendant's counsel again presented his objections to the proceedings and occurrences preceding and attending the view of the premises, basing his motion for a new trial thereon and presenting only the reporter's transcript of the case in support thereof. The court denied said motion for a new trial, whereupon the defendant took an oral appeal from the judgment in open court, and also filed with the clerk a written notice of appeal from the judgment. He did not in either form of appeal specify that he also appealed from the order denying a new trial, but in his written application to the clerk for a transcript, filed with his said written notice of appeal, he set forth the grounds of his appeal, one of which was the alleged error of the court in denying the defendant's motion for a new trial. The transcript on appeal contains the entire record of all of the proceedings in the case, including those had upon the view of the premises, together with the defendant's later specific objections to the sufficiency and legality of such proceedings. Upon the hearing upon this appeal the respondent has presented an objection to the consideration by this court of the propriety or correctness of the action of the trial court in ordering and conducting the proceedings during which the view of the scene of the homicide was had, for the reason that those were matters which were properly presentable only upon motion for a new trial and were only reviewable upon an appeal from the order denying a new trial, which appeal, the respondent contends, this appellant has not taken. Upon this appeal the entire record in the case is before this court, and, since it appears from the papers

contemporaneously filed with the clerk of the trial court at the time of the appeal from the judgment, that the appellant desired and intended to have the alleged errors of the trial court in the respect above indicated and in its denial of his motion for a new trial included within said record and presented to this court for review upon this appeal, we are not disposed to deny him that opportunity, since this court has said, in *People v. Durrant*, 116 Cal. 217, 48 Pac. 85, that—

"In cases of capital crime, the law is reluctant to deny a defendant a full consideration of his points because of technical errors or omissions of his counsel, upon whom he must rely."

[2] We are thus brought to a consideration of the merits of the appellant's first contention, viz. that the jury received evidence out of court other than that resulting from a view of the premises. Under this heading the appellant undertakes to discuss in his brief the propriety of the making of any order by the trial court providing for a view of the premises in question, in view of the circumstances of the case, and particularly of the fact that the physical features of the premises where the homicide occurred had been materially changed by the completion of the building since the date of the tragedy. This point requires but brief discussion, in view of the broad discretion with which trial courts are invested under the terms of section 1119 of the Penal Code with respect to permitting the jury to view the place where an offense is charged to have been committed. The fact that physical conditions upon or about the premises may have been to any degree altered is a fact to be considered by the trial court in exercising its discretion to permit or refuse to permit such view, and its conclusion in that regard will not be disturbed upon appeal, in the absence of a clear showing of an abuse of such discretion. No such abuse of discretion is disclosed by the record in this case.

[3-6] The appellant next contends that the trial court, in its direction for the view of the premises, and in its instruction to the selected shower as to the specific duties he was to perform, limited the proceedings during such view strictly to an inspection of the premises during the course of which no testimony of any kind was to be taken; but that during said proceedings and while upon said premises these limitations were transgressed and considerable important evidence was presented to the jury out of court. It is true that at the outset of said proceedings the trial court did attempt to restrict them to certain specific limits embodied in its instructions to the shower selected by it; and it is also true that when the court, the jury, the defendant, the shower, together with the court attachés and the counsel for the re-

spective parties, reached the premises to be thus viewed, the procedure there was much broader than its earlier limitations imposed by the court, and that considerable testimony was taken and evidence received by the jury upon the scene of the alleged crime. But the record expressly discloses that during the entire proceedings attending and embracing the view of the premises the court in its completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the jury, the defendant, and the respective counsel was at all times present; the only element absent being the walls and fittings of the courtroom wherein the court is usually convened. There is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed, which appears to have been done, though with some absence of formality, in the instant case (*Block v. Kearney*, 6 Cal. Unrep. 660, 64 Pac. 267); but aside from this we think that the defendant is precluded from objecting to any of the alleged informalities in the procedure of the trial court during its view of the premises in question by the fact of the entire acquiescence of himself and the acquiescence and even active participation of his counsel in the taking of testimony and receiving of evidence by the jury during the inspection of the scene of the homicide. If the defendant or his counsel had any objection to the shower appointed by the court, such objection should have been made at the time of his designation, and when not so made must be held to have been waived. If the defendant had any objection to make to the action of the trial judge in putting certain questions to the shower intended to clarify and expedite the proceedings, they should have been made at the time, and this was evidently understood by defendant's counsel, since he did in fact object to certain questions asked the shower by the court or by a juror which were promptly sustained by the court. So, also, as to every other alleged irregularity in the proceedings which the defendant's counsel undertook to take advantage of after the proceedings during the view of the premises were concluded and at a later session of the court. All of these we hold to have been waived by the defendant's failure to object and concurrence in their commission at the time. *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554; *People v. Rolfe*, 61 Cal. 542; *People v. Tarm Poi*, 86 Cal. 225, 24 Pac. 998. As to certain of these asserted irregularities the record fails to disclose their existence and the defendant, not only did not support his claim of their occurrence upon his belated objection or upon his motion for a new trial, but the

trial court, in ruling upon the defendant's said objections on both occasions, expressly negatived their presence during the proceedings as matter lying within the observation and knowledge of the court at the time.

[7-10] There are, however, one or two matters embraced in the appellant's objection to the regularity of the proceedings of the trial court upon the view of the premises in question which would seem to require a more particular consideration. At the conclusion of the proceedings at the scene of the crime the defendant's counsel, in response to an inquiry by the court, said: "We object to all this evidence." This general objection then made forms the basis for the appellant's present contention that the statutory proceedings for a view of premises where an offense is alleged to have been committed is so limited in its scope as to preclude the reception by the jury of any evidence during such view. This conception of the scope of such proceeding is an erroneous one, based upon certain expressions of this court in the early cases of *Wright v. Carpenter*, 49 Cal. 607, and *People v. Green*, 53 Cal. 60, wherein proceedings upon a view of premises were very strictly limited, both as to procedure and effect; but this court, in the later cases of *People v. Bush*, 68 Cal. 623, 10 Pac. 169, and *People v. Milner*, 122 Cal. 171, 54 Pac. 833, overruled so much of these earlier cases as appeared to hold that evidence could not be received by the jury in the course of a view of the scene of an alleged offense; the court holding that a jury, in viewing premises and having pointed out to them the places which, according to the testimony in the case, the parties occupied therein at the moment of the crime, were receiving evidence and might properly do so, if the forms of law were otherwise being observed. There is one further point urged by the appellant under this head, which might be disposed of before passing to the other points in the case. It is that at the time the jury went to the scene of the alleged crime the bailiff, in whose charge the jury were placed by the court for the purpose of being taken to the premises for the view and thereafter returned to the court, had not been sworn, and also that the shower had not been sworn. As to the latter, the point has no merit, since the record shows that the person selected as shower had been sworn as a witness in an earlier stage of the case, and hence was under oath as such witness in whatever statements he made to the jury in the course of his duties as such shower. As to the omission of the court to swear the bailiff it was at most an irregularity which should have been objected to at the time. *Ball v. United States*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; *State v. Crilley*, 69 Kan. 802, 77 Pac. 701; *Knouff v. People*, 6 Ill. App. 155. But be-

yond this it has been held that the fact that the bailiff or other officer placed in charge of a jury had not been sworn to the faithful performance of his duty in that particular capacity will not be ground for a reversal, in the absence of a showing that the unsworn officer has not faithfully performed his duties in that capacity. *Wilson v. State*, 15 Ga. App. 632, 84 S. E. 81; *State v. Crilly*, supra.

[11, 12] The next contention of the appellant is that the court misdirected the jury in matters of law arising during the course of the trial. The first matter referred to under this head relates to an episode during the cross-examination of the defendant, during which the district attorney sought to question him as to a statement regarding the shooting of the deceased made by the defendant at the coroner's inquest. The record, however, discloses that, after repeated efforts on the part of the district attorney to examine the defendant as to such statement, as the same was embodied in a stenographic report of the proceedings at the inquest he failed in that effort, for the reason that the interpreter at the inquest was shown by said report to have incorrectly reported what the defendant actually said on that occasion. The appellant does not here contend that the trial court did not correctly rule in excluding such evidence, but complains that the court in so ruling intimated that the statement then made by the defendant would have been admissible if the interpreter could have been produced to testify as to what the defendant did then say. This objection is too remote. What the court may have incidentally stated concerning a matter upon which he was not required at the time to make a ruling might possibly be misconduct, but could not be taken advantage of as an error of law. Besides, no injury is shown to have resulted to the defendant, since whatever the statement the defendant may have made at the coroner's inquest did not get before the jury at any time during the trial of the cause on account of the absence of the interpreter which prevented the proper foundation for its admission being laid.

[13] The next error of law which the appellant alleges to have been committed by the trial court occurred during the cross-examination of Elmer Ballou, one of the defendant's witnesses. Ballou was being asked, for the purpose of impeachment, as to certain testimony given by him upon the preliminary examination. The district attorney read from the transcript the matter to which the witness there testified, and then asked the witness the question: "Did you so testify?" to which the witness replied, "I did." He was then asked: "Which was the truth?" His answer was: "That was the truth, but

it was not as clear," and he further said, "I am telling the truth both times;" whereupon one of the defendant's counsel said, "If the court please at this time I request that the witness be permitted to explain." The court replied: "He will be given an opportunity later." The record shows that the examination of the witness proceeded for some time thereafter, and that counsel for the appellant had the opportunity of having his witness make any explanation he desired as to any apparent discrepancy in his two statements but did not avail himself of it. A comparison of the two statements of the witness, as given in the record, shows that the witness' explanation made at the time was all the explanation the situation required, since his statement on the trial clarified but did not contradict his testimony given upon the preliminary hearing. The defendant was therefore in no way prejudiced by the fact that a fuller explanation was not given at the time or called for later in the witness' examination.

The final contention of the appellant is that the verdict of the jury is contrary to law. Under this heading he merely repeats his insistence upon the former alleged errors of the trial court, which have already been discussed and determined. We are satisfied from a careful consideration of the whole record in this case that no error has been committed which would justify a reversal.

The judgment is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.

192 Cal. 467

WAITE et al. v. SOUTHERN PACIFIC CO.
(L. A. 7146.)

(Supreme Court of California. Dec. 5, 1923.
Rehearing Denied Jan. 4, 1924.)

1. Judgment $\S$ 163—Whether state court had jurisdiction after record filed in federal court not available on motion to vacate default.

Where action was begun in state court, and defendant petitioned for removal to the federal court, and thereafter plaintiff took default in the state court, whether the state court had jurisdiction after transcript of the record was filed in federal court and before petition to remand was granted could be urged on appeal, but is not available in motion to vacate default, by reason of defendant's alleged mistaken belief that jurisdiction was in the federal and not the state court.

2. Judgment $\S$ 139—Court exercises legal discretion in passing on motions to vacate defaults.

In passing on motions to vacate defaults, the trial court exercises a sound and legal discretion, which is guided and controlled in its exercise by fixed principles.

3. Judgment — 163—Doubts resolved in favor of application to vacate default.

It being policy of the law to bring about trial on the merits wherever possible, in application for vacation of default, any doubts which exist should be resolved in favor of the application.

4. Judgment — 143(3)—Mistake as to law ground for vacating default.

Where action was begun in the state court, and defendant petitioned for removal to the federal court, where it filed transcript of record and petition for removal, a default judgment taken while the action was pending in the federal court in which defendant asserted a meritorious defense should on defendant's motion be set aside, defendant showing a proper case for relief under Code Civ. Proc. § 473, from default entered because of his mistake of law.

5. Judgment — 153(1)—Five months' delay held not to defeat motion to vacate.

Notwithstanding that defendant did not move to vacate default until more than five months after it was entered, during most of which time it acted on the belief that the state court had no jurisdiction, but filed its motion within five weeks after order of the federal court remanded the cause to the state court, such delay did not defeat its right to relief under Code Civ. Proc. § 473.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. E. Waite and another against the Southern Pacific Company. Judgment for plaintiff. From an order denying its motion to set aside judgment, defendant appeals. Reversed and remanded.

W. I. Gilbert, of Los Angeles, for appellant.

L. M. Chapman and Ward Chapman, both of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from an order denying defendant's motion to vacate and set aside a default judgment.

On January 19, 1921, plaintiffs filed their complaint in the superior court of Los Angeles county, alleging that they delivered to defendant, a common carrier in interstate commerce, goods of the value of \$3,326.10 to be transported from Portland, Or., to Los Angeles, Cal., and which, through the negligence of the defendant, were destroyed by fire at Quail, Cal. Recovery was sought for their value.

On January 31, 1921, defendant filed a demurrer to the complaint, and at the same time filed a petition for the removal of the cause to the United States District Court for the Southern District of California on the ground that the action involved a law of the United States. On February 15, 1921, the petition and demurrer came on for hearing, and the petition was thereupon denied

and the demurrer overruled by the court, with 10 days' leave to defendant to answer.

On March 2, 1921, defendant filed in the said federal court a transcript of the record and a petition for removal thereto from said superior court, and while the action was pending in the federal court the plaintiffs, on March 26, 1921, caused default to be entered against the defendant in the state court for failure to answer within the required time. Judgment upon said default was entered April 14, 1921. The defendant, having in the meantime filed its answer in the federal court, the plaintiffs on April 11, 1921, filed in said court their motion to remand the cause to the state court. This motion was submitted for decision on April 18, 1921, and granted on August 6, 1921. Thereafter, on September 12, 1921, defendant filed in the state court notice of motion to set aside and vacate the judgment by default, which motion was denied on September 19, 1921. From the order in that behalf made the defendant prosecutes the present appeal.

[1] The motion to set aside the judgment was made under section 473 of the Code of Civil Procedure, providing for relief from orders made through the "mistake, inadvertence, surprise, or excusable neglect" of those against whom they are rendered. In effect, the ground of the motion was that defendant suffered its default to be entered, and judgment thereon to be rendered because of its mistaken belief that jurisdiction of the cause was in the federal and not the state court. Whether this mistake on the part of the defendant is of such a character as to entitle it to the relief sought is practically the only point involved on this appeal. In passing upon it, we lay aside the question whether the state court had jurisdiction of the cause after the transcript of the record had been filed in the federal court and before the petition to remand was granted, for that question, while it could be urged upon an appeal from the judgment, is not available on the present appeal.

It is not questioned that defendant was at all times acting in the honest belief that the federal court alone had jurisdiction, and that plaintiffs knew that it was for this reason that defendant did not file an answer in the state court. In fact, it was shown by an affidavit of one of the counsel for respondents that appellant's time to answer ran out on February 25, 1921; that on March 1, 1921, affiant informed counsel for defendant that the time for filing an answer had expired, and asked whether defendant intended to answer in the state court, to which counsel for defendant responded that "they did not recognize the jurisdiction of the state court and had already filed a transcript of the proceedings in the federal court, and would file in that court an answer to the

complaint within the time provided by federal statutes in such cases provided"; that on March 21, 1921, affiant called defendant's counsel on the telephone, and informed him that affiant intended to stand upon the jurisdiction of the state court, desired to proceed in that court, and wished to enter the default of defendant there, but that before doing so he desired to give the defendant an opportunity to take whatever necessary proceedings it might determine upon; that defendant's counsel then requested that the matter be allowed to stand in abeyance for a few days so that the situation might be considered by defendant; that on March 25, 1921, defendant's counsel informed affiant that defendant had determined to proceed with the action in the federal court, and "informed said affiant to proceed to enter the default, but requested that he be notified when that was done, in order that he might consult with their San Francisco correspondents for further instructions"; that on March 26, 1921, the default was entered; and that on March 31, 1921, affiant wrote and mailed a letter to defendant's counsel in which he said:

"Re Waite v. S. P. Co. * * * In accordance with your request, I desire to notify you that the default of the defendant in the above action has been entered in the state court, and I desire to further notify you that the plaintiff intends to proceed to take judgment against the said defendant in the action now pending in the superior court."

It must be conceded that, while the determination by both the federal and state courts was in favor of the jurisdiction of the latter, the defendant was not without plausible grounds for its contention, and the fact that the United States District Court retained the case under advisement for many months would seem to be sufficient indication that the question of law involved was in doubt, and was one upon which an attorney might very well be mistaken. In any event, if it be conceded that the defendant's mistake of law was a reasonable one under the facts set forth in the complaint, we believe that its neglect to file an answer because of such belief is at least excusable.

[2] The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. At all times the trial court is to exercise a sound and legal discretion in passing upon an application for relief against such a judgment. This discretion, however, is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.

"It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised

in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." *Bailey v. Taaffe*, 29 Cal. 422, 424.

[3] It is also well established that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. *Jergins v. Schenck*, 162 Cal. 747, 748, 124 Pac. 426. And it has been held by this court that in a proper case relief may be obtained under section 473 of the Code of Civil Procedure from a default judgment entered by reason of defendant's mistake of law. *Mitchell v. Cal., etc., S. S. Co.*, 156 Cal. 576, 580, 105 Pac. 590; *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849. See, also, *Staley v. O'Day*, 22 Cal. App. 149, 133 Pac. 620.

[4] Tested by these legal principles, we believe that it was the duty of the trial court to grant the defendant's motion. The defendant asserts a meritorious defense, which it set out in the answer filed in the federal court, a copy of which was attached to its affidavit filed in support of its motion, and it ought to be given the opportunity of presenting this defense. Nor is there anything to indicate that the plaintiffs will be in any way prejudiced by a trial upon the merits, especially in view of the fact that it is within the power of the superior court to impose terms in granting the motion.

[5] While it is true that the defendant did not file its motion to vacate the default judgment until more than five months after it was entered, it must be remembered that during most of this time defendant was acting upon its honest belief that the state court had no jurisdiction of the action. It filed its motion within five weeks after the making of the order by the federal court remanding the cause to the state court, which delay is not such as will defeat a defendant's right to be relieved under section 473 of the Code of Civil Procedure. See *Wolff & Co. v. Canadian Pacific Railway Co.*, 89 Cal. 332, 26 Pac. 825.

For the reasons above indicated, the order refusing to vacate and set aside the judgment by default is reversed, and the cause remanded to the superior court, with direction to permit the defendant to file an answer to the plaintiff's complaint within such time as the court may deem proper, and upon such terms as may seem just.

We concur: WILBUR, C. J.; LENNON, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; MYERS, J.

(192 Cal. 489)

PEOPLE, by WEBB, Atty.-Gen., ex rel. TEM-
PLE v. CITY OF MONTEBELLO et al.
(L. A. 7747.)

(Supreme Court of California. Dec. 5, 1923.)

Municipal corporations $\S$ 12(6)—Notice of incorporation, although unsigned, held sufficient.

A writing as follows: "Notice is hereby given by the undersigned that the following petition will be presented to the board of supervisors, * * *" published together with and preceding a petition addressed to county supervisors stating, "We, the undersigned petitioners, * * *" followed by the names of the petitioners, was a sufficient notice, under Stats. 1889, p. 371, providing that, to incorporate a city, a petition signed by 50 electors shall be published in some newspaper "together with a notice," since it showed upon its face that it was given by petitioners, although the notice itself was not separately signed.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Quo warranto by the Attorney General, upon the relation of Walter P. Temple, against the City of Montebello and others, to determine the validity of a proceeding leading to the incorporation of defendant City. From a decision in favor of defendants, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., Woodruff & Shoemaker and Lawler & Degnan, all of Los Angeles, Paul M. Gregg, of San Luis Obispo, and Paul Vallee, Edward T. Bishop, County Counsel, and J. H. O'Connor, Asst. County Counsel, all of Los Angeles, for appellant.

Delphin M. Delmas, Frederick Baker, Thomas A. Berkebile, Hunsaker, Britt & Cosgrove, and Robert B. Murphey, all of Los Angeles, for respondent.

KERRIGAN, J. This is an action of quo warranto, commenced in the superior court of Los Angeles county by the Attorney General, upon the relation of Walter P. Temple, to determine the validity of the proceeding leading to the incorporation of the city of Montebello as a city of the sixth class, under the Municipal Corporation Act of 1883 (Stats. 1883, p. 93). After decision rendered in favor of defendants, judgment was entered that plaintiff "take nothing by this action." From this judgment, plaintiff appeals.

The plaintiff contends that the incorporation order is illegal and void, basing its contention upon the single ground that the published notice of the hearing of the petition for the incorporation not being signed, was legally insufficient to vest the board of supervisors with jurisdiction to hear the petition. The defendants' position is (1) that the published notice shows on its face that it was given by the petitioners, and fully complies

with the Municipal Corporation Act, *supra*; (2) that the proceeding for the incorporation of a city of the sixth class is a legislative act, therefore the jurisdiction of the board of supervisors is not open to attack in a quo warranto action.

Section 2 of the Municipal Corporation Act, *supra*, as amended, provided that the incorporation proceedings shall be initiated in the following manner:

"A petition shall first be presented to the board of supervisors of such county, signed by at least fifty of the qualified electors of the county, residents within the limits of such proposed corporation, and the affidavit of three qualified electors residing within the proposed limits, filed with the petition, shall be prima facie evidence of the requisite number of signers. The petition shall set forth and particularly describe the proposed boundaries of such corporation, and state the number of inhabitants therein as nearly as may be, and shall pray that the same may be incorporated under the provisions of this act. Such petition shall be presented at a regular meeting of such board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in such county, together with a notice stating the time of the meeting at which the same will be presented. * * *" Stats. 1889, p. 371.

Plaintiff alleges in its complaint that late in August and early in September, 1920, there was published in the Montebello News, a newspaper of general circulation in the county of Los Angeles, the following notice:

"Notice.

"Incorporation of the 'City of Montebello' as a City of the Sixth Class.

"Notice is hereby given by the undersigned that the following petition will be presented to the board of supervisors. * * *"

There was also published, together with and following said notice, a petition in the following terms:

"Petition for the Incorporation of the Proposed 'City of Montebello.'

"To the Honorable Board of Supervisors of the County of Los Angeles, State of California.

"We, the undersigned petitioners, respectfully represent that we are qualified electors of the county of Los Angeles, state of California, and reside within the limits of the hereinafter proposed municipal corporation. * * * (Here follow the names of said petitioners.)

On the day designated in the notice, the petition was presented to the board. Thereupon, and after an election had been held, in which 401 out of the 473 electors of Montebello had voted in favor of incorporation, such proceedings were had that, on the 11th of October following, by an order entered upon its minutes, the board declared said terri-

tory to be a municipal corporation of the sixth class, under the name of Montebello. A certified copy of this order was filed in the office of the secretary of state; and from that time on the city of Montebello has exercised all the functions of a municipal corporation.

We are of the opinion that the published notice was sufficient, and that consequently the record shows a compliance with the statute. To sustain its contention that the notice was insufficient, the plaintiff relies chiefly upon the case of *In re Central Irrigation District*, 117 Cal. 382, 49 Pac. 354, in which this court held that the notice therein published did not comply with section 2 of the Wright Act (Stats. 1887, p. 29), providing for the organization of irrigation districts. This statute, so far as the question of notice is concerned, is identical in wording with the Municipal Corporation Act of 1883, *supra*. In *Re Central Irrigation District*, *supra*, the court, in commenting upon the notice, said:

"It was shown that there were published for two weeks in the Weekly Colusa Sun the petition, with the names of the signers thereto, and immediately below this the following: 'The foregoing petition will be presented to the honorable board of supervisors of Colusa county on Monday, October 10, 1887, at 10 o'clock a. m. of that day.' The notice was unsigned. It did not bear upon its face any showing of authority. It did not appear from it that it was given by the petitioners, who alone could issue the process. Indeed, from all that is shown, the so-called notice may have been but the declaration of the editor of the newspaper, and the publication of the so-called notice may have been but the statement in the paper of a bit of news. It is essential to the validity of a notice that it shall bear upon its face evidence that it has been given by the person authorized so to do, and this evidence is shown by the signature of the officer or other person charged with the duty."

It is clear from this quotation that the court did not intend to lay down a hard and fast rule that the published notice must in all cases be signed. To the contrary, it was simply a decision that the notice published must bear upon its face the signatures of the petitioners or show that it was issued by them or given under their authority.

In the present case the notice comes first (while in *Re Central Irrigation District*, *supra*, it came last) and reads: "Notice is hereby given by the undersigned. * * *" Following this is printed the petition, beginning with the words, "We, the undersigned petitioners, respectfully represent, * * *" and at the end of the publication appear the signatures of the petitioners. Surely this notice could mislead no one. It gave full and detailed information in regard to the time and place at which the petition would be presented to the board of supervisors. No one could believe that the newspaper was publishing this formal document, separated

from the rest of the contents of the newspaper by a heavy black line, and covering over 10 pages of the printed manuscript, as a bit of news. In brief, as this notice showed upon its face that it was given by the petitioners, the only persons authorized to give such notice, it was sufficient to warn all persons who might desire so to do to present their objection at the time and place named, why the petition should not be granted. And, as was said by this court in *Imperial Water Co. v. Supervisors*, 162 Cal. 14, at page 24, 120 Pac. 780, 785:

"We know of no authority to the effect that a signature to the published notice is a necessary part of such process, where the only notice given or required is a publication in a newspaper. The substantial thing is that such notice shall be given as, under the circumstances, would have a reasonable tendency to apprise the parties interested of the nature of the proceeding and the time and place of the hearing. * * *"

In *Ahern v. Board of Directors*, 39 Colo. 409, 89 Pac. 963, it was held that a notice similar to the one here in question did not conform to the Colorado statute, which is identical with the Municipal Corporation Act, *supra*. The court in that case cited *In re Central Irrigation District*, *supra*, as decisive of the point involved, but we are of the opinion that the present case, as well as *Ahern v. Board of Directors*, *supra*, can be distinguished from the case of *In re Central Irrigation District* in the manner in which we have already pointed out. For this reason we do not feel constrained to adopt the conclusion reached in *Ahern v. Board of Directors*, *supra*. Furthermore, in the case of *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773, the Supreme Court of the United States apparently disapproves of the suggestion made by counsel that the published notice should be signed, and, by way of dictum, intimates that the decision of this court in *Re Central Irrigation District*, *supra*, should be limited to a notice similar to the one before the court in that case.

We have taken some pains to distinguish the present case from *In re Central Irrigation District*, *supra*, but we are of the opinion that a later case (*Fogg v. Perris Irrigation District*, 154 Cal. 209, 97 Pac. 316) is decisive of the identical point here raised. In that case, as here, the publication showed a notice essentially like the one published herein, immediately followed, as is the one here, by the petition. The only signatures appearing in the publication was, as here, those appearing under the petition. The notice was not—as here it is not—separately signed. It was there claimed that the notice and the petition were distinct instruments, each of which must be separately signed, and that one single set of signatures could not per-

form the twofold function of attesting both. It appeared, from an examination of the original on file, that the petition and notice were both contained in a single document, hence it was argued that this document was either a notice or a petition, but could not be both. But the court rejected this argument, as it could see no legal objection to this method of embodying the notice and the petition in one document and using it for each purpose successively. The court, in holding that this document, when published, was a sufficient notice, even though the only signatures appearing upon the face of the publication were those following the petition, said: "The only notice required is a notice to be published in a newspaper." So far as the question of the notice in that case is concerned, it was immaterial that the published document was circulated among the petitioners. That fact did not appear upon the face of the published notice. Interested parties reading this notice in the paper would receive no more information as to its authenticity than they would receive from the notice published in the present case. Further, there is a factor in the published notice here involved not appearing in the case of *Fogg v. Perris Irrigation District*, supra, which makes this a much stronger case upon its facts. The notice, as published in the *Fogg Case*, read, "Notice is hereby given that, * * *" and left it to be inferred that it was given by the petitioners; while the notice here expressly states that it is "given by the undersigned," and at the end of the publication appear the signatures of the petitioners.

Under the view which we take of this case, it is unnecessary to discuss any other points raised in the briefs.

For the reasons which we have above indicated, the judgment of the superior court of Los Angeles county, declaring the city of Montebello to be a de jure and a de facto municipal corporation should be, and it is hereby, affirmed.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

(192 Cal. 431)

ALLIED ARCHITECTS' ASS'N OF LOS ANGELES v. PAYNE, County Auditor.
(S. F. 10778.)

(Supreme Court of California. Nov. 30, 1923.)

I. Counties $\S$ 153½—Promotion of patriotism is a public purpose.

The promotion of patriotism is a public purpose for which the public money of a county may be expended.

2. Counties $\S$ 153½—Erection of building serving as a stimulus to patriotism would be for public purpose.

Erection of a building by a county as a memorial hall to the extent that it would serve as a stimulus to patriotism would be for a public purpose, which would not be defeated by permitting its use by associations of veterans, whose purpose is to promote patriotism or by restricting its use to them.

3. Constitutional law $\S$ 70(1)—Means of promoting public purpose held for legislative determination.

The means and methods of promoting a public purpose by legislative enactment is ordinarily for legislative determination.

4. Constitutional law $\S$ 205(2)—Restriction of use of memorial building to associations of veterans held not to confer special privileges.

The restriction of the use of a county memorial building to be erected under Pol. Code, $\S$ 4041f, as added by St. 1921, p. 476, to "associations" of veterans, does not confer special privileges on such veterans as are members of associations; the Legislature having in view the promulgation of patriotic impulses by the formation of associations for that purpose.

5. States $\S$ 119—Statute authorizing erection of memorial hall for association of war veterans not unconstitutional as a "gift."

Pol. Code, $\S$ 4041f, as added by St. 1921, p. 476, authorizing boards of supervisors to erect a memorial hall for the use of associations of veterans of every war, is not unconstitutional as involving a "gift" to an individual, municipal, or other corporation, in violation of Const. art. 4, $\S$ 31, as the benefit conferred is but incidental to the paramount purpose of promoting patriotism and is in itself inconsequential.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

6. States $\S$ 119—Prohibited "gift" of public property defined.

Notwithstanding Civ. Code, $\S$ 1146, defining a "gift" as a transfer of personal property made voluntarily and without consideration, Const. art. 4, $\S$ 31, prohibiting gifts of public property, is not limited to a transfer of personal property only, but includes all appropriations of public money for which there is no authority or enforceable claim or which may rest upon moral or equitable obligation; but the gifts contemplated are gratuities bestowed without return.

In Bank.

Action by the Allied Architects' Association of Los Angeles against H. A. Payne, as County Auditor of Los Angeles County. Application for writ of mandate prayed to be directed to the Auditor of Los Angeles County, directing him to approve claim for services rendered. Granted.

Milton D. Sapiro, Geo. J. Hatfield; and John U. Calkins, Jr., all of San Francisco, and M. B. Silberberg and Walter K. Tuller, both of Los Angeles, for petitioner.

E. T. Bishop, County Counsel, and Ivan G. McDaniel, Deputy County Counsel, both of Los Angeles, for respondent.

LENNON, J. This is an application for a writ of mandate directing the respondent, as county auditor of the county of Los Angeles, to approve the claim of the Allied Architects' Association and the claim of C. W. Maples, duly assigned to said association. The claim of the association is for services rendered in the preparation of certain architectural plans for a proposed "Victory Hall," for which an appropriation of \$500,000 has been made by the board of supervisors of the county of Los Angeles. The claim of C. W. Maples is for services in the form of labor rendered in maintaining the present temporary quarters designated and dedicated by the board of supervisors for the use of patriotic, fraternal, and benevolent associations, composed of veteran soldiers, sailors, and marines who have served the United States honorably in any of its wars.

The purposes for which the proposed Victory Hall is to be erected and maintained by the county of Los Angeles are contained in the declaratory clauses of a resolution of the board of supervisors adopted on July 13, 1923, which reads as follows:

"It is resolved by the board:

"1. That said Victory Hall, for which an appropriation of \$500,000 has been made by this board, is to be erected, supplied and maintained by Los Angeles county, and is at all times to be used exclusively as a meeting place for the use of patriotic, fraternal and benevolent associations, whose membership shall be composed only of veteran soldiers, sailors and marines who have served the United States honorably in any of its wars, and to the exclusion of all persons not members of such associations.

"2. That said present temporary Victory Hall, now supplied and maintained by the said county, is exclusively used for the purposes above mentioned, and none other."

The appropriation of \$500,000 for the erection of the building to be known as Victory Hall and the maintenance of a temporary building for the uses specified in the above resolution was made under and by virtue of section 4041f of the Political Code, enacted by the Legislature in 1921 (St. 1921, p. 476), which is as follows:

"Homes and meeting places for veterans and associations of veterans to be provided. Any county may provide and maintain (1) a home or homes for veteran soldiers, sailors and marines who have served the United States honorably in any of its wars; (2) buildings, memorial halls, or meeting places for the use of patriotic, fraternal and benevolent associations of such persons. For these purposes the board of supervisors of any county shall have jurisdiction and power:

"(a) To purchase, receive by donation, take by condemnation, lease or otherwise acquire, real or personal property necessary for such

building or buildings, and to improve, preserve, take care of, manage and control the same.

"(b) To purchase, construct or lease, build or rebuild, furnish or refurnish, or repair any and all such buildings, and to provide all necessary custodians, employees, attendants and supplies for the proper maintenance of the same.

"(c) To levy in any year a special tax not to exceed three mills on the one dollar of assessed valuation on all the taxable property in the county, such tax to be in addition to all other taxes provided for and the fund so created to be expended for the purposes hereof.

"(d) To establish a fund or funds for the purposes hereof, and to transfer from the general fund to such fund or funds, from time to time, such moneys as the board may deem necessary.

"(e) To incur, in the manner provided by law, a bonded indebtedness on behalf of the county for any of the purposes hereof."

Both claims, although regularly approved by the board of supervisors, were refused approval by the county auditor upon the ground that subdivision 2 of the Code section above quoted, by virtue of which the debts were incurred, is unconstitutional and void in that (1) it is in violation of article 1, §§ 11 and 21, of the state Constitution; (2) the statute provides for the expenditure of public money for other than public purposes, and (3) the statute provides for the making of a gift of "public money or thing of value" contrary to article 4, § 31, of the Constitution.

The gravamen of the contention that the statute in question is unconstitutional is that it limits the use of the building, when erected, to "patriotic, fraternal and benevolent associations, whose membership shall be composed of veteran soldiers, sailors, and marines who have served the United States honorably in any of its wars, and to the exclusion of all persons not members of such associations." In other words, it is not the erection of the building to which objection is made, but it is its dedication to a particular use. In this behalf it is claimed that the limitation of its use subjects the entire plan to the constitutional inhibitions against the granting of special privileges, the expenditure of public money for a private purpose, and the making of a gift of public money or thing of value.

[1, 2] It is settled beyond question that the promotion of patriotism, involving as it does the sense of self-preservation, is not only a public purpose but the most elemental of public purposes. *Veterans' Welfare Board v. Riley*, 188 Cal. 607, 206 Pac. 631; *People v. Westchester Nat. Bank*, 231 N. Y. 465, 132 N. E. 241, 15 A. L. R. 1344; *Opinion of Justices*, 211 Mass. 608, 98 N. E. 338. The continuity of our governmental institutions is dependent in a large measure upon the perpetuation of a patriotic impulse which is but the willingness to sacrifice all for the ideas and the ideals which form the foundation stones of

our republic. It will not be gainsaid that patriotism is promoted by the erection of a memorial monument, be it granite shaft or building, symbolic of the soldier's spirit of sacrifice, conceived and consummated in recognition of his deeds of heroic daring, and perpetuating in grateful remembrance those who dedicated their lives to the service of their country. Such a monument brings visibly and effectually before the minds of the present and future generations the sacrifices of the past. It is conceded, as indeed it must be, that the erection of a building as a memorial hall, to the extent that it would serve as a stimulus to patriotism, would be for a public purpose. *Kingman v. City of Brocton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *Barrow v. Bradley*, 190 Ky. 480, 227 S. W. 1016; *Hill v. Roberts*, 142 Tenn. 215, 217 S. W. 826.

Of course, it goes without saying that it is not necessary that such a building shall stand vacant in order to be effective for the purpose for which it was designed and erected. True, the building standing vacant would accomplish, in a measure, the purpose for which it was designed; but if its mere erection would have the effect of promoting and stimulating patriotism, then, of course, its occupancy and use as a meeting place for those who honorably served their country in her time of need must necessarily increase the extent of the utility of the building as a means for the promotion and promulgation of patriotic principles and practices. To permit the men whose associations have been effected for the purpose of inculcating and promoting patriotism to use the vacant halls as a rendezvous for revivifying and broadcasting the spirit of patriotism throughout the length and breadth of the land is clearly a public and not a private purpose.

[3] The means and methods of promoting a public purpose by legislative enactment is ordinarily for legislative determination. *Veterans' Welfare Board v. Riley*, 188 Cal. 607, 206 Pac. 631. And the determination of the Legislature to make the memorial hall in question a living force for the promulgation of patriotic principles by dedicating its use to associations created to foster the spirit of patriotism rather than leaving it a mere unoccupied inanimate tribute to the men who made the supreme sacrifice was certainly a wise and commendable exercise of legislative power.

We do not think that it is necessary that the proposed Victory Hall should be open to the public generally in order to bring its erection and maintenance within the meaning and designation of a public purpose. To permit the use of the hall by the people generally for general purposes would be to permit it to be used necessarily at times for something other than the promotion of patriotism. The obvious object of the use of the hall is

to promote patriotism, and when it has done that it has done all that is required. It is not necessary, nor, still keeping in mind the paramount purpose of its erection, desirable, that the scope of its use be enlarged to indefinite limits. The hall being dedicated to patriotic purposes it is but reasonable and right to say that in the promotion of that purpose its use and occupancy should be limited to those associations which are builded upon patriotism and perpetuated for the preachment of patriotism. Indeed, the Legislature by its limitation of the use of the building to those who were joined as brothers in arms in defense of the nation conserves rather than detracts from the purpose for which it was erected.

[4] It is conceded that our veterans of every war are as a whole a reasonable classification, within the purview of the Constitution, for legislation which has in view the conferring of benefits upon them. *Veterans' Welfare Board v. Riley*, 189 Cal. 159, 206 Pac. 631; *Board of Directors v. Nye*, 8 Cal. App. 527, 538, 97 Pac. 208. It is, however, insisted that by the limitation of the use of the hall to associations of veterans a classification into a subclass has been made which is unreasonable and, therefore, falls within the inhibition of the Constitution. It is said that such limitation confers special privileges upon veterans who are members of patriotic, fraternal, and benevolent associations, even though composed exclusively of veterans, to the extent that it excludes all other veterans who stand in the same relation to the purpose of the law but who do not happen to be a member of any of the enumerated associations. It is to be noted that the building is devoted to and to be used as a "meeting place" for the use of associations of veterans. The Legislature undoubtedly had in mind that it was by the meeting together, the gathering, the coming together, and congregating of the veterans that the patriotic impulse would by that contact be revived and radiated to the people at large. Having in mind this purpose, there is a reasonable and substantial distinction existing for the dedication of the hall to the use of associations and not to the use of individual veterans. And in view of the fact that no minimum or maximum of membership is required of any veteran association which may use the hall and the fact that any number of veterans may associate themselves together, it follows that by the formation of small organizations practically the entire body of veterans may, if they desire, make themselves eligible to the benefits of the statute.

In the fact above stated lies the distinction between this case and the case of *Kingman v. Brocton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123, relied upon by respondent in support of the contention that the restriction of the use of the building operates to

defeat its public purpose. Even if it were to be conceded that the situation in the case last referred to was not distinguishable from the situation presented here, still it must be borne in mind that the decision of one jurisdiction is not absolutely binding upon the courts of another jurisdiction and that it is ordinarily resorted to for its persuasive effect rather than for its controlling influence. In the case above cited, the persuasive effect of the decision is weakened, if not entirely destroyed, by the fact that the limitation of the use was to an individual and particular post of the Grand Army of the Republic. Obviously, such a stringent limitation of its use might well suffice to defeat the public nature of its purpose.

[5] The contention that the entire plan and scheme of the statute is unconstitutional, in that it involves a gift to any individual, municipal or other corporation, cannot be sustained. The same principle which actuated this court in upholding the validity of the statute in the case of *Veterans' Welfare Board v. Jordan*, 189 Cal. 124, 146, 208 Pac. 285, 22 A. L. R. 1515, is applicable here. That case, although dealing with another and different inhibition of the Constitution, is, we think, particularly pertinent to the present situation, inasmuch as it involves the construction and application of analogous fundamental constitutional principles. In that case the court had under consideration the validity of a statute authorizing a bond issue to be used for the purchase and improvement of large tracts of land by the veterans' welfare board and the subdivision and resale of the same on long terms of credit to veterans. The objection there was made that the statute authorizing the bond issue contravened the provision of the Constitution prohibiting the giving or loaning of the credit of the state. Article 4, § 31. Although it was held that the bond issue proposed would create a debt against the state when such bonds were issued, it was held that the statute was valid as authorizing the expenditure of public money for a public purpose. In disposing of the objection the court said:

"In view of the fact that the money raised * * * is applied to a public purpose, * * * the fact that incidentally there is a benefit derived by the purchaser from the credit of the state and that such purchaser is a veteran should not render invalid such legislation. That is to say, where the transaction authorized by statute on its face purports to be a purchase and sale of land and there is no loan of credit in the ordinary acceptance of such terms and where in substance and effect the legislation accomplished a wholly different public purpose from the mere extension of credit, the law is not to be held unconstitutional as a violation of the substance and effect of the provision against lending or giving the credit of the state."

It may be fairly said in the instant case that the benefit conferred is but incidental to the paramount purpose contemplated by the statute and is in and of itself inconsequential. The main object of the statute should not be circumvented and condemned because some mere incidental and inconsequential benefit may be derived from the operation of the statute. It is true that the *Veterans' Bond Act of 1921* (St. 1921, p. 959) was held to be unconstitutional so far as it authorized the use of money from the sale of bonds in the farm and home purchasing scheme. *Veterans' Welfare Board v. Jordan*, supra. But this ruling resulted from the fact that the benefit to the individuals was a direct benefit because the homes and farms which by the terms of the act they were enabled to possess and occupy was to be put to a strictly private use, whereas in the instant case, the possession, use, and occupation of the building will at all times be devoted to a strictly public use. As was said in *Veterans' Welfare Board v. Jordan*, supra:

"The distinction * * * is perhaps not very great, but enough * * * to require us to give the benefit of the doubt, if any, of the constitutionality of this scheme, to the legislative determination of that matter."

[6] But aside from this the granting of the use of the memorial hall cannot, we think, in any view which may be taken of the case, be said to fall within the inhibition of the Constitution against the making of a gift of public money, or thing of value to any individual, municipal, or other corporation. A "gift" is defined by the Civil Code to be "a transfer of personal property, made voluntarily, and without consideration." Section 1146, Civ. Code. "A gift is something bestowed without return." *Miller v. Dunn*, 72 Cal. 462, 474, 14 Pac. 27, 32 (1 Am. St. Rep. 67). "To be a gift, this voluntary transfer must be gratuitous—a handing over to the donee something for nothing." *Yosemite Stage, etc., Co. v. Dunn*, 83 Cal. 264, 23 Pac. 369. The gift which the Legislature is prohibited from making is not limited, of course, to a "transfer of personal property" as defined by section 1146 of the Civil Code, but includes all appropriations of public money for which there is not authority or enforceable claim, or which perchance may rest upon some moral or equitable obligation. *Conlin v. Board of Supervisors*, 99 Cal. 17, 21, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17. But a gift as implying a gratuity, that is, something for nothing, or, as expressed in *Miller v. Dunn*, supra, "something bestowed without return," is the "gift" meant by the Constitution. It cannot, we think, be truthfully said that in the instant case there will be no return for the benefit conferred. While it is true that the return

anticipated is incorporeal and intangible, it is nevertheless a very vital and valuable return to the state. The promotion and promulgation of patriotism upon which the state must rely for its own self-preservation is in truth and in fact a good consideration for the thing granted by the state and justifies the extending the bounty of the state.

There is no need to attempt to justify the loaning of the use of the building as payment for either a legal or a moral claim. The granting of the use of the building is not analogous to the direct payment of bonuses to persons who have served in past wars. The justification for the grant does not rest upon the moral or equitable obligation of payment to the veterans for services already rendered. In its dedication of the use of the building to associations of veterans the state is not looking toward the past, but to the future. In short, it is not for past services rendered that the proposed building is dedicated to the use of those who served their country, but for the services to be rendered by them to the state in the future by keeping alive and fostering that spirit of patriotism which actuated them when they offered their all, even unto "the last full measure of devotion," for the perpetuation of the ideals and institutions for which this nation stands.

With reference to the hypothetical situation suggested that the building might perchance be used as the meeting place for associations composed entirely of veterans of other states and that no money of this state should be expended for any benefit which might possibly be shared by veterans who enlisted from other states, it is only necessary to say that the contingency suggested is so remote as to be practically negligible. Furthermore, the question of what organizations are eligible to use the building being merely an administrative matter, the situation can be met when the problem arises—if it ever does arise. Patriotism involves not only a love for a particular state, but for the whole United States—the individual profit and glory of each state is, in a manner of speaking, the community property of the nation at large.

It follows from what has been said that the board of supervisors, acting in pursuance of section 4041f of the Political Code, is empowered to erect as a memorial hall the building to be known and designated as Victory Hall. Furthermore, it is empowered to limit the use of the hall to a meeting place for associations of veterans who have served the United States honorably in its wars. We do not, however, wish to be understood as holding that the Legislature has not the power to enlarge the scope of the use of the hall to include kindred organizations or to open it to the public at large if future exigencies in-

dicade that a wider use of the hall would enhance its usefulness and better subserve the public needs.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

(192 Cal. 494)

In re KRATZ'S ESTATE.**KEEGAN v. CRAIG.**

(L. A. 7861.)

(Supreme Court of California. Dec. 5, 1923.)

Exceptions, bill of ~~§~~ 58(3)—Purchaser held not entitled to service of bill of exceptions on appeal from order confirming sale.

Under Code Civ. Proc. § 650, as amended by St. 1911, p. 400, making it unnecessary to serve bill of exceptions on the party who has not appeared in the proceeding, an executor's sale purchaser, who did not appear at the hearing on confirmation of sale in the manner specified in Code Civ. Proc. § 1014, made applicable to probate matters by section 1713, was not entitled to service of copy of proposed bill of exceptions on appeal from order confirming sale, notwithstanding fact that his name appeared in the order appealed from, and that he would be injuriously affected by a reversal of the order and that he was present with an attorney at the hearing.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives and Victor R. McCucas, Judges.

In the matter of the estate of Valentine Kratz, deceased. Proceedings by J. C. Craig, executor, for sale of decedent's land. From an order confirming sale, H. M. Keegan, successor in interest to Mollie E. Kratz, widow of the deceased, and the daughter of Mollie E. Kratz, appeals. On motion for affirmance of order. Motion denied.

Nathan Newby, of Los Angeles, for appellant.

G. P. Adams, W. W. Orme and Miller & McComas, all of Los Angeles, for respondent.

WILBUR, C. J. This is an appeal from an order confirming the sale of the real es-

tate of the decedent to Martin C. Neuner, purchaser. The purchaser moves for an affirmation of the order confirming the sale upon the ground that appellant's proposed bill of exceptions was not served upon him as required by the provisions of section 650 of the Code of Civil Procedure, and consequently claims that there is no record upon which the appellant can present his appeal, and consequently that the order must be affirmed. The purchaser's contention is based upon the proposition that the purchaser of the real estate to whom the sale is confirmed by the order appealed from is an adverse party to the appellant. It was held by this court, in *Estate of Bell*, 125 Cal. 539, 58 Pac. 153, that the purchaser to whom a sale of real estate was confirmed by the order appealed from was an adverse party required to be served with a notice of appeal. In the *Estate of Young*, 149 Cal. 173, 85 Pac. 145, it was held that where the bill of exceptions proposed by an appellant was not served upon an adverse party, and where the points relied upon for reversal were shown only by such bill of exceptions, the judgment should be affirmed upon motion of such adverse party.

Upon the authority of these cases and the decisions therein cited, it follows that the judgment should be affirmed, unless by reason of the amendment to section 650 of the Code of Civil Procedure, adopted subsequent to those decisions, and called to our attention by the appellant, the rule in this state upon that subject is changed.

Section 650 of the Code of Civil Procedure was amended in 1911 (Stats. 1911, p. 400) by the addition of the concluding paragraph. As it now stands, this paragraph reads as follows:

"No bill of exceptions, notice of appeal, or notice or paper, other than amendments to the pleadings or an amended pleading, need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding." Stats. 1915, p. 207.

The appellant claims that this amendment was adopted for the purpose of setting at rest the question as to who was to be served in the preparation of a bill of exceptions, and that therefore no adverse party who had not formally appeared in the action need be served with the proposed bill of exceptions, notwithstanding the fact that section 650 still requires that the proposed bill of exceptions be served "upon the adverse party."

Appellant also contends that the cases of *Elliott v. Superior Court*, 144 Cal. 501, 508, 77 Pac. 1109, 103 Am. St. Rep. 102, *Estate of Carpenter*, 146 Cal. 661, 80 Pac. 1072, *Estate of Young*, 149 Cal. 173, 176, 85 Pac. 145, and *Ford v. Cannon*, 5 Cal. App. 185, 187, 89 Pac. 1071, established the proposition, even before the amendment to section 650, Code of Civil Procedure, that unless the purchaser

had appeared and made himself a party by such appearance, that the bill of exceptions need not be served upon him. In *Estate of Bell*, supra, however, it was held that where the interest of the purchaser appeared by the decree itself, he was an adverse party upon whom the notice of appeal should have been served. If he was an adverse party within the meaning of the Code section requiring the notice of appeal to be served upon him, the same rule would require the service of the proposed bill of exceptions upon him, although the Code section with reference to notice of appeal has been amended, so that it no longer has to be served upon adverse parties. Under this decision it is clear, we think, that prior to the amendment of section 650, Code of Civil Procedure, in 1911, that the proposed bill of exceptions, notwithstanding the authorities cited, would have to be served upon the purchaser in order to lay the foundation for an appeal from the order confirming the sale to him. The question then is whether or not the mere fact that the name of the purchaser appears in the order appealed from, and that he would be injuriously affected by a reversal of the order, and that he was present with an attorney at the hearing for a confirmation of sale to him, is a sufficient appearance of the purchaser within the meaning of the section as now amended. The method of making an appearance in court is fixed by statute. Section 1014 of the Code of Civil Procedure defines the method of making an appearance in court, and these rules apply to probate matters. Section 1713, Code Civ. Proc. In *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470, 471, it was said:

"A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. * * * There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute. There was no such appearance in this case."

See, also, *Davenport v. Superior Court*, 183 Cal. 506, 191 Pac. 911.

There is no contention in this case that the purchaser conformed with the requirements of section 1014, Code of Civil Procedure, with reference to an appearance, or that he appeared within the meaning of that section. It follows that under the express provisions of section 650, Code of Civil Procedure, as amended in 1911, it was unnecessary to serve him with a copy of the proposed bill of exceptions. If he desired to have the proposed bill of exceptions served upon him in the event of an appeal, he could have secured

that privilege by filing a written appearance in the case.

Motion denied.

We concur: MYERS, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

192 Cal. 521

STEELE v. SCOTT. (S. F. 10321.)

(Supreme Court of California. Dec. 14, 1923.
Rehearing Denied and Judgment Modified
Jan. 10, 1924.)

1. Contracts —265—Party rescinding need not undo acts of other party in effort to restore status quo.

The duty of a party to a contract rescinding, in so far as restoring the status quo is concerned, does not extend to the undoing of acts performed by the other party.

2. Sales —123—Sale to second buyer of half interest in business subsequent to sale of other half to first buyer held not to affect first buyer's right to rescind.

After a sale to plaintiff by defendant of a one-half interest in a restaurant business, defendant could part with the half interest remaining in him, but by doing so he could not affect any legal right of the plaintiff to rescind who did all that was necessary in restoring the status quo when he made tender to defendant of the proportionate interest in the business which defendant had sold to him.

3. Partnership —122—Findings held to establish copartnership was formed with seller in view of buyer's acquisition of half interest in seller's business.

Findings held to establish that the copartner between plaintiff and defendant seller was formed in view of the acquisition by plaintiff of a half interest in the business of which defendant was the sole owner.

4. Partnership —227—Transfer by one partner of his half interest to others held not to create partnership between them and other partner.

Where plaintiff buyer became a copartner with defendant, sole owner of a restaurant business, by reason of plaintiff's purchase of a one-half interest in the business, a transfer by defendant to third persons of his remaining interest did not create a partnership between them and plaintiff.

5. Sales —124—Buyer's continuation of business for 30 days after seller's wrongful refusal to receive it back held not to affect buyer's right to rescind.

That, subsequent to defendant seller's refusal to receive a half interest in a restaurant business, tendered back by plaintiff buyer, the latter and the successors to defendant's remaining one-half interest, in operating business for 30 days, consumed some of the articles, rendering impossible its return to defendant, held not to affect plaintiff's right of rescission, where because of the nature of the business the continuance of it was practically forced upon plaintiff

by defendant's wrongful refusal of the tender, and the value of the articles consumed was deducted from the amount which the trial court found that defendant had fraudulently obtained from plaintiff.

6. Sales —124—Seller held placed in statu quo.

Where the trial court found that the value of articles consumed by plaintiff, buyer of a one-half interest in a restaurant business, in operating it for a short period after defendant seller's wrongful refusal to receive back plaintiff's interest as tendered, was a certain amount, and that, apart from that amount, the business was valueless, the deduction of that amount from the amount paid by plaintiff for his interest placed defendant in statu quo.

7. Sales —398—Judgment for return of buyer's money held "relief consistent with the case" within statute.

In an action by a buyer to recover the purchase price of a one-half interest in a restaurant business, where the complaint alleged in separate counts a cause of action for rescission, for money had and received, and for breach of contract based on failure of consideration, held that, independently of the question of rescission, the facts found by the court, being within the issues, required a judgment in favor of plaintiff for the return of his money, less one-half of the value of the personal property consumed by plaintiff in operating the business for a brief period; such a judgment being relief consistent with the case within Code Civ. Proc. § 580.

8. Election of remedies —15—Sales —398—When amount recoverable on rescission may be damages recoverable in action for deceit, stated.

If the grounds upon which rescission is asked are fraud and deceit in obtaining plaintiff's money in exchange for worthless property, the rule that in case of rescission of a contract an action for damages thereon cannot be sustained does not apply, but in such case, in order to prevail, plaintiff must prove his allegations of fraud, and, if the court finds that in fact the property was worthless, its judgment, whether it include a cancellation or not, must award to plaintiff the money so paid by him, whether for rescission or as compensation for defendant's deceit, such a case clearly being within Code Civ. Proc. § 580.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by H. B. Steele against F. J. Scott. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

C. F. Humphrey and Grant & Zimdars, all of San Francisco, for appellant.

W. F. Stafford, of San Francisco, for respondent.

KERRIGAN, J. Plaintiff in his complaint, in one count, sets forth a cause of action for

the rescission of a contract of sale; in a second count, a cause of action for money had and received; and, in a third, a cause of action for breach of the contract by reason of the consideration therefor having failed.

The cause was tried, and the court found that the defendant on February 7, 1917, owned a certain restaurant business in San Francisco, and then and prior thereto had represented that it was profitable; that the receipts of the restaurant were in excess of \$135 per day, and that the business was clearing more than \$300 per month over and above all expenses, this latter representation being in the form of a written guarantee; that he also represented that there were goods and personal property of great value belonging to the business, and a half interest in the business was worth \$1,750. The court found that as a matter of fact all these representations were false and known to be so by the defendant; that the business had made no profits since May 1, 1916; that these representations were made to the plaintiff for the purpose of inducing him to buy; that the plaintiff believed and relied thereon and was thereby induced to pay defendant \$1,650 for a half interest in said business, making the first payment on February 7, 1917, and completing the payments on the 16th of that month; that plaintiff was induced to enter into a partnership agreement with the defendant on February 16, 1917, for the conduct of said business; that on February 24th following plaintiff discovered that said representations were false, and on February 28, 1917, notified defendant that he repudiated and rescinded said sale and copartnership; that he then tendered to defendant and offered to restore to him all property received, upon condition that defendant return his \$1,650, and gave due notice of such rescission; that plaintiff was not a man versed in business and had no knowledge of the restaurant business; that he believed and relied upon defendant's representations and was induced thereby to buy said one-half interest and pay \$1,650 therefor, and to enter into said partnership; that between February 16 and 24, 1917, upon similar representations, defendant sold the other one-half of the business for \$900 to one Sam Illich and the latter's four partners, who were experienced restaurant men, and that these, on February 28, 1917, also rescinded their purchase; but that defendant refused to accede to such rescission or to the rescission by plaintiff, and that plaintiff and said Sam Illich and the latter's four partners conducted the business until March 28, 1917, applying all receipts therefrom to the current expenses thereof, but that the receipts were entirely insufficient to pay the necessary running expenses, and on March 28, 1917, the business was attached in actions brought to recover these unpaid expenses, and closed up, and all the physical property subsequently

applied under execution upon judgments obtained in said actions, and that there was nothing left; that the physical property belonging to the business was not worth in excess of \$500 at the time of the sale to plaintiff, and the one-half thereof sold to plaintiff was not worth in excess of \$250; that plaintiff was damaged by reason of said facts in the sum of \$1,650, less the sum of \$250, which latter was the value of one-half of the physical property belonging to said business at the time of plaintiff's purchase.

The trial court made this further finding, to wit:

"When plaintiff made his offer of rescission on February 28, 1917, * * * said plaintiff could not at said time restore to defendant the one-half interest in the partnership existing at the time of plaintiff's purchase thereof (and which was a partnership of said plaintiff and defendant) for the reason that said defendant had previous to such offer of rescission by plaintiff, sold the other one-half interest in said business to said Sam Illich and his four partners, and because thereof the partnership existing at the time of said offer of rescission was a partnership consisting of said plaintiff and said Sam Illich and the latter's four partners."

The court thereupon entered judgment in favor of the defendant, from which plaintiff appeals; the case being here upon the judgment roll.

The appellant makes two contentions in support of his appeal, namely, that upon the findings of the court he was and is entitled to judgment annulling the contract and ordering the return of the money paid by him; and, second, that even if the findings will not support such a judgment, they nevertheless support and require a judgment in his favor for the amount so paid by him, inasmuch as the findings show that such amount was fraudulently obtained as the consideration for property possessing no value whatever, such a judgment being within the case by the pleadings and proof.

We agree with the appellant in both of these contentions.

It may be said, parenthetically, that while the price paid was the sum of \$1,650, the appellant acquiesces in a deduction of \$250 from that amount, found by the court to be the value of certain articles or commodities turned over to him by the defendant in connection with the transfer of the business, and which were entirely consumed in conducting the business during the brief period that it survived the transfer to the plaintiff. While we think the plaintiff is quite liberal in this concession, we will consider the appeal upon the understanding that he is now only asking this court to direct that a judgment be entered in his favor for the purchase price less this sum of \$250, to wit, \$1,400.

Referring to the trial court's findings above set forth, it is apparent therefrom that the

only grounds upon which it denied the plaintiff judgment in the sum of \$1,400 are those stated in the last of those findings. By it the court finds that the plaintiff could not have restored to the defendant "one-half interest in the partnership existing at the time of plaintiff's purchase thereof (and which was a partnership of said plaintiff and defendant) for the reason that said defendant had, previous to such offer of rescission by plaintiff, sold the other one-half interest in said business to said Sam Illich and his four partners; and because thereof the partnership existing at the time of said offer of rescission was a partnership consisting of said plaintiff and said Sam Illich and the latter's four partners."

[1, 2] This finding upon its face purports to be nothing more than an inference drawn by the court from its previous findings; and if such inference is erroneous, as it undoubtedly is, the previous findings retain and must be given their due legal effect. The court specifically found that the plaintiff duly gave notice of rescission of the contract upon sufficient grounds, and tendered back the property received. That property was a half interest in a certain restaurant business; and the court finds that such tender is inefficacious because the defendant had in the meantime parted with the remaining half interest retained by him at the time of his transaction with the plaintiff. But the duty of a party to a contract rescinding, in so far as restoring the status quo is concerned, does not extend to undoing acts performed by the other party. The defendant was, of course, at liberty to part with the moiety of the business remaining in him after the sale to the plaintiff; but by doing so he could not affect any legal right of the plaintiff. So far as the latter was concerned, the status quo was restored when he made tender of the proportionate interest in the business which the defendant had transferred to him. 13 C. J. 621; 2 Black on Rescission and Cancellation, § 618, p. 1427; Hammond v. Pennock, 61 N. Y. 145.

[3, 4] It is not necessary to refer at length to two other erroneous inferences contained in the particular finding under discussion, namely, that the half interest in the business purchased by plaintiff was a half interest in a partnership existing between the parties, and that the sale by defendant of his remaining interest to other persons constituted such other persons and the plaintiff partners in said business. As to the first, the preceding findings of the court establish that the co-partnership between plaintiff and defendant was formed in view of the acquisition by the former of a half interest in a business of which the defendant was the sole owner; and, as to the second, the transfer by the defendant to Illich et al. of his remaining interest did not in law create a partnership between

them and the plaintiff. With the exception of this erroneous inference from the previously found facts, there is no finding that the plaintiff ever entered into partnership with these persons.

[5, 6] If it be objected that subsequent to the tender wrongfully refused by the defendant, the plaintiff and the successors to defendant's remaining half interest, in the conduct of the business for some 30 days, consumed some of the property, rendering impossible its return to the defendant, a sufficient answer to this is that the property forming the subject of the sale being a going business, the continuance of the business during the brief period of 30 days was practically forced upon the plaintiff by the wrongful act of the defendant, and the value of the articles thus consumed was deducted from the amount which the trial court found that the defendant had fraudulently obtained from the plaintiff. By this deduction from the amount to which by the findings of the trial court the plaintiff would have been entitled, the defendant was placed in statu quo, since the court finds that it was the full value of the property consumed, and that apart from this modicum of property the business was valueless. The plaintiff's right of rescission, therefore, remained unaffected. Clark v. Wells, 127 Minn. 353, 149 N. W. 547, L. R. A. 1916F, 476; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

[7] We think, also, that independent of any question of rescission, the facts found by the court, being within the issues, required a judgment in favor of the plaintiff for the return of his money, less one-half of the value of the physical personal property, or \$250. A judgment for the return of the money was, therefore, "relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580; Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 Pac. 919.

[8] In opposition to this view the respondent cites the case of Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667, holding that in the case of rescission of a contract an action for damages thereon cannot be sustained. While that case undoubtedly states the general rule, it is not of invariable application, and it was so held in Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964, in which that case was reviewed in an opinion by the late Chief Justice Beatty. It may happen, as here, that upon rescission the plaintiff is entitled to a sum of money, to which amount he would be equally entitled in an action for deceit brought upon the contract. In such a case, if the grounds upon which rescission is asked are fraud and deceit in obtaining plaintiff's money in exchange for worthless property, in order to prevail the

plaintiff must prove his allegations of fraud; and if the court find that in fact the property was worthless, its judgment, whether it include a cancellation of the contract or not, must award to the plaintiff the money so paid by him. This amount is the same whether recovered as the result of rescission or as compensation for the detriment suffered through the defendant's deceit. Such a case comes clearly within the provisions of section 580 of the Code of Civil Procedure, above cited. *Bancroft v. Woodward*, 183 Cal. 99, 190 Pac. 445; *Montgomery v. McLaury*, 143 Cal. 83, 76 Pac. 964. See, also, *Glover v. Radford*, 120 Mich. 542, 79 N. W. 803; *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317.

It results from the foregoing that upon the court's findings of fact (disregarding its erroneous inferences based thereon) it should have entered judgment for the plaintiff for at least the sum of \$1,400, with interest and costs as prayed.

The judgment is reversed, and the cause remanded to the trial court, with directions that it enter such judgment, provided, however, that the defendant may within the time provided by law move for a new trial, or appeal, if so advised, upon the ground that the findings of fact are not supported by the evidence.

We concur: WILBUR, C. J.; LAWLOR, J.; MYERS, J.; SEAWELL, J.; LENNON, J.

192 Cal. 479

CALIFORNIA PRESS MFG. CO. v. STAFFORD PACKING CO. (L. A. 7152.)

(Supreme Court of California. Dec. 5, 1923.)

1. Sales ⚡442(5)—Profits lost through breach of warranty held too remote to constitute element of damages.

Where a plant for the manufacture of fishmeal from fish offal, though not of the capacity warranted, by working less than half time, could convert all the offal available, damages for the loss of profits, based on the theory that more offal might have been produced, if more fish had been purchased in the open market, were too remote and speculative to be recoverable.

2. Damages ⚡40(1)—Lost profits not reasonably within contemplation of parties not recoverable.

Damages for the loss of anticipated profits, which cannot be said to have been reasonably within the contemplation of the parties, are not recoverable.

3. Sales ⚡442(5)—Damages for loss of profits anticipated by new business enterprise not recoverable.

Loss of profits growing out of a breach of a contract to furnish a machine of a designated capacity to an unestablished business is too uncertain to constitute a basis for the computation of damages.

4. Sales ⚡442(5)—Damages for not furnishing machine or article ordinarily market value of another.

The measure of damages for failure to furnish a machine or article as agreed is usually the market value for which another might have been procured, rather than the possible loss of profits.

5. Sales ⚡288(2)—Breach of warranty as to fishmeal plant waived.

Where the purchaser of a fishmeal plant, after discovering a breach of warranty as to the capacity of the plant, agreed that, if the vendor would install a new drum and consent to a change in the contract as related to payments, the plant would be accepted, which was done, he thereby waived the breach of warranty.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the California Press Manufacturing Company against the Stafford Packing Company, wherein defendant filed a cross-complaint. From a judgment for defendant on the cross-complaint, plaintiff appeals. Reversed.

S. W. Molkenbuhr, of San Francisco, and Porter & Sutton, of Los Angeles, for appellant.

W. A. Alderson, of Los Angeles, for respondent.

WASTE, J. The plaintiff sold and delivered to the defendant, under a conditional sales contract, a fishmeal machine or plant, for an agreed sum of \$8,000. On the refusal of the defendant to pay a trade acceptance for the amount of the final installment due on the purchase price, plaintiff instituted an action in claim and delivery to recover possession of the machinery. The complaint was in the usual form for actions of this character. The defendant answered, denying plaintiff's right to possession, and, at the same time, filed a cross-complaint, alleging a breach of warranty on plaintiff's part in failing to furnish a machine having an agreed capacity, and sought damages for the alleged loss of prospective profits which would have been realized had the machine been as warranted. Plaintiff answered the cross-complaint, denying the alleged breach of warranty, and any loss of profits, and, as an affirmative defense, pleaded a waiver by defendant. The trial court ordered, and the jury returned, a verdict in favor of the press company for the return of the fishmeal machine, and, in case delivery could not be had, then for the value thereof. The jury also returned a verdict in favor of the packing company under its cross-complaint for the sum of \$1,000 damages for loss of prospective profits. Plaintiff in due course moved for a new trial, and, this being denied, it has appealed from that portion of the judgment

awarding damages to the defendant. Its contentions are that damage resulting from the loss of expected, future, or prospective profits was not within the contemplation of the parties when the contract was entered into in this case, and that any such expected profits claimed by respondent are too dependent upon numerous, uncertain, and changing contingencies to afford a trustworthy and definite measure of damages, and are likewise speculative, remote, and not the direct and immediate result of the nonfulfillment of the contract.

The appellant was the sole manufacturer of a large machine and accessory equipment by means of which machine or device fish canners are able, by a continuous process, to reduce fish offal or cannery waste into fishmeal and fish oil, useful for fertilizer and other purposes, and for animal consumption. The respondent packing company negotiated with the predecessors of the appellant for the purchase of a plant to cost, when set up and in operation, the sum of \$8,000. These negotiations resulted in the execution of a written contract, by the terms of which appellant agreed to furnish "one continuous fishmeal plant, having a capacity of two and one-quarter tons of raw material per hour." The contract contained a guaranty that the machinery furnished should be of standard quality, and that any parts developing mechanical defects within 30 days from the time machinery was put in operation would be replaced by the seller at its own expense. When the plant was set up and in operation, it did not have the capacity to reduce two and one-quarter tons of raw material per hour. There was considerable correspondence between respondent and the appellant concerning the operation of the plant. Numerous inspections were made by appellant's employees and experts in an endeavor to increase the capacity of the plant. A number of adjustments and replacements were made, which "brought the plant somewhere near the capacity we [respondent] desired." As a result, respondent agreed to accept the plant, provided the appellant would install an additional drum on the drier, and would agree to put forth its best efforts to increase and better the performance of the machine. This arrangement was agreeable to appellant, which also, at the request of the respondent, agreed to a modification of the terms of payment for the plant. The changes in installation were made, and respondent continued to use the machine as before. It made two payments on the unpaid purchase price under the modified terms of the agreement, but failed to honor a trade acceptance for the balance, and this action resulted.

[1] The respondent attempts to justify its claim for loss of profits "solely because of the breach of appellant's warranty, and the loss to respondent directly by failure of the fishmeal machine to consume to the capacity

warranted by appellant, thereby causing the respondent to lose the difference between what the fishmeal machine would have produced, if it had performed in compliance with the warranty, and what it actually produced." It relies upon the language of the contract, by which appellant proposed to furnish "one continuous fishmeal plant, having a capacity of two and one-quarter tons of raw material per hour." Assuming that both of the parties to the transaction may have contemplated that the packing company would make a profit from the manufacture and sale of the by-products of its fish business, and that this case on the facts thus far related might fall within the reasoning of *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62, other facts differentiate it from the situation there considered. It is clearly established by the evidence that the machinery installed by appellant did actually convert all of the fish offal which the respondent could produce, and did so by working less than half time. Respondent's theory is, however, that it could have purchased more fish in the open market; that if it had done so and packed more fish it could have produced more offal, and therefore, if the machinery had been capable of converting it into meal and oil, respondent would have made more money. It is at once clear that the prospective profits claimed by respondent are too remote and speculative to be recoverable.

[2] It is a well-settled rule that the damages that can be recovered for any breach of contract are only such as may reasonably be supposed to have been in the contemplation of the parties at the time of entering into the agreement, as the probable result of a breach.

"Other damages are too remote. * * * This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow, in the ordinary course of things, from a breach, and therefore to have in effect stipulated against. The understanding and intention of the parties in this regard must of course be ascertained from the language of the contract in the light of such facts." *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 56, 87 Pac. 1093, 1095, (7 L. R. A. [N. S.] 913).

The president of the respondent company testified that, at the time the contract was signed, all that was said by either of the parties was that he told Mr. Meakin, the inventor of the fishmeal machine and president of the appellant company, that respondent wanted a machine which it "could use for making fishmeal out of scrap and fish in general," and "he said he was going to give us a machine for such purpose." Meakin testified that at the time the contract was entered

into he knew the purpose for which the respondent wanted the machine and for which it was to be used by the packing company. No testimony was introduced showing that there were any special circumstances surrounding the execution of the contract whereby appellant engaged itself to assume a loss for prospective profits, or to have warranted respondent in reasonably supposing that it would assume the same. The contract itself contains no stipulation to pay for "prospective profits."

[3] Another element enters into the consideration. At the time the parties were negotiating for the sale and purchase of the fishmeal plant in this case, the respondent had not theretofore engaged in the conversion of its fish offal or cannery waste into fishmeal. It therefore had no experience in the operation of any such plant as it contemplated purchasing. So far as it was concerned, the enterprise was a new undertaking and engaging in a new industry. The reduction of cannery by-products into fishmeal and fish oil by appellant's process was an entirely new industry invented by the president of the appellant corporation. It would appear unlikely, therefore, that either the appellant or the respondent had in contemplation a warranty by the appellant sufficient to cover anticipated profits which the respondent might realize had the machine the capacity called for by the contract. As a proposition of law, it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. *Kettering v. Sheppard*, 19 N. M. 330, 142 Pac. 1128. Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation. 17 Cor. Juris. p. 797, § 118; *Shoemaker v. Acker*, 116 Cal. 239, 244, 48 Pac. 62. The rule is one of necessity. Damages must be certain of ascertainment. If one engages in a new industry, there are no provable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. *Central Coal Co. v. Hartman*, 111 Fed. 96, 99, 49 C. C. A. 244.

[4] Aside from these considerations, the general rule is that, as between possible methods by which a loss may be computed, the law prefers that which leads to certain, and not speculative, results. The damage to be recovered for not supplying a machine or other article, as agreed, is usually the market value for which another may be procured, and is not to be founded upon the uncertain and speculative basis of the profit which might have been made from its use. 2

Mechem on Sales, § 1779. The great weight of authority seems to be that the recovery of profits is possible only under exceptional circumstances, unless the engagement by its very terms discloses them to have been in effect, in whole or in part, a subject-matter of the contract. *Pusey & Jones Co. v. Combined Locks Paper Co.* (D. C.) 255 Fed. 700, 705. The grounds upon which rest the general rule of excluding profits in estimating damages are concisely stated in *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, a case almost identical with the one here. Damages were there sought to be recovered for loss of profits due to the failure to construct a flour mill within a certain period and with a given capacity per hour. The court gave three reasons for excluding profits (139 U. S. 206 11 Sup. Ct. 501 [35 L. Ed. 147]):

"(1) That in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite, and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the non-fulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms [citing cases]."

See, also, *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. The subject was reviewed by another court in a case involving a sale of flour mill machinery, the contract for which warranted the machinery to have a capacity of a certain number of barrels per day, and it failed to measure up to the stipulated capacity. Damages were sought for loss of profits "which might have been made." The court held it was no part of the contract that the plaintiff should make profits by carrying on a business with the machinery which the defendant agreed to erect. It distinguished the transaction from a sale of chattels or of land in which the possible profit is the very object of the contract and is necessarily in the contemplation of the parties, saying:

"When a machinist furnishes machinery to a mill owner, it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote, and speculative profits which may or may not be made in the business to be done." *Pennypacker v. Jones*, 106 Pa. 237, 242.

It is therefore manifest, from these authorities, that the issue as to prospective profits advanced by the respondent in this case was improperly submitted to the jury. The cases cited by respondent in support of

its claim for such profits lose persuasive force when applied to a situation like that we are now considering. They relate to such other, and different facts as to be readily distinguishable, and do not in the least militate against the rule preventing a recovery of prospective profits not in the contemplation of the parties, or of profits "which might have been earned" in a new and untried industry.

[5] For another reason, respondent should not be allowed to recover damages in this case. In its answer to the cross-complaint, certain acts on the part of the respondent were pleaded by the appellant as amounting to a waiver and as an estoppel. It was clearly proved that some time after the plant was in operation, during a conference between the presidents of the two companies, Mr. Stafford, president of the respondent, said he was satisfied with the cooker and press connected with the plant, but complained that the capacity of the drier was not two and one-quarter tons. He proposed that appellant install an additional drum on the drier, on which being done, "he felt sure the plant would be satisfactory, and he would accept it." The additional drum was thereupon installed by appellant at a cost of \$1,500. The packing company thereafter wrote a letter to appellant, in which, after discussing certain tests of the plant, it said:

"The last changes you have made have brought the plant somewhere near the capacity we desired, and we are not going to insist on a rigid adherence to your guarantee."

It expressed itself as thoroughly satisfied with the performance of the drier, while still of the conviction that it was impossible to make the cooker and press, in its then condition, do the required amount of work. It suggested that appellant might be able to make certain improvements or adjustments which would accomplish the desired results, and agreed to accept the plant, if appellant would agree to put forth its "best efforts to increase and better the performance of the cooker and press assembly," and provided appellant would deviate slightly from the terms of the contract in the matter of making final settlement. This proposal was agreed to by the appellant. Later, the respondent in writing repeated the substance of this offer which, it stated, "was that we would accept the plant, and trust that you will see that this plant does deliver two and one-quarter tons per hour." It renewed its

offer to give trade acceptances for the balance of the purchase price, and requested that the time for payment of the same be extended until it could get returns from its tuna packing season. Its offer being agreeable to appellant, respondent executed and mailed to the press company, for signature, three trade acceptances, two for \$1,000 each, due July and August following, respectively, and the third for the balance of \$1,238.50, due in September. The first two trade acceptances were paid without further protest when due. During all of this time the respondent used the fishmeal machine in connection with the operation of its plant.

The foregoing facts are established without contradiction. There is some dispute in the evidence as to what the appellant did on its part to increase the output of the machine. But, from the facts proven, it must be held that the respondent did not insist, but, on the contrary, waived a rigid adherence to any guarantee on the part of appellant as to the amount of the output of the machine. The facts proven present a clear and complete defense to the claim for damages for the breach of the warranty as to capacity. By causing appellant to expend the sum of \$1,500 in installing a new drum, upon the promise that respondent would accept the machine, and by accepting the plant in the condition in which it was after its installation, and securing at the time an extension of the period for making final payments, respondent must be held to have waived any right to claim damages by reason of the failure of the machine to measure up to capacity, and is now estopped from asserting any such demand in this action.

The conclusion we have reached renders it unnecessary to attempt to analyze the testimony in what we think would be a vain endeavor to determine the method by which the jury arrived at the sum of \$1,000 as the amount of the prospective profits lost by the respondent. It also becomes unnecessary to consider the contention of the appellant that the trial court committed error in admitting in evidence the "Cost Book" of the respondent, in order to determine the physical and actual capacity of the plant per hour, in the absence of any witness being called to testify or identify slips and memoranda which were copied into the book.

The judgment appealed from is reversed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

192 Cal. 441

PEOPLE v. HENDRIX. (Cr. 2572.)

(Supreme Court of California. Dec. 4, 1923.)

1. Homicide $\S$ 253(1)—Evidence held to sustain conviction for first degree murder.

In a homicide case, evidence held sufficient to sustain a conviction for murder in the first degree.

2. Homicide $\S$ 166(8)—Sexual relations with deceased's wife after killing admissible.

Proof of acts of sexual intercourse with deceased's wife after the killing was admissible as tending to show motive.

3. Criminal law $\S$ 371(4)—Evidence of sexual assault admissible in homicide prosecution.

In a prosecution for murder, evidence of a criminal sexual assault upon deceased's wife after the killing was admissible as tending to show the intent or motive of the defendant in the commission of the homicide, though also tending to prove commission of another offense.

4. Criminal law $\S$ 1169(2)—Introduction of photograph held not substantially prejudicial.

In prosecution for homicide, any error of the court in permitting introduction in evidence of photographs of deceased's wife, showing her cut, bruised, and scratched condition caused by rocks, brush, and barbed wire on her way to inform officers of the killing of her husband, and her condition of mind on arriving there, offered for the purpose of showing that she did not in fact consent to defendant's sexual acts with her after the killing, could not have substantially prejudiced the defendant, where the prosecution had introduced all of the details of the alleged criminal assault upon the wife and her flight over the mountains without shoes or stockings.

5. Criminal law $\S$ 1169(2)—Rejection of evidence not prejudicial, where similar evidence introduced.

Rejection of some testimony as to reputation of a witness could not have prejudiced the accused, where the part which was admitted was clear and direct.

6. Witnesses $\S$ 340(3)—Lack of chastity not admissible to impeach.

Lack of chastity of a witness is not admissible for the purpose of impeaching credibility.

7. Criminal law $\S$ 676—Court may limit number of impeaching witnesses.

Where testimony as to reputation of witness for truth, honesty, and integrity was but cumulative, court did not err in excluding it; it being proper for the court to limit the number of witnesses.

8. Criminal law $\S$ 656(4)—Remark of court held not prejudicial.

Where, during examination of witness in homicide case, the court stated that there was a discrepancy as to the date of the homicide, whether or not the morning following was the 14th or 15th of August there was no prejudicial error; there being no dispute that there was such a discrepancy.

9. Criminal law $\S$ 730(9)—Argument of counsel held not prejudicial.

Where, during argument of case, district attorney stated that defendant claimed that deceased threw a stick of stovewood at him, and defendant's counsel assigned this remark as misconduct, adding that there was no evidence that the stick of wood thrown was firewood or stovewood, and the district attorney, referring to this interruption, stated that it showed to what technicalities counsel was resorting to save "the neck of this defendant," there was no prejudicial error, where the jury was admonished by the court to pay no attention to such matter.

In Bank.

Appeal from Superior Court, San Diego County; Spencer M. Marsh, Judge.

J. V. Hendrix was convicted of murder in the first degree, and appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Chester C. Kempley, Dist. Atty., and E. L. Johnson, Deputy Dist. Atty., both of San Diego, for the People.

KERRIGAN, J. Defendant was tried in the county of San Diego for the killing of one Thomas Kester, and was found guilty of murder in the first degree. He moved for a new trial, and, the motion being denied, he was sentenced to suffer the penalty of death. This appeal is from the judgment and the order denying a new trial.

In the early part of the summer of 1922, the defendant, J. V. Hendrix, Thomas Kester, the deceased, and the wife of the latter met in a lumber camp in the northern part of the state. There they entered into an agreement to engage in the unlawful manufacture and sale of whisky in San Diego county. A little later the two men worked in a lumber camp at a place called Sterling. They left there for San Diego, taking with them the sum of \$300, saved from the earnings of the two men, and which was deposited with Mrs. Kester as treasurer. With this sum they purchased the equipment for a still. From Sterling to San Diego the party traveled in an automobile belonging to Kester, camping at night at various points on their way. At the lumber camps and while traveling the defendant took his meals with the Kesters and slept near their tent. About two weeks after arriving in San Diego they rented a small piece of land in a secluded part of the county, and there installed the still in a small adobe building and put it into operation. Kester and his wife slept in a tent a short distance from the still, and the defendant occupied a bunk near by.

On the evening of August 14, 1922, the defendant ate no dinner, stating that he was indisposed. Later Mrs. Kester, having fin-

ished her housework, joined the defendant and her husband at the still where they were engaged in general conversation, nothing unusual occurring. At 9 o'clock she bade the two men goodnight, went to her tent, and retired for the night. At 9:30 she heard her husband say to the defendant, "To-morrow we will go to San Diego, and Thursday we will go to Warner's Hot Springs." Following this remark she heard a crash and a thump five or six times, whereupon she hurriedly arose and left her tent, calling out, "What's the matter?" The defendant replied, "Nothing's the matter." To an inquiry after her husband the defendant stated that he had gone over the hill for water. Just then she heard the voice of her husband, faint and growing fainter with each word, saying "Help me, dear, help me," immediately followed by "thud, thud, thud, as if of something hitting upon wood," to quote the words of Mrs. Kester. Thereupon, knowing that something was wrong and dressed only in a nightgown, she fled from the camp. While endeavoring to crawl under a tight board locked gate about 100 yards from the still she was overtaken by the defendant, who grabbed hold of her, threw her on the ground, called her a "nasty puppy," and said "You are mine now," and there attempted to and to some extent did have sexual intercourse with her. She admits that she threw her arms around his neck and said, "Oh, John, I am so excited," and that she did not resist the assault, but she states that what occurred was against her will, and at the trial the prosecution attempted to show that her nonresistance was prompted by fear. The defendant then told her that her husband was dead. He also asked her how much money she had, and said he was going to take her to Louisiana. They spent about 30 minutes at the gate, when the defendant took her to the tent. On the way there they stopped at the still to enable the defendant to place a jar so as to save a wasting of the distilling whisky. Thereupon they went to bed for the night, where he again attempted an act or acts of sexual intercourse with her. He also at this time said to Mrs. Kester, "In the morning I will bury Tom, and you get breakfast, and we will head over across the Rockies in the machine;" also, "I will go to the gallows for you. You nasty little thing, why didn't you approach me before? Why did I have to do this to approach you?" Then hearing a dog snore, Mrs. Kester pretended to believe that "Tom" was "coming to life," and persuaded the defendant to go out and investigate, and when he did so she slipped out of the tent, made her escape over the mountain in her nightdress, without shoes or stockings, and reported the slaying of her husband to the authorities at San Diego.

While the Kesters and the defendant were in San Diego looking for a location for a

still, the Kesters lived with Mrs. Kester's parents, and the defendant lived next door in a vacant house; Mrs. Kester doing the cooking for him. The Kesters were married in April, 1922. Mrs. Kester was 24 years old and her husband was 42. He was tall and weighed 200 pounds. He was blind in one eye, and the sight of the other eye was impaired. As a result of a severe attack of rheumatism, his right arm and leg were shorter and thinner than the left arm and leg. The defendant was 52 years old, was in good health, and weighed 170 pounds.

The autopsy surgeon, Dr. John J. Shea, examined the body of the deceased, and found that he had been beaten to death by a blunt instrument; all of the wounds being on the back of the head.

The county coroner, S. C. Kelley, testified that, on the morning of August 15th, he visited the site of the homicide, accompanied by Deputy Sheriffs Sexson and McNett. They found the body, a pickhandle with stains of blood on it, and a loaded Winchester rifle in the defendant's bunk. Within about 15 minutes after the deputy sheriffs left to return to San Diego a man appeared on the scene who later proved to be the defendant. He said to Coroner Kelley that his name was Henderson; that he was a neighbor living with his family over the hill; that he had heard some shooting and he came to learn what the trouble was. Later, during the conversation, he told the coroner that his name was Johnson. Subsequently, on the return of Deputy Sheriff McNett, the defendant was put under arrest, and at that time he denied that he knew anything about the death of Kester. He stated to a newspaper reporter, Albert E. Brown, that he had to kill Kester, for he was coming at him with a stick of wood. He also told this witness that he had been intimate with Florence Kester, and that they had planned to run away. The rifle which was found in defendant's bunk was usually kept in the tent of the Kesters. A blunt piece of iron, which Mrs. Kester said she had seen in the defendant's bunk a few days before the slaying, was found near the still house, and on it there were blood stains, hair, and a piece of skin.

As before stated, the defendant claimed that the killing of the decedent was in self-defense. In that behalf he testified that on the 10th of August, while he and Mrs. Kester were alone, he had told her that she had a pretty foot, and Kester, having overheard the remark, later, and in the absence of Mrs. Kester, told him that a man who "would brag on another man's wife was a son of a bitch." To this statement the defendant made no reply, walked away, and the matter was dropped. On the fatal evening of August 14th, after Mrs. Kester had retired for the night, the decedent and the defendant had a dispute about how much material

should be drawn from the still, the deceased, saying that in this instance he was going to have his way; that the deceased called the defendant a son of a bitch, and hit him over the head with an empty quart bottle. The defendant got up from his sitting position and turned to the door of the still. Deceased threw a piece of wood at him, also a pick handle. The deceased's aim was poor, and neither of these missiles hit the defendant. The defendant seized the pick handle, and as the deceased was advancing towards him with another piece of wood in his hand, the defendant knocked the piece of wood out of the deceased's hand. Then the deceased pulled a knife out of his belt, whereupon the defendant hit the deceased two blows on the head with the pick handle; the deceased falling near the bunk of the defendant on the second of these blows. At this juncture the deceased picked up a piece of iron and again advanced upon the defendant. Then the defendant struck the deceased another blow, felling him. Deceased dropped the piece of iron, and when he arose he was standing within arm's length of an oak tree and reached for a rifle which he had previously placed there, saying, "Damn you, I will put your light out." Then, says the defendant, "I hit him the last blow." Subsequently, the defendant looked for Florence Kester and found her, when she answered a call, standing down the road at the first gate. Upon approaching her she threw her arms around him saying, "Oh, John, I am so excited." They walked back to the cook house, where they each had a drink of whisky, and at his suggestion she made some coffee, which they also drank. Subsequently, they went out to the still house together, and while there she helped the defendant adjust a jar to prevent the waste of malt, and at her request the defendant turned the body of her dead husband around so that his head was lying uphill. This being done, she said, "I believe I will see how much money he has," and she took \$10 out of his pants pocket. Then they went back to the tent. Thereafter the defendant left the tent, and on returning 10 minutes later he found that Mrs. Kester had gone. Defendant further testified that he neither had nor attempted to have sexual intercourse with Mrs. Kester that night, but admitted that their relations had been intimate, commencing with the last afternoon in Sterling, and continuing up to shortly before the slaying of her husband. Defendant further testified that at the time of the killing he, the deceased, and the woman were all somewhat under the influence of liquor.

The morning after the slaying, the defendant, in answer to a question by a deputy sheriff, said, "I hit the son of a bitch because he threw a stick of wood at me," and for the reason that "I believed that my life was in danger."

It was not until the trial that the defendant claimed that he had been hit on the head with a bottle, and that he had been attacked by the deceased with a stick of wood, a pick handle, another stick of wood, a knife, a piece of iron, and a rifle.

It might also be well to state that the officer who made a careful physical examination of the defendant shortly after his arrest found no swelling or any mark on his head tending to support defendant's assertion that he had been hit there with a bottle by the deceased.

According to the testimony of the officers, the dust on the ground around the body of the deceased tended to show that the body had been turned around as testified to by the defendant.

[1] No claim is made that the evidence is insufficient to sustain the verdict; and it is clear that there is abundant evidence in the record which, if believed by the jury, showed the defendant to be guilty of a cruel and deliberate murder.

[2, 3] Over the objection of defendant, evidence was admitted tending to prove that after the murder defendant committed an act or acts of sexual intercourse with Mrs. Kester. This evidence was offered, and we think was admissible, as tending to show a motive for the crime charged. It is true that evidence of crimes other than the one for which a defendant is on trial is not usually admissible; but to this rule there are exceptions; and, where evidence is material as tending to show the intent or motive of the defendant in the commission of the offense for which he is being tried, the fact that it also tends to prove the commission of another offense by him will not warrant its exclusion.

In the case of *People v. Craig*, 111 Cal. 460, 44 Pac. 186, the defendant murdered his wife, and shortly thereafter he went to a place several miles distant, where he killed her parents. It was held that evidence of the killing of the parents was admissible to show that the killing of both of them and their daughter was part of a common plan, and was relevant to establish the motive for the crime for which the defendant was on trial, and that the evidence could not be excluded because it tended to establish another and different offense.

In *People v. Cook*, 148 Cal. 334, 339, 83 Pac. 43, it was held that evidence was admissible tending to prove the existence for some time prior to the homicide of an incestuous relation between the defendant and his daughter, the purpose of the evidence being to establish a motive for the killing of a young man who had made improper amatory advances to the young woman. In addition to the jealousy with such advances might reasonably be considered to have aroused in the defendant, it was suggested, as an addi-

tional reason for allowing the testimony, that the defendant might have feared that, if the young man had succeeded in winning the girl's favor, he would discover and expose the criminal relation; the fear of such exposure also furnishing a motive for the crime.

In the case at bar we think the evidence was clearly admissible to show motive, for, according to the testimony of Mrs. Kester, immediately after the slaying the defendant not only attempted to have sexual intercourse with her against her consent, but he also asked her in effect why she had not consented to this relationship before and saved him the necessity of killing her husband. He also proposed they should flee the locality together and go to Louisiana, where he had previously resided. The case is similar to *People v. Cook*, supra, in that both the defendants endeavored to establish that the killing was done in legitimate self-defense; and, each being charged with murder, the evidence of motive was not only material but important. That the jury might infer one in the present case from the existence of a desire on defendant's part to continue or initiate a liaison with the wife of the deceased will hardly be disputed, especially in a case where the defendant attempts acts in pursuance of such relation before the body of his victim is cold.

[4] Apparently for the purpose of showing that Mrs. Kester did not in fact consent to defendant's acts, the prosecution, over the objection of defendant, was permitted to introduce evidence showing the effects of her efforts to escape them. To this end a photograph was admitted showing the cut, bruised, and scratched condition of Mrs. Kester's feet caused by contact with rocks, brush, and barbed wire on her way to San Diego, and of her condition of mind on arriving there. In this behalf defendant contends that admitting, for the sake of argument, that the prosecution was entitled to introduce evidence of the assault for the purpose of proving motive, still it should have been confined to evidence of the bare assault, without any of the details thereof. The prosecution had, however, introduced in evidence, without objection, practically all such details and of what followed the assault, including, among other things, all that was said and done by Mrs. Kester and the defendant, both at the gate, and in the tent immediately following the slaying, also of her flight over the mountains in her nightgown and without shoes or stockings. Consequently it cannot reasonably be held that the admission of the photograph showing the condition of her legs, and that she was in an agitated state of mind on reaching San Diego, was of any substantial prejudice to the defendant.

[5, 6] The defendant produced a number

of witnesses to prove that the general reputation of Mrs. Kester for chastity was bad. As to some of these witnesses the evidence was received. As to one or possibly two it was excluded. It is urged on behalf of the defendant that in rejecting any of the proposed testimony the court committed prejudicial error. It is doubtful whether the question of the excluded testimony is so presented by the record that it calls for determination, but we shall, nevertheless, pass on the merits of the rulings. The testimony was apparently offered to rebut the evidence of the prosecution, already referred to, relating to defendant's asserted conduct in attempting to have or having sexual intercourse with Mrs. Kester after the killing, which evidence was admitted on the theory that the defendant's desire to possess the woman furnished a motive for the murder. Assuming, without deciding, that evidence of general reputation for lack of chastity, at a period several years before the killing, is competent to rebut evidence of motive for the murder, yet it does not appear to us that the defendant could have been prejudiced by the rejection of a part of the proffered testimony. The part which was admitted was clear and direct, and we cannot say it was not sufficient to enable the jury to determine the question involved. And if it is contended that the evidence of the lack of chastity was admissible for the purpose of impeaching the credibility of Mrs. Kester, the contention is without support in the authorities. *People v. Yslas*, 27 Cal. 630; *People v. Johnson*, 106 Cal. 289, 293, 39 Pac. 622.

[7] Defendant also complains that the testimony of two of his witnesses as to the reputation of Mrs. Kester for truth, honesty, and integrity was improperly excluded. It appears to have been rejected upon the ground that it was too remote; it appearing that the witnesses knew nothing about her reputation in the respects mentioned for the period of approximately 2½ years last past. Assuming, contrary to the great weight of authority (*Estate of Akers*, 184 Cal. 514, 194 Pac. 706; 3 *Wigmore on Evidence* [2d Ed.], § 1617; 22 *Corp. Jur.* [Evidence] § 575; *Lawson v. State*, 32 Ark. 220; *State v. Lanier*, 79 N. C. 622; *People v. Nunley*, 142 Cal. 441-445, 76 Pac. 45) that this testimony was too remote, and that the court did not abuse its discretion in rejecting it on this ground, still the court's action in this regard amounted to no more than a reasonable limitation on the number of witnesses on the subject. The rejected testimony was but cumulative, and in such case the trial court may properly limit the number of witnesses. It is not seriously urged—nor could it be under the attending circumstances—that the limitation was unreasonable, or that prejudice resulted to the defendant, especially as no attempt was made by the prosecution to controvert the

testimony that said witness' reputation for veracity was bad. *People v. Yokum*, 118 Cal. 437, 441, 50 Pac. 686; 4 Wigmore on Ev. § 1908; *People v. Burke*, 18 Cal. App. 72, 89, 122 Pac. 435; *People v. Murray*, 41 Cal. 66.

[8, 9] The defendant makes two assignments of misconduct: (1) During the examination of a witness the court stated that there was a discrepancy as to the date of the homicide—whether or not the morning following was the 14th or 15th of August. That there was such a discrepancy is not disputed. (2) During the argument of the case the district attorney stated that the defendant claimed that the deceased threw a stick of stovewood at him, whereupon the defendant's counsel assigned this remark as misconduct, adding that there was no evidence that the wood thrown was firewood or stovewood. The evidence was merely that it was a stick of wood. The district attorney, referring to this interruption, stated that it showed to what technicalities counsel was resorting to save "the neck of this defendant."

In regard to the first of these assignments, the matter is so trivial as not to require consideration. The second is scarcely more serious; but in any event the jury was admonished by the court to pay no attention to such matters, and it cannot be seriously urged that the defendant was at all prejudiced thereby.

Because of the gravity of the case we have examined with painstaking care the record and the points advanced by the defendant. We find no substantial error, and are entirely satisfied that the defendant had the benefit of a fair trial.

The judgment and order are affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; MYERS, J.; WASTE, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

(192 Cal. 498)

PEOPLE v. LE ROY. (Cr. 2620.)

(Supreme Court of California. Dec. 6, 1923.)

1. Burglary $\S$ 4(1)—Evidence held sufficient to sustain conviction.

In prosecution for burglary, evidence aside from mere possession of stolen property held sufficient to sustain a conviction.

2. Criminal law $\S$ 369(7), 1169(1)—Evidence that witness had owned watch found in defendant's camp held prejudicial error.

In a prosecution for burglary, where, among articles found in defendant's abandoned camp, was a watch, admitting evidence of witness that it was her watch, and that it had been taken from her without her consent, which connected defendant with another crime, was prejudicial error requiring reversal.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Frank Le Roy was convicted of burglary, and he appeals. Reversed.

Drapeau, Orr & Gardner, of Ventura, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WILBUR, C. J. [1, 2] The facts in this action are correctly stated in the opinion written by Mr. Justice Houser, which we adopt, as follows:

"Defendant was convicted of the crime of burglary. He appeals from the judgment and from the order of the court denying his motion for a new trial.

"It is first argued that the evidence is insufficient to sustain the verdict. There was ample evidence to sustain at the least the following ultimate facts: The person who committed the burglary wore a peculiarly shaped pair of shoes, and that such person had a camp in the river bed. A pair of shoes such as was worn by the burglar, as well as several of the stolen articles, were found in a place where defendant had been 'hobo' camping in the 'jungles of a river bottom.' The tracks of the burglar were followed from the house which was burglarized to a point within 50 feet of defendant's camp. When arrested (which was at a time three months after the date of the burglary) defendant was wearing a shirt which was identified as one which had been stolen at the time the burglary was committed.

"It was not shown that the shoes which were found in the camp were worn by defendant at any time, nor that they were of the size worn by defendant. However, it is admitted that the shoes were of such a size that defendant might have worn them. On the other hand, the defendant in his testimony did give an explanation of his possession of the shirt. Those matters, however, were for the consideration of the jury, going to the point whether or not, from all the evidence in the case, the jury should believe beyond a reasonable doubt that the defendant committed the crime. Defendant's explanation of his possession of the shirt was undoubtedly considerably weakened by an attack upon his credibility as a witness, arising particularly out of the fact that theretofore he had been convicted of a felony on two separate occasions. (1) While it is true that the mere possession of stolen property, standing by itself, is insufficient evidence upon which a conviction may be sustained, the presence in defendant's abandoned 'hobo' camp of several of the stolen articles, together with the shoes apparently worn by the burglar at the time the offense was committed, and the fact that, when the shirt was found in defendant's possession, he refused to tell where he got it, furnished sufficient additional evidence against defendant to justify the jury in reaching the conclusion that defendant was guilty. *People v. Lang*, 142 Cal. 482, 485, 76 Pac. 232.

"Among the articles found in the defendant's abandoned camp was a watch. This watch was not one of the articles taken in the commission

of the offense with which defendant was charged, but it was used as a means of connecting defendant with the occupancy of the camp where the other articles were discovered. In this connection a witness, after identifying the watch as being her property, testified as follows: 'Q. And is there anything inside of the case of the watch that enables you to state that it is your watch? A. There was. Q. And what is inside of the case there, Mrs. Proctor? A. When it was taken from it (me) it had "E. Ormsby" engraved on the inside case, which now has been changed. Q. We ask you, Mrs. Proctor, what it has been changed to? A. E. Kemsley. Q. Semsley now, will you say? A. I would say Semsley.'

"Other testimony in the case showed that defendant had called at the post office for mail addressed to C. Semsley. Defendant's contention is that error was committed by the court in admitting such evidence, for the reason that it insinuated into the minds of the members of the jury the fact that more than one burglary had been committed, and the possibility of defendant being guilty thereof. But there was no direct evidence of the commission of any other burglary, or anything to the effect that the watch had been stolen. The evidence, in substance, was that the engraved name of 'Ormsby' thereon had been changed to 'Semsley.'"

The purpose of the evidence in regard to the watch, as a means of connecting the defendant with the occupancy of the camp, was fully accomplished, by testimony showing that the watch had been found at the camp, and that it contained a name similar to that used by the defendant. The fact that the watch was identified by the witness, Mrs. Proctor, as her watch, and that it had previously had her name engraved therein, was thus wholly immaterial, so far as the avowed purpose for which the evidence was adduced. The court erred in admitting this testimony over the objection of the defendant.

The next question is whether or not the error of the court was so prejudicial to the rights of the defendant as to result in a miscarriage of justice. The witness stated, "this is my watch." This would indicate that, notwithstanding its presence in the hobo camp with the name of the defendant engraved thereon and her own name scratched out, she had never parted with title thereto. The witness also stated that the watch had been taken from her, and, in view of the fact that she stated that it was her watch, and the fact that it was found with the stolen goods belonging to the complaining witness, the clear inference from all the facts and circumstances was that it had been stolen, notwithstanding the fact that the witness did not expressly so state. From the fact that the watch was stolen, the name of the owner removed, and that of the defendant put in its place, the inference would be very clear that the defendant was connected with the crime. Indeed, if the witness had testified that the

watch had been taken from her without her consent, the evidence to connect the defendant with that crime would be nearly as full and complete as the evidence tending to connect him with the crime of which he is convicted, with the single exception of the footprints leading from the camp to the place of the burglary, for in one case we have a stolen watch with his name engraved therein, indicating possession, and in the other case we have the actual possession of the stolen shirt.

We cannot escape the conclusion that this evidence was so prejudicial that it probably resulted in the conviction. Under the well-known rule pertaining to criminal cases depending upon circumstantial evidence, it was much easier to account for the possession by the defendant of the stolen shirt three months after it was stolen upon the hypothesis for his innocence, than to account for the possession of a stolen watch from which the name of the owner had been removed and the name of the thief had been substituted. For instance, the defendant was found guilty of going to and entering into the house of the complaining witness with intent to commit the crime of larceny, and the only evidence tending to show that he went to that house and returned therefrom was the footprints made by shoes found at the camp, which, upon the presumption of innocence which required the jury to accept the view of the circumstances most favorable to the defendant, they might well have assumed were worn by some other member of the group at the camp. If the defendant did not aid or abet in the commission of the crime, but accepted the shirt, knowing it was stolen, his offense would not be burglary. The evidence tending to support the verdict, while sufficient to sustain that verdict, was, nevertheless, meager. The defendant was laboring under the extreme disadvantage of having to admit on cross-examination that he had been twice convicted of felony, and, while this evidence was admissible solely for the purpose of discrediting his testimony, it is manifest that the jury was likely to consider it in weighing the incriminating circumstances proved against him.

For the error in admitting this testimony, the judgment must be reversed.

In view of our conclusion, it is unnecessary to pass on the other matters presented by the defendant.

Judgment reversed.

We concur: MYERS, J.; SEAWELL, J.; LENNON, J.; KERRIGAN, J.

LAWLOR, J. I dissent.

It is conceded by the main opinion that the evidence is sufficient to sustain the verdict, but, before considering the asserted error in the admission of the evidence touch-

ing the watch, I shall refer to other phases of the proof, in order to show that, even if such rulings were erroneous, the admission of the evidence cannot be held to call for a reversal.

According to the record, appellant asked for mail both for "Frank Monroe" and C. Semsley, and on arraignment he gave the name by which he was prosecuted. "Recent possession" of the shirt is established by appellant's own testimony to the effect that, in the first part of September (the burglary was committed on August 24) it was left where he was camped near the Santa Clara bridge, between El Rio and Montalvo, by two men, Art Croten and his father, who drove in with a Chevrolet express car. Art Croten was wearing the shirt at the time. The two men camped with appellant about three days. When departing they left the shirt and some other articles and, he "washed up the shirt and have wore it ever since." Appellant admitted he was living in that camp between the 1st and 10th of September; that he bought the car from the Crotens, paid them \$190 in currency, and "they went away with the car and beat me out of the car," took his roll of blankets with them, and that they were more valuable than the roll they brought to the camp and left there. Jacob Cohn, who kept a grocery store at El Rio, testified that appellant bought supplies from him several times in the early part of spring and in October and November. In October, accompanied by appellant, he delivered goods to a "hobo camp" in the river bottom about a mile or a mile and a half north of the bridge, on which occasion he saw two or three other men at the camp. John Donlon, Jr., testified that in the month of April he saw appellant at a camp a mile and a half "up the river in the direction of Santa Paula," above the Montalvo bridge, and that appellant told him he was camped there. This camp was southwest of the Linehan place. He was attracted to the presence of appellant by noise in the brush, that this was the only camp he knew of on the river bottom, and that he had met appellant on a trail in the river bed prior to the meeting at the camp, and two or three weeks later he met him on the road coming from Oxnard. Henry C. Sullivan, a deputy sheriff, testified that the camp where the things were found was "about a mile north, or a little northeast of the Montalvo river bridge, the east end of the Montalvo river bridge"; that Donlon directed him to the camp and was present at the time the things were found. The testimony of Cohn, Donlon, and Sullivan approximates the distance of the camp from the bridge and agrees in the description and location—referring to the camp where the shoes, watch, and jewelry were found—and neither Cohn nor Sullivan refer to any other camp on the river bottom.

Appellant did not testify as to the location of the camp visited by the Crotens, but Sullivan quoted him as stating in the district attorney's office that he lived in the river bottom, west of the bridge. He testified his camp was between El Rio and Montalvo, near the bridge—not giving the distance from the camp to the bridge.

The evidence is, then, that Cohn accompanied appellant to the camp; that Donlon saw appellant at the only camp he knew of in the river bottom; that appellant told him he was camped there; that he directed Sullivan to that camp; and that it was at that camp the things were produced in his presence. None of this testimony was contradicted, nor is it denied that the shoes were worn by appellant, that the shoes, the jewelry, and watch were located in the camp, nor that he brought them there. Appellant's counsel argue that if he was connected with the camp the officers would have contrived to find him there. There is no claim by the defense, and no one testified that there was a camp on the river bottom other than the one where the missing property was located. There is direct evidence that appellant was seen at the camp before the burglary, that he said he camped there, and the only camp shown to exist was that camp, and it was there the things were found. It can hardly be true, in the light of the record, that the shoes were the only evidence that appellant went to and returned from the Linehan house, for the possession of the stolen property is evidence of burglary, and this would cover both the going to and coming from the house during the brief absence of the occupants.

The adverse verdict disposes of the statement in the majority opinion that upon the presumption of innocence the jury may well have assumed the shoes "were worn by some other member of the group at the time." And especially as appellant was the only person the evidence traces to the camp where the shoes were discovered. Moreover, there is no evidence that there was any other occupant of the camp before the burglary.

Appellant's direct examination was limited to the possession of the shirt. There is no counter evidence of any kind that he did not commit the burglary. He admitted two previous convictions of felony, but could not recollect the character of one of them. The evidence given by appellant, including the fantastic story of this admitted hobo buying an automobile from his supposed visitors and paying \$190 in currency for it, the car, like his visitors, vanishing into thin air, would alone destroy the defense. The court instructed the jury as to the limited purpose for which the evidence of previous convictions might be considered, and that such evidence would not warrant a verdict of guilty of the crime charged upon any less degree

of proof than that required in any other case.

Upon this evidentiary showing there can be no warrant for placing the finding of miscarriage of justice upon the character or quantity of the proof.

The judgment of conviction is to be reversed because the owner of the watch was allowed to testify, "This is my watch," that it had been taken and that her name on the watch had been obliterated and "Semsley" substituted. One tendency of this testimony would be to further identify the time-piece.

If nothing more were shown than that the watch was found in the camp, and that it bore a name appellant was known to have used, the jury would probably draw the inference that he was the owner—a false hypothesis which the prosecution should not allow the jury to assume, even if it more certainly tended to connect appellant with the camp. It follows that the facts as to the watch should have been proved completely, even if the evidence suggested an unexplained possession in appellant. It was open to the defense to request an instruction limiting the purpose for which the jury might consider the evidence as to the watch, and none was proposed. It is the duty of the prosecution to rebut every presumption which, under any theory of the case, might favor innocence, and to anticipate matters of defense sounding in the case of the prosecution when it is believed the accused is guilty. In view of the evidence and the entire record, it should not be held that appellant was prejudiced in his rights by the admission of the evidence in question, even if it be assumed it was not proper to admit it in order to further identify the watch. Under no circumstances can it be said the admission of the evidence worked a miscarriage of justice.

The order denying the motion for a new trial should be affirmed.

(192 Cal. 632)

BECSEY v. CALIFORNIA TITLE INS. & TRUST CO. (S. F. 10191.)

(Supreme Court of California. Dec. 18, 1923.
Rehearing Denied Jan. 17, 1924.)

1. Vendor and purchaser — Purchase money paid to trust company held paid to it as agent of vendor.

Where defendant held property conveyed by vendor, under a trust agreement under which moneys received from the land were to be applied to the satisfaction of a mortgage thereon, and defendant was to execute deeds to purchasers when the mortgage was satisfied and a certain percentage of the purchase price as fixed by the vendor had been paid, moneys paid to defendant by plaintiff's predecessor pursu-

ant to a contract of purchase with the vendor, held paid to and accepted by defendant as agent of the vendor.

2. Vendor and purchaser — Purchaser paying purchase price of land to agent of vendor could not recover money from agent.

Where money received by defendant trust company from plaintiff's predecessor, a purchaser of two lots, one for \$600 and the other for \$400, was paid to defendant as agent of the vendor, under a certain trust agreement between defendant and the vendor under which the purchase money was to be applied so as to satisfy a certain mortgage, and deeds executed by defendant when a certain percentage of the purchase price was paid, as fixed by vendor, the money so paid immediately became the property of the vendor to be applied in accordance with the trust agreement, and plaintiff could not recover the money from defendant where the latter applied it in accordance with that agreement, even if, assuming \$995 was paid as alleged, the money was applied in payment of the \$400 lot, and the balance on the \$600 lot, plaintiff's recourse being against the vendor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Marjorie Becsey, administratrix of the estate of Elizabeth Kyne, deceased, against the California Title Insurance & Trust Company, a corporation. From a judgment of nonsuit, plaintiff appeals. Affirmed.

James Gartlan, of San Francisco, for appellant.

McCutchen, Olney, Willard, Mannon & Greene and John W. Parker, all of San Francisco, for respondent.

WILBUR, C. J. This is an action to recover the sum of \$995. Plaintiff appeals from a judgment of nonsuit.

Plaintiff in this action alleged that her predecessor in interest, Patrick Kyne, had deposited with the defendant \$995 in trust, to be invested in certain real estate in the city of San Francisco; that Patrick Kyne had demanded of the defendant that it secure for him a conveyance of the real property; that the defendant refused to do so; and that the defendant, without the knowledge or consent of the plaintiff, had itself purchased the real property in question and sold the same to other parties without plaintiff's knowledge or consent. The defendant denied the allegations of plaintiff's complaint.

[1, 2] It developed on the trial that, instead of the plaintiff's predecessor having intrusted the defendant with \$995 with which to purchase for him certain real estate, he had made a contract himself with the Sunnyside Land Company for the pur-

chase of two lots, one for \$600 and the other for \$400, in a tract of land the legal title to which had been conveyed by the Sunnyside Land Company to the defendant trust company prior to its contract with Patrick Kyne. The defendant held the property under a trust agreement by which all the moneys received from the sale of the land in question were to be paid to the mortgagee of the property, until the mortgage was satisfied. Deeds were to be made by the defendant trust company to the purchasers when a certain percentage of the purchase price fixed by the Sunnyside Land Company had been paid, and then only upon condition that the mortgage covering that portion of the property had been released. The purchaser, Patrick Kyne, paid the entire purchase price of one lot and a considerable portion of the purchase price of the other lot so purchased by him from the Sunnyside Land Company. This money was paid in part to the Sunnyside Land Company and in part to the defendant. Whether paid to one or the other, it was paid in pursuance of the contract for the purchase of the land, and by the agreement between the Sunnyside Land Company and the defendant was to be applied to the payment of the first mortgage upon the land. It is obvious that the moneys paid to the defendant were paid to it and accepted by it in its capacity as agent of the vendor, the Sunnyside Land Company. Inasmuch as the money received by the defendant from Patrick Kyne was paid to it as the agent of the vendor of the land, it is clear that the plaintiff cannot recover the money from the agent, but that her recourse is against the vendor to whom the money was thus paid. It is clear that as soon as the money was paid by Patrick Kyne to the defendant for the Sunnyside Land Company or in pursuance of the relationship created between the Sunnyside Land Company and the defendant by the trust agreement under which the defendant held the title, the money immediately became the property of the Sunnyside Land Company, to be applied in accordance with the agreement of that company contained in the trust agreement between it and the defendant and the other parties participating in the trust agreement. Assuming that the plaintiff made a prima facie showing of payment of the sum of \$995, and that this amount was applied to the full amount of the purchase price of the \$400 lot and the balance to the payment upon the lot for which the purchase price was \$600, it nevertheless follows that the motion for nonsuit was properly granted by the trial court, for the reason that the plaintiff had not established any right to recover the money paid from the defendant. Whether upon proper showing the plaintiff could have established under the trust deed a right to the convey-

ance of the property from the defendant to her is a question which is not involved in this case, nor is it necessary for us to consider what rights the plaintiff may have against the Sunnyside Land Company, which is not a party to this action.

To recapitulate: The facts alleged by the plaintiff as the basis for her recovery were not true. The money was not intrusted to the defendant by Patrick Kyne to purchase land for him, but was paid by him upon a contract made for the purchase of land, and immediately upon the payment became the property of the Sunnyside Land Company, to be applied in accordance with its agreement and directions. The defendant, having so applied the money in accordance with the instructions of its owner, cannot be held accountable to the plaintiff.

Judgment affirmed.

We concur: LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; LENNON, J.; MYERS, J.; WASTE, J.

192 Cal. 643

RIVERSIDE PORTLAND CEMENT CO. v. TAFT et al. (S. F. 10340.)

(Supreme Court of California. Dec. 19, 1923.)

1. Attachment 338—Judgment creditor entitled to return of property taken under replevin bond or value thereof.

Where attached property has been released under replevin bond, plaintiff in attachment is entitled to have all the property taken under the replevin bond returned, or if it cannot be returned then to have judgment for the value of the whole, and is not bound to accept part, but if he does so its value must be deducted.

2. Replevin 1—Possession only involved in action of.

Only the right to possession is involved in replevin action.

3. Attachment 338—Where attaching creditor diverted property from possession of sureties, credit given on bond.

Where attached personal property was turned over to claimants under replevin bond and thereafter attaching creditor obtained judgment, but levy was made on replevied property, under instructions of creditor's attorney, first to satisfy another judgment, and then levy execution in action by the third party claimant, the creditor thereby intermeddled with the property in a way that diverted it from control of sureties so as to entitle them to credit on the bond for the amount diverted.

4. Attachment 338—Amount of money attached but not released by replevin bond deducted from judgment against sureties.

Where personal property and money were attached, but the property was released to claimant under replevin bond, but the money was never discharged from the attachment, in action against replevin sureties the amount of money so attached should be applied in reduction of the judgment.

In Bank.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the Riverside Portland Cement Company against Mrs. G. W. Taft and others. Judgment for plaintiff, and defendant named and others appeal. Reversed.

Frank Kauke, of Fresno, and El. I. Feemster, of Visalia, for appellants.

A. W. Carlson, of Fresno, and Fredericks & Hanna, of Los Angeles, for respondent.

SEAWELL, J. This appeal is taken because of the refusal of the trial court to reduce the judgment obtained by respondent in an action against appellants as sureties on a claim and delivery bond given for the redelivery of certain personal property by applying a sum of money seized by respondent on attachment levied upon the personal property of respondent's debtor, but which sum of money was not claimed by the third party claimant and was not taken from the sheriff's possession in the replevin suit; and, further, because of the court's refusal or failure to apply the value of certain personal property actually taken possession of in said replevin suit and which was afterwards applied, with the consent and by the direction of respondent, in satisfaction of a judgment obtained in a different action and for which no credit, offset, or recoupment was allowed appellants, as sureties, in the action against them.

Respondent obtained a judgment in the court below against Mrs. G. W. Taft, H. H. Backer, and A. H. Backer, sureties on the claim and delivery bond executed by them with W. W. Taft as principal, in the sum of \$7,929.15. The history of the case involves the proceedings of three other cases tried in the superior court of Fresno county. The chronological order of those cases is as follows:

John Grummett commenced an action against the Fresno Glazed Cement Pipe Company to recover the sum of \$3,045.25. Judgment for that amount was rendered in his favor in said action on January 20, 1920. This will be referred to as the Grummett suit.

The Riverside Portland Cement Company (respondent herein) commenced its action against the Fresno Glazed Cement Pipe Company some time after the institution of the Grummett suit to recover the sum of \$5,000 with interest. An attachment was issued therein, and the sheriff of Fresno county, on April 12, 1917, levied on certain machinery, tools, appliances, and materials used in the manufacture of cement pipe and kindred products, a large amount of manufactured product, and also \$990.92 in cash. W. W. Taft claimed ownership of all the attached property except the \$990.92, gave a claim and delivery bond, and took the prop-

erty into his possession. On April 9, 1921, judgment in this action was rendered in favor of respondent and against the Fresno Glazed Cement Pipe Company for the sum of \$5,000, with interest from April 20, 1917. This case will be referred to as the attachment suit.

W. W. Taft failed in his action as a third party claimant against Horace Thorwaldson, sheriff, and judgment went against him and the sureties on his claim and delivery bond for the sum of \$7,929.15. This sum included the judgment in the attachment suit, to wit, \$5,000, together with interest, plus damages and costs. This action will be referred to as the replevin suit.

The attorneys who represented Grummett in his suit against said common debtor, Fresno Glazed Cement Pipe Company, also represented the respondent in its attachment suit, the defendant sheriff in the replevin suit, and also the respondent in the instant case. This representation of said several parties by the same attorneys, the long delays, due in part to appeals and retrials, in bringing any of said actions to a final determination, and the order in which executions were levied under instructions from the attorneys representing the respective parties, is responsible for a confused situation. Although many months intervened between the entries of judgments in the Grummett suit and the replevin suit, respectively, executions thereon were issued and placed in the hands of the sheriff on the same day with the following written instruction signed by the attorneys who represented both of said judgment creditors:

"Instructions to Sheriff. Under the execution in the case of John Grummett v. Fresno Glazed Cement Pipe Company, and the execution in the case of W. W. Taft v. Horace Thorwaldson, please levy upon the following described property, to first satisfy the execution the case of Grummett v. Fresno Glazed Cement Pipe Company and after the satisfaction of that execution, levy upon the same property to satisfy the execution in the case of Taft v. Thorwaldson so far as it may be sufficient."

A list of the property, describing the articles to be levied upon, was appended to the instructions. It included a number of the articles of machinery, appliances, and tools which had been taken over by Taft upon giving the claim and delivery bond. A number of the articles enumerated in said list were, in obedience to the instructions given in the Grummett and replevin suits, taken possession of by the sheriff and subsequently sold at execution sale, bringing \$2,290, which amount was applied in part satisfaction of the Grummett judgment. Execution in the replevin suit was returned wholly unsatisfied. Plaintiff in the present case thereupon brought suit on the bond and recovered judgment for the amount of the judgment rendered in the attachment suit, to wit, \$6,186.

85. This sum, augmented by damages allowed by the court, aggregated \$7,929.15. The last-named sum was the alternative amount fixed in case a delivery of the replevied property could not be made. In the suit prosecuted against the principal and sureties on the bond the court found that the defendants had not returned the personal property released to W. W. Taft, nor had said judgment or any part thereof been satisfied. It also found that the sum of \$990.92, which had been levied upon as the property of the Fresno Glazed Cement Pipe Company in the attachment suit and which had never been released from said levy or claimed by any third party, was not in any way "connected with the bond sued on in this action and was not affected by said suit." It also found that substantially all of the property delivered to W. W. Taft by reason of the undertaking sued upon was sold, disposed of, and used up by him long prior to the recovery of the judgment against him for its return, and therefore it was impossible for the appellants to return to the sheriff the property replevied by said Taft.

We are satisfied that the findings of the court upon the two matters above specified are not sustained by the evidence. As to the first proposition, appellants by their answer put in issue their right to have the \$990.92, held by respondent by virtue of said writ of attachment, applied as part satisfaction against appellants on the theory that respondent was entitled to recover from them the amount of the judgment recovered from the Fresno Glazed Cement Pipe Company, and no more. This undoubtedly was the measure of appellants' obligation to respondent. The \$990.92 item was not and could not have been litigated in the replevin action. In the action against the sureties, however, it was proper for the court to consider the fact that respondent held under attachment said sum of \$990.92, which could and should have been applied to appellants' debt. As to the second proposition, the uncontradicted evidence as shown by the property lists is that a portion of the pipe-making machinery and appliances which was taken on execution in the Grummett Case was practically the same property that was levied upon in the attachment suit and afterwards replevied by Taft. From an examination of the property lists it is inferable that the property, including manufactured products, which was sold under the Grummett execution, was equal in value to the property levied upon in the attachment suit. It was not, however, identical in form and did not correspond numerically in manufactured product with the articles levied upon in the attachment suit and later taken over by Taft. It is the claim of appellants that when this property was taken on execution in the Grummett case, under the instructions given by the attorneys who represented both

Grummett and the Riverside Portland Cement Company, it amounted to a return of and an acceptance by the latter of said attached property, and exonerated the bond. It is urged that a contrary conclusion would require the appellant sureties to pay the judgment in the replevin suit without getting the property to compensate them for the judgment. This is the precise thing which *Hunt v. Robinson*, 11 Cal. 262, holds cannot be done.

[1, 2] The general rule in this state is well settled that the respondent was entitled to have all of the attached property taken under the replevin bond returned, and, if it cannot be returned, then to have a judgment for the value of the whole. Only the right of possession is involved in the replevin action. If a portion be accepted, the value thereof should be deducted from the judgment. The respondent, however, is not bound to accept a portion of the property. *Whetmore v. Rupe*, 65 Cal. 237, 3 Pac. 851; *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228; *Metrovich v. Jovovich*, 58 Cal. 341. If there was an acceptance, constructive or otherwise, of the property which was capable of identification by respondent, it should not for this reason alone be held to have accepted property which was not in existence when the attachment was levied and consequently was never in the custody of the court.

Doubtless the attorneys in the instant case, acting in a dual capacity, were attempting to serve the interests of Grummett as well as the interests of the Riverside Portland Cement Company. No doubt the bond of Taft was regarded by them as sufficient to insure the satisfaction of the judgment in the attachment case. This unquestionably accounts for the instructions given by them to the sheriff to first levy the execution issued in the Grummett Case and "after satisfaction of that execution to levy upon the same property to satisfy the execution in the case of Taft v. Thorwaldsen so far as it may be sufficient."

[3, 4] No attempt was made to replevy the \$990.92. The personal property taken under the replevin bond was and remained in the custody of the law by virtue of the lien of the attachment. The giving of the replevin bond did not remove or obliterate the lien of the attachment. The doctrine early announced in the case of *Hunt v. Robinson*, supra, and which has remained unchallenged, is to the effect that a replevin bond gives to the party merely the possession of the property pending the litigation. The effect of such a bond under our statute is not to divest either the title or the lien (attachment or execution) of the other party. The contest is about specific personal property. The recovery of the thing itself and not damages in lieu thereof is the primary object of the suit. The value is recoverable

only as an alternative when delivery of the specific property cannot be had. The effect of the replevin bond is simply to give the party the possession of the property pending the litigation.

"It is certain that the unsuccessful party may deliver the property and discharge himself from so much of the judgment as is made up by the assessed value. The very reason why he may do this is because the suit is about that specific property, and because the title is not affected by the replevin bond. But, where property attached is released upon the bond of the defendant, he cannot discharge himself, or his sureties, by a delivery to the sheriff of the same property, for the reason that the lien is gone. In the case of *Nickersen v. Chatterton et al.*, 7 Cal. 568, we held that 'when the plaintiff or defendant in the original suit obtains judgment for the delivery of the property, or if it cannot be found, then for its value, the title in the property vests in the party against whom the judgment is given, subject to the right of the successful party, to take it in discharge of so much of the judgment as is made up by the assessed value of the property.'

* * *

"The claimant and his sureties, who have stipulated for the return of the property, would then be left to pay the judgment in the replevin suit, while, at the same time, they would not get the property to compensate them for the judgment. This would certainly place the claimant of property seized by an officer in a worse condition than that of an ordinary trespasser. When A. takes the property of B., and the latter obtains judgment for the value of the property, if A. pays the judgment, he is entitled to the property. The law gives him the property for the judgment. But if the theory of the plaintiff be true, the unfortunate claimant must pay the judgment, and still lose the property. In claiming the property he assumes a double responsibility; while the defendant in the attachment or execution may be fortunate enough to obtain double the value of the property seized by the officer. In reference to such a theory Mr. Justice McLean, in the case of *Hagan v. Lucas* [10 Peters, 400], already referred to, makes these forcible remarks:

"If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond; for a levy takes the property out of the possession of the claimant, and renders the performance of this bond impossible. Can a result so repugnant to equity and propriety as this be sustained? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the forfeiture? This would indeed be a reproach to the law and to justice."

"But the theory that the possession obtained by virtue of the writ of replevin is only temporary, and does not divest the title or discharge the lien, is the most logical, and at the same time the most just to all parties. The party ultimately entitled to the property has a double security; while the party who replevies it does not incur the extraordinary risk of having to pay the judgment and also to lose the property. And the defendant, in the attach-

ment or execution, has no opportunity to obtain two prices for his property.

"If these views be correct, the lien of the attachment continued, and when the same property came again into the hands of the sheriff, the condition of the replevin bond, to return the property, was fulfilled. The property was then liable to a second levy, but such second levy was subject to the levy under the prior attachment." *Hunt v. Robinson*, supra.

The \$990.92 seized in the attachment suit has been held undisturbed, and is still held unclaimed by any other party litigant. It has never been discharged from the attachment lien. No one has disputed the right of respondent to have that amount applied to its judgment in the attachment suit. Such an application would reduce the judgment of respondent against the sureties to that extent. The sureties possess every right that Taft had. They are entitled to a recoupment to the extent of the sum of money held by respondent and which it should apply in partial satisfaction of its judgment against the Fresno Glazed Cement Pipe Company. Under the authority last cited, the sureties were certainly entitled to all other personal property subject to identification or its value which they obligated themselves to make good.

Respondent undoubtedly knew that a portion, at least, of the property described in the instructions to the sheriff was the identical property that had been attached and replevied by Taft. Extensive lists were made of all the property attached and afterwards taken over by Taft in the replevin action.

Respondent consented that the personal property which had been relinquished by Taft should first be applied to the extinguishment of the Grummett judgment. This act was an assumption of authority over said property. It thereby directed that any claim it had against said property as growing out of the attachment lien or arising from any source be made secondary to the Grummett execution. Respondent at least became an intermeddler in a way that diverted the property from the control or possession of the sureties who owed Grummett no obligation and who had a right to the property if compelled to pay the debt owing by the Fresno Glazed Cement Pipe Company to respondent.

We are of the opinion that the judgment of respondent should be reduced by allowing as credits the following: The \$990.92 held by virtue of respondent's attachment lien; also the value of the personal property taken in the replevin action and capable of identification, and which was thereafter sold in satisfaction of the Grummett judgment.

For the foregoing reasons the judgment is reversed.

We concur: WILBUR, C. J.; RICHARDS, J. pro tem.; LAWLOR, J.; LENNON, J.; MYERS, J.

(192 Cal. 451)

In re RELPH'S ESTATE. (Sac. 3362.)

(Supreme Court of California. Dec. 5, 1923.)

1. Wills ⚡384—Directed verdict reversed regardless of errors if evidence sufficient, but errors disregarded if evidence insufficient.

Where judgment in will contest was for proponents on directed verdict, if there was evidence sufficient to support material allegations on any issue presented, it must be reversed regardless of errors in admission of evidence; while if evidence was insufficient all errors which did not prevent introduction of additional evidence thereon would be immaterial.

2. Evidence ⚡217—Declarations of subscribing witness to will not original evidence.

In a will contest, statements by a subscribing witness after testator's death to the effect that testator had not left a will, were not admissible as original evidence.

3. Witnesses ⚡321—Witness not to be impeached by party calling him except for surprise.

A witness cannot be impeached by the party who calls him, except on a showing of surprise.

4. Witnesses ⚡380(5)—Witness to will held witness of contestants, and not subject to impeachment.

In a will contest, where subscribing witness to will had been examined by the court on preliminary proof, and thereafter called by contestants on issues which were to be tried by jury, he became a witness for contestants, and could not be impeached by them by showing prior contradictory statements, except on showing of surprise.

5. Wills ⚡272—Will contest before probate involves two proceedings.

When a will is contested before probate there are two proceedings, one being the petition for probate of the will, and the other a contest thereof.

6. Wills ⚡272—Probate proceeding and contest contrasted.

A petition for probate of a will is an *ex parte* proceeding in rem, in which proponent tenders issues of fact relative to validity, and, while all persons interested are in a sense parties, they are not active parties litigant, the burden being on proponent to prove his allegations; but a contest is an adversary proceeding, the parties to which are all persons interested in the estate who have filed grounds of opposition to probate and those who have appeared and answered, the only issues being those which are framed by the pleadings.

7. Wills ⚡288(1)—Burden of proof of issues in contest on contestants.

In a will contest, the burden of proof as to the issues rests on contestants, and pro-

ponents need not submit evidence until contestants shall have produced some evidence legally sufficient to support their allegations.

8. Wills ⚡324(1)—Evidence and issues of fact in proceeding to probate will for court.

In proceedings to probate a will, as distinguished from a contest, evidence and issues of fact are for the court, even though a jury may be demanded to try issues on the contest.

9. Witnesses ⚡267—Granting right to cross-examine in probate proceedings is matter of grace.

In a proceeding to probate a will, granting the contestants the right to cross-examine witnesses is a matter of grace, and not of right.

10. Wills ⚡322—Order of proof in probate and contest proceeding in court's discretion.

In a will contest, the order of proof rests in the court's discretion, and it may direct preliminary proofs on the petition for probate to be made either before or after hearing issues on the contest.

11. Wills ⚡263—In probate proceeding, contestants not parties.

In a proceeding to probate a will, contestants are not parties.

12. Wills ⚡322—Better practice to hear evidence in proceeding to probate in absence of jury.

In a will contest, it is better practice for the trial court to hear preliminary proof on the petition for probate in the jury's absence.

13. Wills ⚡384—Contestants not prejudiced by refusal of right to impeach witness.

In a will contest, where contestants called a subscribing witness, who denied that he had made statements that testator left no will, and the court refused to permit them to call witnesses to impeach him, as such impeaching testimony would not have supplied anything affirmative in support of allegations of their contest, where there was no other evidence to overcome presumption of testator's sanity, contestants were not thereby prejudiced.

14. Wills ⚡109—Will held legally executed.

Where will as drafted by the attorney was twice read by testator before execution, and its provisions met with his approval, and the dispositive provisions were in full accord with his express desire, it was executed in full compliance with Civ. Code, § 1276.

15. Wills ⚡52(6)—Evidence held insufficient to overcome presumption of testator's sanity.

Where testator, aged 19, became seriously ill, and was taken to a hospital where at times he was delirious, evidence held insufficient to overcome presumption of sanity with respect to his condition at time the will was executed.

16. Evidence ⚡474(4)—No abuse of discretion in holding witness incompetent to testify as to testator's sanity as an "intimate acquaintance."

In a will contest, where no attempt was made to qualify a nurse as an expert on the subject of insanity, and her testimony could have been admissible only on the theory that she was an "intimate acquaintance" of tes-

tator (Code Civ. Proc. § 1870, subd. 10), and it was shown that she had never seen testator until the day before, there was no abuse of discretion in holding her incompetent to testify.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intimate Acquaintance.]

17. Wills ⚡384—Whether witness as to sanity of testator was intimate acquaintance rests in trial court's discretion which will only be disturbed for abuse.

Determination of the question whether a witness as to testator's sanity has been shown to be an intimate acquaintance is committed in the first instance to the trial court's discretion, and only on showing of abuse thereof will its rulings be disturbed on appeal.

18. Wills ⚡294—Cross-examination of witness as to what he had once done for testator held competent.

Where subscribing witness to will stated that testator had the habit of coming to him for advice, and that testator asked him whether he would do the same thing again as he did when testator went into the army, it was proper for him to state on cross-examination by proponent that testator in 1918 delivered to him an olographic will in favor of the same beneficiary; such evidence being relevant and material.

19. Wills ⚡360—Objection as to receiving secondary evidence not entertained if first urged on appeal.

In a will contest, even though it be conceded that secondary evidence of the contents of an olographic will should not have been received without first requiring proof of a search therefor, and that it could not be found, where contestants did not object on that ground, the objection, which might have been cured had it been presented at trial, will not be entertained when first urged on appeal.

20. Wills ⚡166(1)—Evidence insufficient to show will unduly influenced.

In a will contest, evidence held insufficient to show any pressure which overpowered testator's mind or overcame his volition at the time will was made.

21. Wills ⚡163(5)—Rule as to beneficiary active in preparation of will held inapplicable.

In a will contest, the rule that one who unduly profits by a will as beneficiary, and who sustains a confidential relation to testator and participated in procuring the will, has burden to show that will was not induced by coercion or fraud, did not apply merely because the beneficiary's half-brother participated in preparation of will.

22. Wills ⚡327—Directed verdict against contestants held proper.

In a will contest where it was alleged that it was not legally executed, that testator was not of sound mind, and was unduly influenced, but there was no evidence to support such allegations, a directed verdict for proponents was proper.

23. Wills ⚡384—Excluding evidence as to alleged date of execution not prejudicial error.

Where will was alleged to have been executed while testator was of unsound mind on December 17th, and there was no showing of difference as to his condition on that date and the day following, there was no prejudicial error in excluding evidence that the will was executed on December 18th.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

In the matter of the estate of Glenn G. Relph, deceased. On proceedings to contest will. From judgment admitting will to probate, contestants appeal. Affirmed.

Arthur L. Levinsky and Robert L. Beardslee, both of Stockton, for appellants.

J. B. Curtin, of Sonora, for respondent.

MYERS, J. Contestants appeal herein from a judgment admitting a will to probate, following a directed verdict. Glenn G. Relph, the testator, died on the 21st day of December, 1919, at the age of 20 years, leaving as his next of kin certain uncles, aunts, and cousins, and leaving a document purporting to be his last will and testament, which bore date December 17, 1919, and is the instrument here in controversy. By it he bequeathed his entire estate to Miss Ila Blackwell, who was described therein as his affianced wife, and who was named therein as executrix without bonds. She having offered the will for probate, written grounds of opposition thereto were filed by contestants herein, uncles of the testator, upon the grounds that the same was not executed, published, acknowledged, or witnessed as required by law, that the testator was not of sound mind at the time of the execution thereof, and that the will was the product of the undue influence of said Ila Blackwell and of John A. Marconi, one of the subscribing witnesses thereto. The proponent having filed her written answer to the opposition, wherein she denied substantially all of the material allegations thereof, the matter finally came on for trial with the result above noted. The grounds urged upon this appeal are errors of law in the admission and rejection of evidence, and that the trial court erred in directing the verdict, for the reason that the evidence was sufficient to sustain each of the grounds of contest.

[1] The claimed errors in the admission and exclusion of evidence are more than 60 in number, but it is not necessary to here consider any of these which did not operate to prevent contestants from introducing additional evidence. The judgment appealed from being predicated upon a directed verdict, it is manifest that, if there was evidence legally sufficient to support the material al-

legations of the contest upon any one or more of the issues presented, the case must be reversed regardless of the commission of errors in the admission of evidence. On the other hand, if the evidence was legally insufficient to support the allegations of the contest upon any of those issues, it follows that all errors which did not operate to prevent contestants from introducing additional evidence thereon would be wholly immaterial.

[2] The great majority of the claimed errors involve the same point, to wit, the contention that the trial court erred in excluding evidence offered by contestants for the purpose of impeaching the witness John A. Marconi, which evidence was clearly incompetent for any other purpose whatsoever. This is the point chiefly relied upon by contestants upon this appeal, and an outline of the history of the trial is necessary to its clear understanding.

The case came on for trial, and, a jury having been impaneled and sworn, the trial judge stated that he would hear the preliminary proof as to the document claimed to be the last will and testament, and that he would himself examine the witnesses upon said preliminary proof. Thereupon Ila Blackwell, proponent, was sworn, and testified as to the death of the deceased, the estate left by him, and other jurisdictional facts. John A. Marconi and Mary Marconi, subscribing witnesses to the will, were sworn, and each testified to the circumstances of the execution of the will, all in response to questions from the trial judge. During the examination of these witnesses the court stated in answer to questions of attorney for contestants that the contestants were not bound by the testimony of the aforesaid witnesses, as it was only making preliminary proof. At the conclusion of their testimony the trial judge said:

"The court will hold the preliminary proof will show the prima facie execution of the document, so that you may go ahead with your contest immediately after the opening of court, Mr. Levinsky [counsel for contestants], at 1:30."

Thereupon, at the reconvening of court, contestants "went forward" and called John A. Marconi as their witness, and he was again sworn as a witness and examined by them as to the circumstances of his relations with the testator and the preparation and execution of the will, after which he was cross-examined by proponent upon the same subjects.

After certain other witnesses had been called and examined by contestants they recalled Marconi, and endeavored to prove by him that after the death of the testator he had made statements in the presence of certain of the contestants and at a designated time and place to the effect that the testator had not left a will. This was excluded by

the trial court upon objection of the proponent. Counsel for contestants then asked for a continuance on the ground that certain of their witnesses were not present, whereupon the court said to him:

"You have the right to cross-examine this witness as to the testimony which was introduced this morning. If you want to cross-examine on that you may do so."

Counsel for contestants then proceeded to cross-examine Marconi upon the testimony which he had given upon the "preliminary proof," in the course of which the trial court stated, in response to an inquiry from counsel for proponent:

"This cross-examination is permitted simply upon preliminary testimony which was taken by the court this morning."

Counsel for proponent then requested the court to instruct the jurors whether or not they were to consider it, to which the court replied:

"I have stated it is for the court, not for the jury."

The cross-examination then proceeded, and in the course of it contestants were permitted, over the objection of proponent, to ask the witness if he had not subsequent to the death of the testator made statements indicating that the latter had not left a will, and if he had not made statements on the evening of the day when the will is claimed to have been executed indicating that in his opinion the testator at that time was not of sound mind. The times, places, and persons present, with respect to each of the claimed declarations, were designated in the questions. He answered each of them in the negative. Thereafter contestants called various witnesses, by whom they sought to prove that the witness Marconi had made the declarations at the times and places indicated in the questions which had been put to him. This proof was excluded by the court upon the objection of proponent. In answer to a question from counsel for contestants for an explanation of his ruling, the trial judge said:

"There is no foundation laid for it, to start with; couldn't be any foundation laid, under the circumstances of the case, at the present time. I will state it because you don't seem to comprehend the ruling of the court. If, when it comes to the proponents' side of the case, and the proponents put Mr. Marconi on the stand, and he testifies, then you can ask him if he didn't make such and such declaration, then bring back the witness. That state of the case has not been reached."

[3] This ruling was clearly correct. The witness Marconi was in no sense a party to the proceeding or in privity with any party thereto. His declarations or admissions made out of court and out of the presence of

the parties would have no value as original evidence. They would be pure hearsay and inadmissible for any purpose, except to impeach him as a witness. If it had been shown that the witness Marconi had stated in the presence of various persons that "Glenn Relph was utterly insane during that entire week of his last sickness," this would not have been competent evidence as to the testator's mental condition. It could not have been considered by the jurors as tending to prove anything whatever upon that question. It could have been considered by them only as reflecting upon the veracity and reliability of Marconi as a witness. *Thiele v. Newman*, 118 Cal. 571, 48 Pac. 713. But a witness cannot be thus impeached by the party who calls him, except upon a showing of surprise, which was not made here. *People v. Johnson*, 131 Cal. 511, 63 Pac. 842; *People v. Creeks*, 141 Cal. 529, 75 Pac. 101; *Bollinger v. Bollinger*, 154 Cal. 695, 99 Pac. 196.

[4] Appellants invoke the rule that a witness is generally regarded as the witness of the party first calling him. Applying that rule to the situation herein, it still follows that Marconi was the witness of contestants in this proceeding. He had not been called as a witness for proponent in the proceeding upon the contest of the will, the issues in which were to be tried by the jury, but solely upon the proceeding for the probate of the will, the issues upon which were addressed solely to the court.

[5-7] When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will. The other is the contest of the probate of the will. *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Estate of McDermott*, 148 Cal. 43, 49, 82 Pac. 842; *Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888. The petition for the probate of a will is distinctly a proceeding in rem. *Estate of Baker*, 170 Cal. 578, 585, 150 Pac. 989; *Estate of Allen*, 176 Cal. 632, 169 Pac. 364. The petitioner or proponent appears therein as plaintiff and tenders to all of the world all of the issues of fact relevant to the ultimate question of the validity of the will. While all persons interested in the estate are in a sense parties defendant thereto, there are no defendants in the sense of active parties litigant in this proceeding. It is in a sense an ex parte proceeding, in which the burden rests upon the petitioner to prove all the material allegations of his petition, whether denied or not, and the responsibility is upon the court to guard and protect the interests of all persons interested therein. The contest of a will, on the other hand, while a proceeding in rem, is at the same time an adversary proceeding, the parties to which consist, on the one hand, of those persons interested in the estate who have appeared

and filed written grounds of opposition to the probate of the will (commonly referred to as the contest), and, on the other hand, those persons interested in the will who have appeared and filed written answer thereto. The only issues of fact involved therein are those which are framed by the allegations of the contest and the denials of the answer. *Estate of Gregory*, 133 Cal. 131, 136, 65 Pac. 315. As to those issues the burden of proof rests upon the contestants (*Estate of Latour*, supra; *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Estate of Cullberg*, 169 Cal. 365, 146 Pac. 888), and the proponents are not called upon to submit any evidence until the contestants shall have produced some evidence legally sufficient to support their allegations upon one or more of those issues. If the contestants fail to produce such evidence, the decision of the contest must be against them, even though the proponents produce no evidence therein whatsoever. *Estate of Latour*, 140 Cal. 421, 73 Pac. 1070, 74 Pac. 441.

[8-11] In the proceeding for the probate of the will, as distinguished from the proceedings upon the contest, the evidence and the issues of fact are solely for the consideration and determination of the court, even though a jury may have been demanded and impaneled for the trial of the issues upon the contest. *Estate of Latour*, supra; *Estate of McDermott*, supra. The contestants are not parties to this proceeding, and have no right to appear therein (*Estate of Latour*, supra), but the trial court, having itself the right to cross-examine the witnesses produced therein, may, in the exercise of its discretion, permit counsel for contestants so to do (*Estate of Cullberg*, supra). But when such permission is granted it is as a matter of grace, and not in recognition of a right possessed by contestants. The matter of the order of proof rests in the sound discretion of the trial court and it may, in the exercise of that discretion, direct the proofs upon the petition for the probate of the will (commonly referred to as the preliminary proof) to be made either before or after the hearing of the issues upon the contest. *Estate of Smith*, 176 Cal. 729, 171 Pac. 289. But whether the hearing upon the so-called preliminary proof be had before or after the hearing upon the contest, the evidence therein is addressed solely to the trial court, and the contestants are not parties thereto. The trial court herein followed the procedure recommended by Mr. Justice Shaw in the opinion upon application for rehearing in *Estate of Latour*, supra. In the proceeding upon the contest of the will the petitioner for the probate thereof is not even a necessary party litigant thereto. It sometimes happens that after he has filed his petition for the probate of the will, and written grounds of opposition thereto have been filed, he elects to leave the

defense of the will to other persons, and accordingly files no answer to the contest, and therefore never becomes a party litigant therein.

[12] It doubtless would have been better practice for the trial court to have heard the evidence adduced upon the preliminary proof herein in the absence of the jury. This would have eliminated the possibility of any confusion in the mind of counsel or jurors as to what evidence was to be considered by the latter, but no objection was made on behalf of any party to the course which was followed by the court herein. Counsel for all parties acquiesced therein, at least tacitly, and the trial judge made it plain by repeated declarations that the evidence adduced upon the preliminary proof was for the consideration of the court alone, and not for the jury.

[13] But, even if it be assumed that the testimony of the witnesses upon the preliminary proof was to be considered by the jury as a part of the evidence directed to the issues upon the contest, and that the contestants were therefore entitled to impeach the witness Marconi, nevertheless they were not prejudiced herein by the action of the court in denying them that right. If they had succeeded in effectually and completely impeaching the witness Marconi, the sole effect thereof would have been to eliminate his testimony from the consideration of the jury—to erase it all, as it were. It would not have had the effect of supplying any affirmative testimony in support of the allegations of their contest. Marconi had testified upon the preliminary proof in response to a question by the court that in his opinion the testator was of sound mind at the time of the execution of the will. Assume this testimony to have been completely destroyed by the impeachment of this witness, and we still have left the presumption of sanity which would compel a finding against contestants upon this issue, unless they produced some evidence which was legally sufficient to sustain a finding of mental incompetence. Marconi also testified to the circumstances of the execution of the will. Assume that testimony also to have been completely wiped out by his impeachment and we have left the testimony of Mary Marconi to the effect that the will had been executed in accordance with all of the statutory requirements. Assume her testimony also to have been completely eliminated from the case, and we are still faced by the fact that the jury would have been compelled to find against the contestants upon the issue of nonexecution, unless they produced some evidence which tended affirmatively to prove such nonexecution. Estate of Latour, supra.

[14] This brings us to a consideration of appellants' contention that the court erred in directing the verdict, for the reason that the

evidence was sufficient to support findings in their favor upon the issues presented by the contest. With respect to the issue of nonexecution, contestants' claim is thus stated in their brief:

"The document is not the last will and testament of Glenn G. Relph, deceased, in that he did not request or direct the preparation thereof. Neither did he request or direct the contents thereof. Neither did he know the contents thereof at the time of the alleged execution thereof."

As we gather from their argument, this claim is chiefly predicated upon the circumstances that the provisions in the will nominating Miss Blackwell as executrix thereof, with power to sell the property of the estate, and directing that she be not required to furnish bonds, were not requested or suggested by the testator, or by any one in his behalf, but were inserted therein by the attorney who drew the will, of his own motion. It does appear, however, that the will as drafted by the attorney was twice read by the testator before the execution thereof, and that its provisions apparently met with his complete approval. With respect to the dispositive provisions of the will, it further appears that they were in full accord with the testator's expressed desire "to see Ila get what I have if anything happens to me." The testimony shows, without conflict, that the will was executed in full compliance with all the essential requirements of section 1276, Civil Code. See Estate of Cullberg, supra; Estate of Dow, 181 Cal. 106, 183 Pac. 794.

[15] With respect to the issue of unsoundness of mind, the utmost that can be said to be established by the evidence in support of contestants' claim may be summoned up as follows: That the testator became seriously ill on Monday, the 15th of December, and was then taken to a hospital for treatment; that he was then suffering great pain, and his body, hands, and face were badly swollen; that a day or two later one eye was swollen shut and the other nearly so; that on the night of Tuesday, the 16th, he was very restless, tossing around and talking quite at random; that on Wednesday evening, December 17th, he was very sick, suffering great pain, breathing very hard, spoke in a choked sort of voice, complained of the heat when it was not warm, and at times during that evening he spoke irrationally and at other times he spoke rationally; that on Thursday evening he was very sick, was groaning and vomiting, and trying to mumble to himself, and when spoken to did not reply; that at times during the nights of Wednesday and Thursday he wanted to get up, and said he wanted to go get himself something to eat, and wanted to go down town and buy him some clothes, and called to his horses, and called them by name; that on Friday during

the daytime he seemed to be in a great deal of pain, was groaning, and was very restless and talked irrationally. There is no evidence whatever of any mental weakness or delirium during the daytime on either Wednesday, the 17th, or Thursday, the 18th, and the will is claimed to have been executed about noon on the 17th. It is clear that the evidence was wholly insufficient to overcome the presumption of sanity with respect to the testator's condition at that time. See *In re Redfield*, 116 Cal. 637, 48 Pac. 794; *Estate of Casarotti*, 184 Cal. 73, 192 Pac. 1085; *In re Wilson*, 117 Cal. 262, 49 Pac. 172, 711; *Estate of Carithers*, 156 Cal. 422, 105 Pac. 127.

[16, 17] It is of some significance that several uncles and an aunt of the testator who testified at the trial (among them the two contestants) were shown to have been with the testator repeatedly during his last illness, yet none of them testified he was of unsound mind. The only witness for contestants of whom this question was asked was Miss Joens, a nurse who attended testator during part of his last illness. Proponent's objection thereto upon the ground that no foundation had been laid and that the witness was not competent was sustained, and this ruling is complained of as error. No attempt was made to qualify her as an expert upon this subject, and her testimony could have been admissible only upon the theory that she was an "intimate acquaintance" of the testator. Code Civ. Proc. § 1870, subd. 10. It was shown that she had never met nor seen the testator until the afternoon of December 16th, the day before the will was executed. The determination of the question whether or not a witness has been shown to be an "intimate acquaintance" is committed in the first instance to the sound discretion of the trial court. It is only upon a clear showing of abuse of such discretion that its ruling thereon will be disturbed on appeal. *In re Wax*, 106 Cal. 343, 351, 39 Pac. 624; *People v. Suesser*, 142 Cal. 354, 360, 75 Pac. 1093; *Estate of McKenna*, 143 Cal. 580, 584, 77 Pac. 461. No such showing is here made. We do not find the slightest ground for concluding that the trial court abused its discretion herein. An utter stranger does not ordinarily become the intimate acquaintance of another within less than 24 hours after their first meeting. There is nothing in the case of *Estate of Budan*, 156 Cal. 230, 104 Pac. 442, which conflicts with this conclusion. There a nurse who had been in attendance upon the testator during every hour of the day over a period of three days, and who had talked with him daily on various subjects, was permitted by the trial court to testify as an intimate acquaintance. All that this court decided upon that point was that such ruling could not be said to be a clear abuse of its discretion by the trial court. We are not called upon to

here determine whether or not the trial court would have been guilty of an abuse of discretion if it had admitted this testimony.

[18, 19] As to the issue of undue influence, the evidence showed that John A. Marconi, one of the witnesses to the will, was a half-brother of Miss Blackwell, the sole beneficiary; that he had known the testator between six and seven years; that their relations were very friendly, and that the testator was in the habit of coming to him for advice; that on Monday, December 16th, the testator said to him, "John, do you know what you done for me when I went to the army? Do you know what I gave you when I went to the army?" to which the witness answered, "Yes;" and the testator said, "Will you do the same thing for me again?" to which the witness answered in the affirmative, and the testator said, "I am awfully bad off. You may not think it, but I am. Something may happen to me. I dreamed of my mother last night. I had a talk with her. I suppose you know the only one that is near to me is Ila, and in case anything happens to me I want you to prepare something to help me out in this matter to see Ila gets what I have if anything happens to me." Upon cross-examination the witness explained the reference to "what I gave you when I went to the army" by stating that in 1918, shortly before testator enlisted in the army, he had delivered to the witness an olographic will whereby he bequeathed all of his property to Ila Blackwell; that the witness had kept the same until testator's return from the army, when the witness had returned it to the testator and had not seen it since. That testimony was admitted over contestants' objection that it was "incompetent, irrelevant, and immaterial, not cross-examination." That it was cross-examination is clearly apparent. That it was both relevant and material is equally clear. If it be conceded that the court should not have received secondary evidence of the contents of the olographic will without first requiring proof of a search therefor, and that the same could not be found, the answer is that contestants did not object upon this ground, and an objection which might have been cured had it been presented at the trial will not be entertained when made for the first time upon appeal. The witness Marconi then went to Stockton, employed a lawyer, and instructed him to prepare a will for the testator bequeathing the entire estate to Miss Blackwell, which was done, and the witness paid the attorney for his services and returned to the hospital and delivered the draft of the will to the testator, who then read it, and again on the following day at noon reread it and executed it. When the will had been signed and executed the testator said to the two witnesses, "Now, Mary and John, can I depend" or

"will you see that Ila gets all that I have?" The beneficiary, Miss Blackwell, was not present at any time during the execution of the will.

[20] Respondent calls our attention in this connection to the fact that the only undue influence pleaded herein is found in the allegations that the respondent and Marconi procured the execution of the will by making certain alleged false representations to the testator, and that there is not a scintilla of evidence to support those allegations, and she invokes the rule that, where fraud or undue influence is relied upon as a ground for contest, the facts constituting it must be alleged, and contestants can prevail only upon proof of such facts. *Estate of Gharky*, 57 Cal. 274, 279; *Estate of Kilborn*, 158 Cal. 593, 112 Pac. 52; *Estate of Kile*, 72 Cal. 131, 133, 13 Pac. 320. But it is not necessary to apply this rule in order to affirm the action of the trial court upon this issue. There was an utter lack of any proof of pressure which overpowered the mind of the testator or overcame his volition at the very time the will was made. *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872; *Estate of Clark*, 170 Cal. 418, 149 Pac. 828; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932; *Estate of Stoddart*, 174 Cal. 606, 163 Pac. 1010; *Estate of Ricks*, 160 Cal. 460, 117 Pac. 532; *Estate of Nelson*, 132 Cal. 193, 64 Pac. 294; *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

[21] Contestants, in reply, invoke the rule that "where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud" (*Estate of Baird*, 176 Cal. 381, 384, 168 Pac. 561, 562; *Estate of Nutt*, 181 Cal. 522, 528, 185 Pac. 393), and that "a 'presumption of undue influence' arises from proof of the existence of a confidential relation between the testator and such a beneficiary, 'coupled with activity on the part of the latter in the preparation of the will.'" (*Estate of Higgins*, 156 Cal. 261, 104 Pac. 6). The rule is well recognized, but is not applicable to the facts herein. Miss Blackwell, the beneficiary, not only was not shown to have been active in the preparation of the will, but was not shown to have participated in any way in procuring its execution. She testified that she did not even know that the testator had executed a will until some weeks after his death. Conceding that be-

cause of her interest in the case the jury might have disbelieved this testimony, there is no evidence in the case that she did in fact have any earlier knowledge that a will had been or was to be executed. Marconi, who was active in the preparation of the will and participated in procuring its execution, was not a beneficiary thereunder, and did not sustain a confidential relation to the testator. Neither is there any evidence that he was in any sense an agent of Miss Blackwell, or that there was any concert of purpose or concert of action between them. The single circumstance that he was her half-brother, standing alone, is of no importance.

[22] We are satisfied, not only that the action of the trial court in granting the motion for an instructed verdict was correct, but that it would have been error to deny the motion.

[23] But one more assignment of error need be considered herein. Marconi had testified that according to his best recollection the proposed will was drafted by the attorney on the afternoon of December 16th, and he testified positively that it was not executed until noon of the day following the day upon which it had been drafted. Contestants called as a witness the attorney who had prepared the will, and sought to show by him that it had not been drafted until the afternoon of December 17th, from which the conclusion would follow that it was not executed until noon of the 18th. The trial court excluded this evidence, and its action in so doing was clearly erroneous. Contestants were entitled to prove, if they could do so by competent evidence, the precise date and hour when the will was executed. This was a fact which was material and relevant to each of the issues upon the contest. But we are unable to see that contestants were injured in the least by this ruling. The evidence is to the effect that the mental and physical condition of the testator was substantially the same on the 18th as on the 17th. There is, in fact, no evidence of any change in these respects on those two dates. Therefore, if we assume that the contestants would, in fact, have proved that the will was executed on the 18th instead of the 17th, such proof would have added nothing whatever to the case in support of their allegations upon the contest.

The judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

(192 Cal. 651)

SIMONTON et al. v. LOS ANGELES TRUST & SAVINGS BANK et al. (L. A. 6902.)

(Supreme Court of California. Dec. 19, 1923.)

1. Executors and administrators §315(4)—Equity may grant relief against decree of distribution obtained by extrinsic fraud.

The fraudulent concealment, by a testator's widow, of the common property, from the attention of the probate court in the administration of testator's estate, was extrinsic fraud, and a court of equity has jurisdiction to interpose and furnish appropriate relief from the final decree of distribution obtained by the employment of that fraud.

2. Trusts §102(2)—Title to legatees' estate vesting on death of testator not changed by fraudulent withholding by executrix, and her distributees will be declared involuntary trustees for rightful owners.

Where legatees' estate, limited in remainder, in view of Civ. Code, § 694, vested immediately on the death of testator, the title to the property was not changed by the fraudulent omission of the executrix to account for it as a part of testator's estate, and where, on her later death, such property was distributed, equity will declare her distributees to be involuntary trustees of the rightful owners.

In Bank.

Appeal from Superior Court, Los Angeles County; C. S. Burnell, Judge.

Action by J. G. Simonton and others against the Los Angeles Trust & Savings Bank and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

Stewart & Stewart, of Los Angeles, for appellants.

George W. Prince, Jr., and Thomas C. Ridgway, both of Los Angeles, for respondents.

Jesse A. Gyger, of Los Angeles, amicus curiae.

SEAWELL, J. A petition for a rehearing was granted in this case, and it is therefore before us for further consideration. The principal reason for granting the petition was to correct and expunge the following misstatement of law which appeared in the last paragraph thereof: "The appellants here are not the heirs of Jane Simonton, and take nothing by her will."

The court does not wish to be misunderstood as to the specific personal property subject to litigation. Appellants are entitled to litigate in this action only the one-half of the personal property alleged to have been omitted from G. W. Simonton's estate, and which property was claimed by them as remaindermen under the will of G. W. Simonton, deceased, adversely to the estate of Jane

Simonton, deceased, and not as her heirs or under her will. The decree of distribution as made in the estate of Jane Simonton as to all other property has become final, and is not subject to further disturbance under the issues as framed and the law as settled in the matter of the Estate of Jane Simonton, deceased, 183 Cal. 53, 190 Pac. 442. To what extent, if at all, the record in the proceedings of the case last mentioned may be urged as a bar to the present action for the remainder in the other half of the property, after the termination of Jane Simonton's life estate therein, cannot now be determined, as the record is not properly before us, and we are not in a position to say, and therefore express no opinion on the subject.

We readopt as the law of the case the following portions of our former opinion enlarged by an insertion of new matter which appears between the quoted portions:

"This proceeding was brought to impress a trust upon certain specified personal property consisting of shares of the capital stock of certain banks, trust companies, etc., the ownership of which is a matter of dispute, distributed to respondents by final decree of the probate court of the county of Los Angeles in the Matter of the Estate of Jane Simonton, deceased. The Los Angeles Trust & Savings Bank, a corporation, was made a party for the sole reason that it is the executor of the last will and testament of Jane Simonton, deceased.

"Appellants by a second amended complaint allege, first, that Jane Simonton, as the executrix of the last will and testament of her predeceased husband, G. W. Simonton, fraudulently and designedly concealed said personal property claimed by appellants to have been common property of said G. W. Simonton and his wife, Jane Simonton, from the notice, attention, and consideration of the probate court in the administration of the estate of said G. W. Simonton, and the same was not mentioned, reported or accounted for by her as executrix of said estate but was fraudulently and wrongfully appropriated by her to her own personal use and benefit, in violation of her trust and to the prejudice of appellants, children and descendants of children of G. W. Simonton, deceased, by a former marriage. It is further alleged that appellants had no knowledge of the existence of said personal property or means of discovering the existence of the same until after said property had been inventoried and returned by the executor of the last will of said Jane Simonton as a part of the separate property of her estate. Said property was by the final decree in the estate of said Jane Simonton distributed to respondents, members of her branch of the family, as provided by section 1386, subdiv. 8, Civil Code, to the exclusion of appellants.

"By way of a second cause of action appellants allege, secondly, that said personal property was not inventoried or accounted for by said Jane Simonton, as executrix of her husband's estate; for the reason that she entertained the false belief and was laboring under a mistake to the effect that it was her separate prop-

erty and was no part of her said husband's estate, or that it was omitted by or through other mistake not shown to appellants.

"A general demurrer was sustained to both causes of action. Appellants refused to amend, and judgment was entered accordingly for respondents. Hence, this appeal.

"The demurrer was no doubt sustained on the theory: First, that the fraud charged or mistake committed was intrinsic to the proceedings in the Matter of the Estate of G. W. Simonton; and, second, that the probate court in the Matter of the Estate of Jane Simonton found as an issue properly before it for determination that said personal property was her separate property at the time of the death of her husband and by the final decree of distribution filed therein appellants and all other persons claiming any portion of said estate are concluded thereby. The *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; Code Civ. Proc. § 1666; *Estate of Schmierer*, 168 Cal. 747, 145 Pac. 99.

"A brief statement of the allegations of the second amended complaint which follow closely the contentions made by counsel is essential for an understanding of the issues submitted for decision.

"G. W. Simonton died testate on the 16th day of August, 1904, a resident of the county of Los Angeles. His estate was administered upon by his wife, Jane Simonton, who was named in his will as executrix. All of the property which was returned or reported as property belonging to the estate was common property and was distributed in accordance with the terms of his will as follows: One-half to the widow, Jane Simonton, in her absolute right as her one-half of the community property, and the other one-half to her during her life with remainder over to the children of said G. W. Simonton or their representatives then surviving. No specific devises of property were made.

Jane Simonton thereafter died, to wit, February 25, 1917, testate, a resident of the county of Los Angeles, without issue of her body, but there survived her children of her said predeceased husband by a former wife and representatives of other children by said former marriage, all of whom it appears are joined as plaintiffs and appellants herein except Sophie Harris, a daughter, who is not a party to this proceeding. She also left blood relatives of her own. By her will she devised and bequeathed the residue of her property to her heirs at law as provided by the laws of succession of the state of California.

"Counsel take the position that the decision must turn upon a finding whether or not the omission or failure to include said personal property in the estate of W. G. Simonton constituted extrinsic or intrinsic fraud."

[1] That the fraud described by the complaint is extrinsic in character is not a debatable question under the authorities of this state. The case of *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, dealt with the settling of a guardian's account and his discharge, and, as it marshals the authorities of this state and makes reference to others, we quote at length:

"The principal question argued in the briefs is whether, upon the admitted facts stated in the complaint, the judgment of the court settling the guardian's account and discharging him from his trust, from which no appeal was taken, is final. Beyond dispute the jurisdiction of the superior court, sitting in probate, is both original and exclusive. (*Goad v. Montgomery*, 119 Cal. 552; *Estate of Strong*, 119 Cal. 663; *Sohler v. Sohler*, 135 Cal. 323. See, also, the earlier cases of *Graff v. Mesmer*, 52 Cal. 638; *Allen v. Tiffany*, 53 Cal. 17; *Brodrick v. Brodrick*, 56 Cal. 564.) Conceding this, however, appellant contends, and we think the law is, that equity has jurisdiction to interpose and furnish appropriate relief where a judgment or order has been attained by the employment of frauds and artifices such as would justify interference of such court. Appellant cites *Dean v. Superior Court*, 63 Cal. 473; *Tobelman v. Hildebrandt*, 72 Cal. 313; *Lataillade v. Orena*, 91 Cal. 565; *Pomeroy's Equity Jurisprudence*, sec. 1007. To these may be added the more recent cases of *Curtis v. Schell*, 129 Cal. 208; *Sohler v. Sohler*, 135 Cal. 323; and *Aldrich v. Barton*, ante, p. 220. In *Griffith v. Godey*, 113 U. S. 89, Mr. Justice Field said: 'If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises and take such action as justice may require. * * * And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.' We are aware of the rule that the fraud which will prevail to set aside a judgment or decree must be extrinsic and collateral to the questions examined and determined in the action. (*Pico v. Cohn*, 91 Cal. 129; *Hanley v. Hanley*, 114 Cal. 690; *Mulcahey v. Dow*, 131 Cal. 73.) It was said in *Pico v. Cohn*, 91 Cal. 129, that 'it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony.' (*See Fealey v. Fealey*, 104 Cal. 354.) It would seem to us, however, that the complaint brings to light transactions which were not embraced in the guardian's account, but are extrinsic and collateral to the matters set forth in it. The case made is quite as strong as the facts presented in the recent case of *Aldrich v. Barton*, ante, p. 220. The theory generally underlying the refusal of equity courts to vacate decrees is, that the complaining party has had his day in court, and that there must be an end of litigation, and that titles would often be thus disturbed and rendered uncertain, and the innocent be made to suffer. *Sohler v. Sohler*, 135 Cal. 323, is a striking illustration of the flexibility of equity jurisdiction where to do justice to the injured and innocent and pursue the guilty the decree was not disturbed, but the party fraudulently benefited by it was held to be a trustee, and equity laid hold of him as such, leaving the original decree as to others unaffected."

See, also, *Gaver v. Early* (Cal. Sup.) 215 Pac. 394; *United States v. Throckmorton*, 98 U. S. 66, 25 L. Ed. 93.

[2] The fact that the personal property was fraudulently withheld from the attention of the probate court and was not administered upon at all in the estate of W. G.

Simonton could not have defeated appellants of their estate limited in remainder which vested immediately upon the death of said testator. Section 694, Civ. Code. The title to the property was not changed in any wise by the omission of the executrix fraudulently to account for it. While the property was included in the estate of Jane Simonton as constituting a part of her estate by her alleged fraudulent acts in violation of her office and trust, and distributed as a part of her estate to respondents, the appellants are not concluded by a decree thus wrongfully procured, and equity with its broad and general powers of relief will come to their aid. The equities of this case are well stated in *Estate of Walker*, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89, in the following language:

"Respondent's position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud, or mistake, the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. (Civ. Code, § 2224; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Wingert v. Wingert*, 71 Cal. 105, 11 Pac. 853; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Parsons v. Weis*, 144 Cal. 419, 77 Pac. 1007; *Bacon v. Bacon*, 150 Cal. 481, 89 Pac. 317; *Insurance Co. v. Hodgson*, 76 Cranch, 332, 3 L. Ed. 362; *Case of Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599.) Respondent further argues that only in the probate court can the status of the instrument offered for probate be established as a will (*McDaniel v. Patterson*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; *Estate of Christensen*, 135 Cal. 674, 68 Pac. 112), and that in the absence of the establishment of the status of the instrument as a will the devisees and legatees named therein could have no standing in a court of equity. Therefore, it was right and proper, if adequate proof of the execution and character of the instrument were established, for the court to grant it probate.

"This reasoning, we think, is indisputably sound. The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake. Such

questions the probate court does not possess the requisite machinery to try. They belong in a court of equity. (*Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358.) Nor are we here called on to anticipate the decision of any such question which may in future arise. It is sufficient on this appeal to say that it was proper for the probate court to establish the last will of the deceased to the end that those entitled to take under that will might be in a position to prosecute their rights in equity."

"The questions presented by this proceeding in equity could not have been determined by the probate court. That court has no power to determine disputes between heirs or devisees and strangers as to the title to property. (*Buckley v. Superior Court*, 102 Cal. 6; *Estate of Vance*, 141 Cal. 624; *Estate of Strong*, 119 Cal. 663; *Title Ins., etc., Co. v. Cal. Development Co.*, 171 Cal. 173; *In re Burton*, 93 Cal. 459; *Dean v. Superior Court*, 63 Cal. 417; *Estate of Hudson*, 63 Cal. 454.)"

The *Estate of Jane Simonton*, supra, is cited by respondents as an authority in their favor. That case is not in conflict with any rule announced here. In fact, it expressly recognizes the rule that equity will intervene in cases where property is withheld by an executor from his account fraudulently or by mistake. There was no claim in that case, as here, that the executrix failed to account for the property in question through fraud or mistake. No such showing was attempted or would have been proper in that proceeding.

Counsel for respondents have requested us to express ourselves in advance of the presentation of certain questions of law and fact which they assert are certain to arise during the trial of the cause. This, we think, would be ill-advised, as any intimation from us in advance of the actual presentation of said matters would be premature and without binding force. We think we have gone as far as it is necessary for us to go in passing upon the merits of a general demurrer.

The judgment of the lower court is reversed, with directions to overrule the demurrer, with leave granted to respondents to answer if they so elect.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; WASTE, J.; MYERS, J.

KERRIGAN, J., being disqualified, does not participate in the foregoing.

192 Cal. 675

**ROYAL INDEMNITY CO. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
(L. A. No. 7697.)

(Supreme Court of California. Dec. 21, 1923.
Rehearing Denied Jan. 17, 1924.)

Master and servant — 373—Death of chauffeur, shot by cook, held not compensable as "arising out of employment."

Where a chauffeur, directed by his employer to investigate noises in the lower part of the house, was killed by the cook from motives of private revenge or some other reason not "arising out of employment," and circumstances showed that the cook had no intention of killing his employer or molesting property, the injury was not compensable as "arising out of employment."

Lawlor, J., dissenting.

In Bank.

Application by the Royal Indemnity Company against the Industrial Accident Commission and others for certiorari to review an order awarding compensation, to Mrs. George R. Ingalls and Cornelia M. Ingalls.

Rehearing denied; LAWLOR, J., dissenting. Award annulled.

Willis I. Morrison, of Los Angeles, for petitioner.

A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

WILBUR, C. J. The Industrial Accident Commission made an award in the above-entitled case, after having first decided the matter in favor of the employer and the insurance carrier, and after having granted a rehearing. The finding of the Commission in regard to the happening of the injury is as follows:

"Said injury occurred in the following manner: Said George R. Ingalls was employed as a chauffeur, and immediately prior to the injury was reporting to his employer on the condition and expenses of operation of the employer's automobiles, in an upper room of her residence. During such report she heard suspicious noises in the lower part of the house, and asked him to investigate. On second thought she asked him to wait, and she would accompany him, which she did, taking with her a revolver, and upon reaching the living room, the Chinese cook stepped from behind a curtain in the dining room, and the employer said, 'Lim you frightened me so, I thought there was a burglar,' whereupon said Chinese cook shot and killed said employee, and thereafter immediately went to his own room and committed suicide. From the foregoing circumstances it is the conclusion of this Commission that the employee was exposed to the risk of this particular injury by the request of his employer to protect her and her property from possible marauders, and that said Chinese cook was at said time such a marauder, although his specific purpose in appearing armed at that time and place is

unknown, and that said injury, therefore, also arose out of said employment, and was proximately caused thereby."

In addition to the foregoing statement of facts it may be added that the Chinese cook had been employed by Mrs. Garvey for two years, and that the deceased had also been employed for about ten months, and that they were well acquainted and apparently friendly. There is no showing of any trouble between them, except that there was evidence that about six weeks or two months previous to the killing the deceased had been skylarking with the cook, and in the course of the skylarking the cook had been somewhat bruised, and had been shut in a closet. Apparently after that time the relations between the two had been friendly. There was also evidence that Mrs. Garvey, the employer, first saw the cook as he came out from behind the curtains immediately before he shot the deceased. She noticed a very peculiar wild look on his face. Nevertheless, she was satisfied, and turned away, and "gave it no more thought." Two shots were immediately fired by the Chinese cook in killing the deceased. The Chinaman then repaired to his room, and killed himself with the same weapon. Under these circumstances, it is clear that the Chinaman intended to kill the deceased, and that he had no intention of killing his employer or molesting her property.

Assuming that the direction by the employer to the chauffeur to accompany her downstairs to repel suspected burglars brought the transaction within the course of his employment, so that, if he had been killed or wounded in preventing a burglary, the injury would have been compensable, because arising out of his employment, it is clear that the death of the deceased did not arise out of such employment, but that he was killed from motives of a private revenge or for some other reason pertaining to him individually and not arising out of the employment. The employer would never have directed the deceased to accompany her for the purpose of overcoming the Chinese cook, and immediately upon discovering his presence she was satisfied that their errand had been unnecessary and fruitless. Neither the employer nor the deceased anticipated the tragedy which immediately followed. The award must be annulled.

In view of our conclusion, it is unnecessary to pass upon the question raised by the petitioner, Royal Indemnity Company, which claims that the award was unauthorized, because of the fact that the notice of the application for rehearing after the first finding of the Commission was not served upon it, and that for that reason the Industrial Accident Commission had no jurisdiction to

vacate the original decision and make the award.

Award annulled.

We concur: KERRIGAN, J.; MYERS, J.; WASTE, J.

LAWLOR, J. I dissent.

The majority opinion assumes that the killing occurred in the course of the employment, and I cannot escape the conclusion that it also arose out of it. When the deceased started down the stairs it cannot be doubted that his mission continued until the occasion of the suspicious noise was ascertained and the situation dealt with. The discovery and the killing were simultaneous. In such an undertaking how can it be held that both elements of the employment did not concur with the shooting? It is apparently conceded that, if a burglar, and not Lim Foon, had caused the killing, it would have been compensable. In my view, under the evidence, no clear reason appears why the injury is not compensable because it was inflicted by Lim Foon.

The risk of the employment continued up to the time of the shooting. According to the other view, the risk ceased with the discovery of Lim Foon, and from that moment the deceased would be without the protection of his employment. He came to the spot, where he lost his life, upon the express directions of Mrs. Garvey. That she realized he was entering upon a dangerous expedition is evidenced by the circumstances that she armed herself, and accompanied him to what proved to be his death. As I have pointed out, the risk of the employment attached when the mission was entered upon, and continued until it ended. Meeting the situation as it arose was a part of the undertaking, and what actually occurred when the occasion for the noise was discovered was just as much a part thereof as the investigation itself. The deceased exercised no volition in obeying Mrs. Garvey's directions; he simply complied with her orders, and in such circumstances the risk of the employment is as broad as the service rendered. The service rendered in this case is the proximate cause of the killing.

The majority opinion reasons that "under these circumstances it is clear that the Chinaman intended to kill the deceased, and that he had no intention of killing his employer or molesting her property." This conclusion necessarily involves a pure question of fact, which it is exclusively within the province of the Commission to decide. The rule has been declared that "this court, in reviewing awards of the Commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the Commission believed all the evidence which tends to

sustain the award made." *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 Pac. 822.

According to Mrs. Garvey, she knew nothing of a feud between the deceased and Lim Foon, notwithstanding she witnessed the scuffle which she testified appeared to be friendly, and in which another chauffeur of the family took part. Mrs. Garvey testified she thought he blamed the other chauffeur, who picked him up, and put him in the closet. The deceased merely stood by while this was being done. In view of this evidence is this court to decide against which one of the chauffeurs, if either, Lim Foon nursed a grievance? He had been with the family for two years, was "a model servant," "very quiet and gentlemanly," and "absolutely trustworthy." The scuffling occurred six weeks or two months before the shooting, and that incident is the only reason suggested for any animosity on the part of Lim Foon. Moreover, there is evidence that on the morning preceding the killing he exhibited a friendly spirit toward the deceased. But Lim Foon's action may have been inspired by causes entirely independent of the deceased. The housekeeper testified that when Lim Foon was leaving the house that morning, in answer to her usual injunction, "Lim, be a good boy," "he looked at me kind of funny, and said: 'I am not going to be a good boy, I am going to be bad.' He came back, and said goodbye to Mr. Garvey and me, and I walked to the door with him, and said, 'Lim, at least try and be a good boy, or we'll have to send you to Sunday school.' He went off laughing. I called to him from the window and said, 'Goodbye, Lim, be good.'" This was his day off, and he left at 10:45 a. m. It was his custom to return early in the evening. The gardener testified the deceased entered the house from the garage from 10 to 15 minutes before the shooting, and that, returning from downtown, Lim Foon followed him into the house from 5 to 7 minutes later. It would appear from the evidence that Lim Foon was not aware the deceased had preceded him into the house. He urged his employer to go out riding that afternoon, which was an unusual suggestion for him to make. It is in evidence that Mrs. Garvey did not expect to find him in the house at the hour in question. Respondents argue that the strange look on his countenance at the time of the shooting might not be due to an intention to kill, but to some other wrongful act in the contemplation or execution of which he was interrupted. It was also suggested the act of killing may have been due to insanity, but this, like the other theories, is found by the Commission to be purely conjectural.

Notwithstanding the finding of the Commission that the specific purpose of Lim

Foon appearing armed is unknown, the main opinion assumes to decide that precise question of fact by holding that he killed the deceased either "from motives of a private revenge or for some other reason pertaining to him individually." This, it seems plain, is invading the province of the Commission, and determining a question of fact which it was unable to decide. The Commission, no doubt, took into account the circumstance that Lim Foon appeared friendly to the deceased on that morning. If the Commission, with the witnesses before it, could not discover the motive for his action, this court could hardly solve the question of fact. In all probability it can never be satisfactorily determined. The question of motive or want of it is hopelessly involved in conjecture, and is beyond the finite mind to solve. If Lim Foon suddenly became insane, the law would not impute a motive to him. Nor do I find warrant for the further statement in the majority opinion as to what Mrs. Garvey would have done, if she had known Lim Foon caused the suspicious noise, or that, discovering his presence, she was satisfied the errand was unnecessary or fruitless.

In my opinion, a prima facie case was made out by the claimants, and the award should therefore be affirmed.

192 Cal. 635

FRANCISCO et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10841.)

(Supreme Court of California. Dec. 18, 1923.)

1. Master and servant § 398—Want of timely application for compensation held not excused by disability.

Under Workmen's Compensation Act, § 11, requiring application for compensation to be made within six months but excepting those totally disabled and bedridden, evidence that applicant, about a week after his injury, traveled some distance for medical assistance, visiting doctors and a hospital either on crutches or in taxicabs, returning to his home when his money gave out, *held* to show he was not totally disabled and bedridden.

2. Master and servant § 398—Indian living on reservation held not "incompetent" within limitation in Compensation Act.

Under Workmen's Compensation Act, § 11, requiring filing of applications within six months from date of injury, but in subsection (d) excepting those incompetent, an Indian not belonging to any well-known tribe *held* not under "incompetency" merely because he was an Indian and lived on a reservation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incompetent—Incompetency.]

3. Master and servant § 398—"Incompetent" within limitation in Compensation Act defined.

Code Civ. Proc. § 1767, defining "incompetent" as any person who, though not insane, is by reason of old age, disease, weakness of mind, or from other cause, unable, unassisted, to properly manage and take care of himself or property and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons, applies to that word as used in Workmen's Compensation Act, § 11, excepting those who are incompetent from its requirement as to the time for making application.

4. Master and servant § 398—Indian held not incompetent within limitation in Compensation Act.

An Indian employee 46 years old, who was healthy physically and had attended school for 13 years, becoming a good carpenter, a fair farmer, shoemaker, and teamster, speaking Spanish, English, and Indian, and earning \$32 a week, the highest wages paid teamsters in his region, *held* not incompetent within Workmen's Compensation Act, § 11, subsec. (d), excepting incompetents from the requirement that applications be filed within 6 months.

In Bank.

Proceedings under the Workmen's Compensation Act by John Mack, claimant, for injuries to himself, opposed by Herb H. Francisco, employer, and the Ocean Accident & Guaranty Corporation, Limited, insurance carrier. Compensation was awarded, and defendants apply for writ of review. Order annulled.

Redman & Alexander, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

RICHARDS, Justice pro tem. The petitioners herein apply for a writ of review whereby they seek to have reviewed and annulled an award of the Industrial Accident Commission to one John Mack, who was injured while in the employ of the petitioner Herb H. Francisco while the petitioner Ocean Accident & Guaranty Corporation was the latter's insurance carrier. The sole question presented for our consideration upon this application is as to whether John Mack, the applicant for relief before the Commission, had filed his application for an award too late to give the Commission jurisdiction to consider the same or to grant the relief prayed for therein.

John Mack received the injuries for which he sought the award in question, on April 13, 1921, while in the occupation of a teamster in the employ of the petitioner Francisco. He filed his application for said award, based upon his aforesaid injuries, with the Industrial Accident Commission on November 28, 1921, claiming total disability

ing from no disease; that as to his mental equipment he had received the advantages of education much beyond those open to and accepted by the ordinary individual of his race; that he had attended various schools during a period of 13 years, among which was the Haskell Institute, at Lawrence, Kan., where he remained 3 years; also a Catholic school at Banning, where he spent from 3 to 4 years; and an Indian school at Phoenix, where he attended for 3 years. It is true, as the testimony discloses, that he did not advance as rapidly as youths of the white race would do, and that on the whole his 13 years of schooling took him about as far up the ladder of education as pupils in the seventh grade of grammar schools ascend. Nevertheless, he received, during these years of school attendance, training in several trades. He became a good carpenter, a fair farmer, a shoemaker, and a first-class teamster. In fact, he stood at the head of his class in this latter vocation, testifying somewhat proudly that he received the highest wages paid to teamsters by the various persons by whom he was employed in that capacity, including Francisco, who was his employer at the time of his injuries. He speaks the English language fluently and correctly in the main, as the record of his testimony shows. He also speaks Spanish, though not so well as English, and is fluent in his native Indian language. At the time of his injuries he was earning \$32 a week, the highest wages paid teamsters in that region. While it is true that John Mack displayed in his character and conduct the simple, trustful, and even childlike qualities typical of the California Indian, it is impossible, in the light of the foregoing undisputed evidence, to arrive at the conclusion that he was possessed of any such weakness of mind as to be unable, unassisted, to properly manage and take care of himself or his property so as to come within the designation of an incompetent person within the intent and meaning of the foregoing section of the Code of Civil Procedure. The decision of the Commission was evidently based upon a misconception of his status because of the fact that he was an Indian, living upon unallotted lands in a federal reservation. As such he had become the employee of an employer, and being injured in that capacity, came within the beneficent provisions of the Workmen's Compensation Act of this state, and has chosen to make application for relief within its terms; but having thus sought its benefits, he must be held also to an assumption of its burdens, one of which was the requirement that he should file his application for relief within 6 months from the date of his injuries. Not having brought himself within the designated exceptions to the operation of this limi-

tation, he must be held to be subject to it, and the lapse of 7½ months between the date of his injuries and the filing of his application for relief must be held to have deprived the Commission of jurisdiction to entertain his application or grant him an award.

The order is annulled.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

192 Cal. 621

GETT v. PACIFIC GAS & ELECTRIC CO.
(Sac. 3342.)

(Supreme Court of California. Dec. 18, 1923.)

1. Appeal and error ⚡930(1)—**Appellate court will construe evidence most favorably to respondent.**

The appellate court, in considering appellant's claim of the insufficiency of the evidence, should construe the evidence to support the contentions of respondent, to the extent that it is fairly susceptible of such construction, and in cases of conflict, to accept as true that evidence which tends to sustain the verdict, unless it is so improbable as to be palpably false.

2. Street railroads ⚡102(1)—**Sudden stopping of street car causing truck to swerve and strike deceased held negligent and proximate cause of injury.**

The act of defendant's motorman, while proceeding at a speed of seven to nine miles an hour, in bringing his car to a sudden stop on a street intersection, thereby violating an operating rule of the company, and forcing a truck approaching from the side to suddenly turn to the right and strike deceased, justified a finding of negligence which was the proximate cause of the injury.

3. Municipal corporations ⚡706(7)—**"Jay walking" not negligence per se.**

Where there is no rule of statute or ordinance which prohibits "jay walking," it is not negligence per se, and whether it is negligence under a given state of facts is a question of fact for the jury.

4. Municipal corporations ⚡706(7)—**What constitutes ordinary care in crossing street by pedestrian for jury.**

While the law requires a pedestrian in crossing a busy street intersection to exercise ordinary care, what constitutes ordinary care is usually a question of fact for the jury.

5. Street railroads ⚡102(2)—**Finding that deceased's negligence was not the proximate cause of his injury held sustained.**

Evidence that a truck which struck decedent had been forced to suddenly turn, due to the negligence of defendant's motorman in stopping its street car suddenly on an intersection, thereby creating a trap from which it would have been impossible for decedent to escape, even though he had exercised due care, justified the jury in finding that decedent's contributory

negligence was not the proximate cause of the injury.

6. Negligence ⇨ 122(1)—Burden on defendant to show contributory negligence.

In an action for death the burden is on defendant to prove that plaintiff's decedent was guilty of contributory negligence and that such negligence was a proximate cause of the injury.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Ema Gett against the Pacific Gas & Electric Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

John P. Coghlan and Thos. J. Straub, both of San Francisco, V. L. Hatfield and W. H. Hatfield, both of Sacramento, and Stanley Moore, of San Francisco, for appellant.

O. F. Meldon and Downey, Downey & Seymour, all of Sacramento, for respondent.

MYERS, J. Defendant appeals from a judgment upon verdict in favor of the plaintiff in an action for damages for the death of plaintiff's husband, resulting from his being struck and run over by a motortruck. Plaintiff's contention was that the defendant was negligent in suddenly stopping its street car in such manner as to block the passageway of the oncoming truck, thus compelling the latter to turn suddenly to the right and to collide with the decedent. This appeal is upon the grounds of the insufficiency of the evidence to sustain the implied findings of defendant's negligence, and of decedent's freedom from contributory negligence, and errors of law in the giving and refusal of instructions.

[1] In considering appellant's claims of the insufficiency of the evidence, it is our duty to so construe the evidence as to support the contentions of respondent to the extent that it is fairly susceptible of such construction, and in cases of conflict to accept as true that evidence which tends to sustain the verdict, unless it is inherently so improbable as to be palpably false. Applying this method to the evidence herein, we glean therefrom the following facts:

The accident occurred at about 11 a. m. at the intersection of Seventh and I streets, two important and busy thoroughfares in the city of Sacramento. I street runs east and west and is intersected by Seventh street, running north and south, upon which there is a double track street car line of the defendant. A north-bound street car approaching the intersection slowed down to a speed of three to five miles an hour, then proceeded to cross the intersection, gaining speed as it went, until it had attained a speed of seven to nine miles an hour, and its rear end had nearly cleared the south line of I street, when the motor-

man suddenly applied his brakes, bringing the car to a stop almost instantly and within a space of five feet. He gave no signal or notice of his intention to stop the car other than such as was afforded by the movements of the car and the sound of the brakes. The car was brought to a stop in such a position that its rear end was blocking the line of the south sidewalk of I street across the intersection of Seventh street (referred to in the evidence and the briefs herein as the "pedestrian right of way"), and its northerly end extended some distance northerly of the center line of I street. At the same time a one and a half or two ton truck, carrying a load of four or five tons, was proceeding at a speed of from twelve to fifteen miles an hour easterly along I street, approaching this intersection. It was the driver's intention not to turn at the intersection, but to proceed easterly along I street. He was just coming on the intersection when the street car was suddenly stopped in such manner as to entirely block his passageway. He immediately applied his foot brake and almost at the same time his hand brake, and pulled his whistle cord. There was not sufficient space available to enable him to stop his truck before colliding with the car, and, if he had turned to the left, such collision would have been inevitable. So he did the only thing remaining, and turned sharply to the right in the hope of being able thus to clear the rear end of the street car. At the same time, the decedent was proceeding easterly across Seventh street upon or in the vicinity of the "pedestrian right of way"—the southerly sidewalk line of I street—and had reached a point about five or ten feet from the street car to the west thereof. The truck driver sounded his whistle, which made but "very little noise" owing to the slowing down of the engine, and then shouted at decedent, who did not appear to hear him. The left front fender of the truck struck decedent, knocking him down, and the rear wheel thereof dragged him some distance and ran over him, causing injuries from which he died a few hours thereafter. Immediately after striking the decedent, the truck struck the rear left portion of the street car, then passed to the rear thereof and was brought to a stop.

[2] Appellant earnestly argues that the motorman cannot be held chargeable with negligence by reason merely of his stopping his car, and that he was under no legal duty to see or heed the approach of the truck upon the cross street. In view of the fact that the street car was entitled to the right of way over that portion of the street occupied by its tracks, and of the circumstance that it was the first of the two vehicles to reach and enter upon the intersection, it may be conceded that, if the motorman had proceeded on across the intersection in the customary man-

ner, he could not be justly chargeable with negligence under those circumstances in failing to observe the approach of the truck. But in suddenly stopping the car, as he did, in such a manner as to blockade the cross street, he created a situation of exceptional danger to such vehicles as might be proceeding upon that street. Under these circumstances we cannot say as a matter of law that the jury was not justified in concluding that he was negligent in so doing. Furthermore, his act in so doing was in violation of an operating rule of the defendant, forbidding its employees to stop the cars so as to block cross streets or crosswalks. The existence of this rule, of course, did not render its violation by defendant's employees negligence per se, but it was a circumstance proper to be considered by the jury in determining whether or not they were negligent.

Appellant further contends that the evidence is insufficient to show that the stopping of the street car was a proximate cause of the injury to decedent. The truck driver testified that, if the street car had proceeded on its way at the speed at which it was going, it would have cleared a space amply sufficient to enable him to proceed on his way in safety, and that, if he had proceeded in the course in which he was going, he would have cleared the decedent by at least six or eight feet. The jury might well have inferred both of these facts from the other facts in evidence without such testimony. The issue as to whether the stopping of the street car was the proximate cause of the injuries to decedent, or whether the conduct of the truck driver was in the nature of an independent intervening agency, was submitted to the jury under appropriate instructions, and the evidence was amply sufficient to justify its conclusion thereon. To say that the evidence is also sufficient to support a finding that the defendant was not negligent and sufficient to support a finding that its negligence if any, was not a proximate cause of the injuries to decedent, is but to say, in effect, that there was a substantial conflict of evidence upon each of these issues.

Upon the question of decedent's negligence, there is much evidence to support appellant's contentions. There is evidence that the decedent was not upon the pedestrian right of way, but was "jay walking"—proceeding diagonally across the intersection. There is evidence that he was looking neither to his right nor to his left, nor even in front of him, but was proceeding with bent head, looking to the ground. There is evidence that he apparently failed to hear the noise of the truck or the sound of its whistle or the shouted warnings of its driver, although all of these were heard by persons who were further away. There is evidence that, shortly after the accident, the decedent admitted that he had been "jay walking" and that the

accident was due to his own fault. In the language of appellant's counsel,

"the picture is one of a busy and hurried man walking across a crowded, congested street intersection, with his head lowered and his mind preoccupied, looking neither to the right nor to the left, and going down before a vehicle which he could have seen had he looked and could have heard had he listened, and having seen or heard could have escaped by merely stepping to one side."

But the evidence is not without conflict upon these points. Counsel for respondent reply that—

"deceased was on the pedestrian right of way, walking across the street, with his back to the approaching truck, and not in its course. He appeared to be waiting for the car to pass or about to get on the car. His attention was concentrated on conditions as they existed in front of him, to wit, the operation of the street car, as they should have been under the law. There was nothing to warn him that the street car would suddenly stop with a bang and in the path of an oncoming truck and cause the truck in the fraction of a second suddenly to change its course and swerve across and over the pedestrian right of way. He was not required to look to the rear, and even if he had done so he would have been advised of no danger until the truck had actually commenced to alter its course. Then it would have been too late to save himself."

There is some evidence tending to support each of these asserted facts. Two witnesses testified that decedent was upon the pedestrian right of way. One witness testified that before the accident decedent, with several other pedestrians, was "waiting for the street car to pass—about to cross the street." The truck driver testified—

"he seemed to be looking across to determine to stop; he stopped just an instant before I hit him; stopped and stepped back. He seemed to be looking down to stop the car."

The testimony as to the alleged admissions of decedent was contradicted, but even if it were not it would be in no way conclusive.

[3] There is no rule of statute or ordinance which prohibits "jay walking," and it therefore is not negligence per se. Whether or not it would be negligence under a given state of facts is a question of fact for the jury. The question whether or not such admissions of decedent would be competent as against the plaintiff in this action has not been raised herein and need not be here considered. See *Marks v. Reissinger*, 35 Cal. App 44, 169 Pac. 24; *Mah See v. North Am. Ins. Co. (Cal. Sup.)* 213 Pac. 42, 26 A. L. R. 123.

[4] The testimony as to decedent's failure to look and listen is substantially uncontradicted except as shown above. Undoubtedly, the law requires a pedestrian in crossing a busy street intersection to use his senses of sight and hearing with ordinary care for his

own protection during all of the time that he is so engaged, but what constitutes ordinary care in these respects is usually a question of fact for the jury. *Burgesser v. Bullocks* (Cal. Sup.) 214 Pac. 649, though there may be circumstances under which it can be said that the pedestrian is negligent as a matter of law. The law does not require of such a pedestrian that he must look in every direction during every instant of his progress. It does require that he must look at least in those directions from which danger may reasonably be apprehended, as often and as carefully as would a person of ordinary prudence under like circumstances. These directions in decedent's case were in front of him and to his left. It was clearly incumbent upon him to look ahead where a street car was in the act of passing within a few feet in front of him, and to look to his left from which direction other vehicles might be approaching. If he had looked to his left a second before the truck commenced to turn, he would have seen nothing to excite apprehension of danger. If the truck was proceeding at twelve miles per hour, the injury must have been accomplished within the space of about one second after the truck commenced to turn. Can it be said that he was negligent as a matter of law in failing to look to his left during that particular space of time? As to the matter of his listening, the evidence is without substantial conflict that he either failed to listen, or that if he did listen he failed to hear that which was heard by several others. But he was within a few feet of a street car which was in the act of coming to an emergency stop. Can it be said with certainty that to one in his position the noise of the truck was not drowned in the grinding of the street car brakes, even though he was listening with ordinary care?

[5] It is not necessary to here definitely determine whether or not the evidence herein establishes the negligence of decedent, as a matter of law. It is respondent's contention that the negligence of decedent may be conceded, yet, if the evidence is sufficient to justify the jury in finding that such negligence was not a proximate contributing cause of the injury, it is sufficient to sustain the verdict as to this issue, and this contention must be upheld. We shall assume, therefore, that decedent was negligent in one or more of the respects claimed by appellant, and proceed to consider whether or not under the evidence such negligence was necessarily a contributing factor which helped to bring about the accident and the resulting injuries, and without which the latter would not have occurred. It is respondent's contention that it may be conceded that decedent was negligent in all the respects claimed, namely, that he was "jay walking," and that he was neither looking nor listening with any care whatsoever, yet, they assert, the coincidence of the stopping of the street car with the ar-

rival of the truck was such as to create a trap of such a nature that decedent could not have escaped from it if he had been exercising due care in every respect. They say:

"He could not step north. The truck was coming into Seventh street from the north. He could not step south. The truck was going to the south. He could not step to the east. The rear end of the street car blocked him there, and it is to be remembered that the truck struck the rear portion of the street car, showing the absence of space between the car and the truck. He might have gone to the west and back to the sidewalk at the Irish Tavern, but that would have been a good many 'mere steps.' It was the left or east fender of the truck which struck decedent. Hence the impossibility of retreating to the west after the truck had commenced its turn into Seventh street is obvious."

We are of the opinion that each of the conclusions thus stated is fairly deducible from the evidence. If the decedent was not upon the pedestrian right of way he was but a few feet northerly therefrom, which would place him still within the course traversed by the truck. If he had heard the whistle of the truck or the shouts of its driver, the truck was then almost upon him, and but a fraction of a second remained in which to escape it. If he had looked around at the very instant the truck commenced to turn, it is not certain that he would have escaped it, even by the exercise of all of the presence of mind, strength, and agility to be expected of a man of his years (fifty-seven). The space between the street car and the west curb was not over twenty-five feet, and when we consider that the truck, which was about eighteen feet long and eight feet wide, traversed this space diagonally from northwest to southeast, or upon a curve, it is apparent that the margin of space remaining was extremely narrow. We are convinced that, under the evidence, the jurors would have been justified in finding that the decedent was negligent in some or all of the respects claimed, and also in finding at the same time that he would have been equally injured if he had used due care in all of those respects. Such findings would have been wholly consistent with the general verdict for the plaintiff, and therefore it cannot be said that the verdict is not sustained by the evidence.

The conclusion just stated disposes, in effect, of the contention chiefly relied upon by appellant at the hearing before this court, namely, that the trial court erred in giving to the jury an instruction which told the jurors, in effect, that, even though they should find that decedent was negligent, such negligence would not bar a recovery by plaintiff if she had otherwise made out a case, unless they should also find that it proximately caused or contributed to the death of decedent. Appellant concedes that the instruction as given embodies in the abstract a correct statement of the rules of law, but as-

serts that it was error to give the same in this case, for the reason that, if the decedent was negligent, as here claimed, it was such negligence as "is in the eyes of the law necessarily concurrent and proximate and precludes recovery." Appellant cites numerous cases as supporting this contention. They are of little value to us, because each case must be governed upon this point by its own particular facts. There are many cases wherein it appears from the evidence, beyond the possibility of a doubt, that the plaintiff's conduct did contribute proximately to produce his injuries. In such cases, if such conduct was in fact negligent, it inevitably follows that it constituted contributory negligence. For example, in the cases wherein the plaintiff attempted to beat an approaching railway train across a crossing and failed to do so and was injured in the attempt, there may be a question as to whether or not his conduct in so doing was negligent, but there can be no question that it contributed proximately to his injuries. So, also, in the case of a pedestrian who attempts to cross in front of a rapidly approaching street car or automobile so close thereto as to be struck in the attempt. So, also, in the case of a person who is injured in the attempt to board or alight from a moving street car. In such cases there may be a question whether or not the plaintiff's conduct was negligent, but the fact that such conduct was a proximate contributory cause of his injuries is not open to question. Therefore, in such cases, it would not be proper to give to the jurors an instruction calling upon them to determine whether or not plaintiff's negligence under such circumstances was a proximate cause of the injuries. The cases cited by appellant in this connection are of this character. But, in the case at bar, if we assume that the decedent was negligent in not being upon the pedestrian right of way at the time of the injury, it does not follow with certainty that he would have escaped injury if he had been upon the pedestrian right of way. If we assume that he was negligent in failing to look or listen, still we cannot say with confidence that he would have escaped injury if he had looked and listened. Therefore, the question whether or not decedent's negligence, if he was negligent, was a proximate contributory cause of his injuries, was in this case a question of fact to be submitted to and determined by the jury. It was not only proper, but it was the duty of the trial court to give the requested instruction or the equivalent thereof.

[6] Appellant objects that the giving of the instruction was an invitation to the jury to enter the domain of surmise and conjecture, and asserts that the evidence herein was such that the jurors could not, except by resort to surmise and conjecture, determine whether or not decedent's negligence contributed to his injuries. If this is correct, appellant has no cause for complaint. If it is true that the jurors could not, in this case, determine whether or not decedent's negligence contributed to his injuries, it follows that the trial court might well have instructed the jurors that defendant had failed in its defense of contributory negligence. Contributory negligence is in this state an affirmative defense by way of confession and avoidance. By pleading it, the defendant, in effect, confesses his own negligence and pleads by way of avoidance thereof that plaintiff's own negligence helped to produce his injuries. In this defense the burden is upon the defendant to prove two things: (1) That the plaintiff was negligent; (2) that such negligence was a proximate cause of the injuries complained of. If he fails to prove either of these things, this entire defense falls. Therefore, when appellant asserts that the evidence herein is such that it cannot be determined therefrom, except by resort to surmise and conjecture, whether or not decedent's negligence contributed to his injuries, it thereby concedes, in effect, that its affirmative defense of contributory negligence has failed, and that the jurors were bound to find against appellant upon this issue. We are not so holding herein, but hold that the question was properly submitted to the jury as a question of fact under the evidence.

Without unduly prolonging this opinion by discussing in detail the numerous claimed errors in the giving and refusal of instructions, it must suffice to say that we have examined all of the instructions given and the instructions refused; that the instructions given were wholly fair to the appellant and covered all of the points of law upon which it was the duty of the trial court to instruct; that the only errors therein are of slight importance and operated wholly to the advantage of the appellant. Some of the rejected instructions contained erroneous statements of law, and those which did not were fully and fairly covered in the instructions given.

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; WASTE, J.

64 Cal. App. 260

(221 P.)

WARREN CONST. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 4702.)

(District Court of Appeal, First District, Division 1, California. Oct. 29, 1923. Rehearing Denied Nov. 28, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

Master and servant — 373—Injury in altercation with coemployee held compensable.

Personal injuries to one acting in the capacity of timekeeper, due to an attack on him by a fellow employee, in a dispute over his refusal, pursuant to orders, to deliver the other employee's pay check, were compensable, under the Workmen's Compensation Act, as there was a causal connection between the injury and the employment.

Certiorari to Review an Order of the Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act, by C. M. Keily, employee, opposed by the Warren Construction Company, a corporation, employer, and the Globe Indemnity Company, a corporation, insurer. Award for applicant, and employer and insurer petition for a writ of certiorari. Award affirmed.

H. C. Kelsey, of San Francisco, for petitioners.

Warren H. Pillsbury and A. E. Graupner, both of San Francisco, for respondents.

TYLER, P. J. This is an original proceeding to review an award of the Industrial Accident Commission, allowing compensation to one C. M. Kelly for an injury suffered while in the employ of petitioner. It is claimed that such injury did not arise out of the employment, and that it was not proximately caused thereby as required by the Workmen's Compensation Act (St. 1917, p. 831), so as to entitle the employee to compensation.

Kelly was employed by the Warren Construction Company as a timekeeper, and was so employed on the 17th day of November, 1922. At that time the company was insured against liability under the Insurance and Safety Act; the Globe Indemnity Company being its insurance carrier. On the day last mentioned Kelly and a fellow employee, one Randall, had an altercation concerning the payment of the wages due Randall, who had terminated his employment with the company. In the performance of his duties, Kelly kept account of the time the different employees worked, and he delivered to them their pay checks. Kelly refused to deliver Randall his check until such time as he was ready to leave the camp. In doing so he was carrying out the express orders of the company, which had adopted this rule for the reason that the company had lost mon-

ey in consequence of employees remaining around the camp and obtaining meals without paying for them after they had severed their connection with the company.

The testimony is in conflict as to who was the aggressor in the altercation. As a result thereof, however, Kelly fell, and his left shoulder was injured in consequence of the fall, and the injury formed the basis of these proceedings.

The Commission found that the injury sustained occurred in the course of and arose out of the employment, and that there was no serious and willful misconduct on the part of the employee. It further found that the injury caused temporary total disability continuing from the date thereof, entitling the employee of the sum of \$20.83 a week during such time, exclusive of the waiting period of 7 days; that the amount accrued to February 14, 1923, inclusive, was \$244, the benefit being based upon the maximum wages allowed by law as a basis of compensation. Medical expenses were also provided for, to be fixed by the Commission upon the filing of itemized bills, and the further sum of \$20.83 weekly, beginning with February 15, 1923, until the termination of disability or the further order of the Commission.

It is claimed by the petitioner that the Commission, in making the award, acted without and in excess of its powers, and that the evidence does not justify the findings of fact.

In support of this contention it is argued that the accident was not one reasonably incident to the employment. We are cited to numerous decisions, both in this and other jurisdictions, upon the question as to the right of compensation in this class of cases, but so much has been said upon the subject that we do not think the instant case requires an elaborate discussion and review of the authorities. The difficulties that confronted courts when the question of liability or nonliability for assaults originally arose have been settled and made clear by the authorities; and, while courts are not in complete accord upon the subject, we do not think that a résumé of the authorities would answer any useful purpose. It is conceded that in this state the decisions are to the effect that injuries sustained by reason of "horseplay" are not compensable, and that they have no application to the present case.

As is pointed out in *Lumber Co. v. Industrial Accident Commission*, 41 Cal. App. 131, 182 Pac. 315, the general rule on nonliability of the employer for injuries resulting from either the playful acts or intended assaults of fellow employees is fully discussed in *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164. Cases are there cited which aptly illustrate the

rule that intended assaults are compensable only when they result from risk reasonably incident to the employment.

In *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, it was held that a personal injury inflicted upon a foreman by inferior employees in an altercation between them, which grew out of the foreman's justifiable efforts to maintain his authority as foreman, was an "accident" arising out of the foreman's employment within the meaning of the Workmen's Compensation Act.

Here, while Kelly was not a foreman, he certainly was a superior employee; and the altercation having arisen over the carrying out by Kelly of his orders, we are of the opinion that the reasoning in the case last cited is controlling here, for he was undertaking to do something in the line of his duty by reason of which he received his injury. It must therefore follow that there is a causal connection between the employment and the injury. It resulted from an incident connected with the employment, and must therefore be held to have arisen out of the employment, the injury being fairly traceable as an incident of the work. The assault was not the result of a personal grievance between workmen, or to excitement over verbal altercations unconnected with the employment of the parties. In such a case, under the authorities of this state, an injury is not compensable, if it cannot be traced to the employment as a contributing cause. See *Coronado Beach v. Pillsbury*, supra. The rule is otherwise where, as here, the injury can fairly be traced as an incident of the work, in which case it must be held to have arisen out of the employment.

The award is affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

64 Cal. App. 197

In re JOHNSTON'S ESTATE.

**FREDERICKA HOME FOR THE AGED
v. SOUTHERN TRUST & COMMERCE
BANK, COUNTY OF SAN DIEGO, et al.**
(Civ. 4333.)

(District Court of Appeal, Second District, Division 2, California. Oct. 23, 1923. Hearing Denied by Supreme Court Dec. 20, 1923.)

1. Wills $\Leftrightarrow$ 487(1)—Findings that alleged codicil was intended as such by testatrix sustained.

Evidence held sufficient to support findings that an alleged codicil was intended as such by testatrix.

2. Wills $\Leftrightarrow$ 125—Codicil held sufficiently signed by testatrix.

A codicil, so denominated, commencing at the foot of a formally executed will, and containing testatrix's name for the second time,

not as part of a recital, as in the first instance, but by itself, on a "Continuation of the codicil to my will" on a separate sheet, held sufficiently signed, though not at the close.

3. Wills $\Leftrightarrow$ 125—Codicil in two parts on separate sheets held not incomplete; "over."

A codicil in two parts, plainly connected with each other, and making a consistent whole, held not incomplete because on separate sheets, at the end of the first of which was the word "over," which is frequently employed to indicate a continuation of matter on a separate sheet.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Over.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceedings by the Southern Trust & Commerce Bank and others to probate a codicil to the will of Susan Mary Gowan Johnston, contested by the Fredericka Home for the Aged. From an order admitting the codicil to probate, contestant appeals. Affirmed.

Sweet, Stearns & Forward, of San Diego, for appellant.

Chester C. Kempley, Dist. Atty., Albert J. Lee, Deputy Dist. Atty., and Hendee & Rodabaugh, all of San Diego, for respondents.

WORKS, J. In addition to leaving a will, concerning the authenticity of which no question is made, the decedent left behind her certain written matter which was by the trial court admitted to probate as a codicil to the will. Fredericka Home for the Aged was a beneficiary under the will, but the bequest to that institution was revoked by the alleged codicil, if it shall be determined that the trial court properly admitted it to probate. The Zoological Society of San Diego and the San Diego County Hospital are named as beneficiaries in the codicil. The Fredericka Home appeals from the order of the trial court admitting the codicil to probate as a part of the last will and testament of decedent.

Several points are stated in the brief of appellant, but the determination of all of them depends upon the settlement of but one question: Was the evidence sufficient to support certain findings of the trial court to the effect that decedent intended and executed the alleged codicil as a codicil to her will?

The matter held by the trial court to be a codicil is altogether in the handwriting of decedent. It is written in ink. It commences immediately after the signatures of the witnesses to the will proper, on the last page of that instrument, occupies the entire space on that page below the signatures, but is not there concluded. A photographic copy of the will, as well as of the alleged codicil, is before us. We reproduce first the matter at the bottom of the concluding page of the

will proper, together with its arrangement, in so far as arrangement seems to be material to the question now to be decided:

"Codicil — La Mesa, San Diego Co., Calif.
"June 26th—1922—

"I, Susan Mary Gowan Johnston hereby revoke and cancel the bequest to the Fredericks Home for the Aged as written herein, and all relating to it.

"And I bequeath to the Zoological Society of San Diego the sum of two thousand dollars — (over)"

The remainder of the codicil admitted to probate was found on a separate sheet of paper, which had been severed into parts by a jagged tear running across the written matter in such a way as to separate the last line and a part of the line preceding from the remainder. The sheet was found in this condition after the death of the testator, but it has since been pasted together, and so appears in the photographic copy. The bottom of the sheet below the handwriting did not show a straight edge, but was torn diagonally across the page, the remainder of the paper not being produced. The matter on this separate piece of paper was as follows, both as to context and arrangement:

"Continuation of the Codicil to my Will June 26/22—

"Susan Mary Gowan Johnston.

"And I further name and appoint the San Diego County Hospital as Residuary Legatee under this Codicil of June 26/22—and direct that the funds obtained from the residue of my estate be used for the purpose of a special Ward or building for the necessary care and treatment of patients who prefer to pay for Hospital services rather than accept charity—the fees to be" (here are one or two unintelligible words, illegibility apparently caused by tear) "and within the means of working people to pay—while the care and treatment of such patients to be of the best."

The will proper, together with the matter written at the bottom of its last page, was found in the bedroom of the testator. The paper containing the second part of the alleged codicil was in two pieces, separated by the tear already mentioned, and was discovered in a writing desk in another room in testator's place of residence, a place which appellant calls her "literary workshop."

[1] The contention of appellant as to the insufficiency of the evidence to support the findings may be separated into several parts. It is said that the discovery of the opening portion of the codicil in one room and the remaining portion in another, together with the fact that the paper containing the second part had been severed by a tear, shows that the testator never intended that the matter thus found should be operative as a codicil

to the will. If we concede for the sake of argument that the circumstances just mentioned, taken alone, do not show an intention to leave a codicil, we are at once to observe that other evidence in the record indicates such an intention on the part of the testator. Three days after the execution of the original will she wrote her counsel, the draftsman of the will: "I wanted to know," referring to a visit to his office at a time when she had been unable to consult him, "If a special form would be necessary for a codicil or if I could write in my own hand what might be needed if I tried to help some worthy object, and would it need to be attached to the main will to be legal?" We have already remarked that the alleged codicil was written in ink, a circumstance tending in some degree toward the showing of an intent to leave a memorial of a permanent and final character. This circumstance is aided materially when we consider that the codicil was commenced on the last page of the will proper, which was a typewritten document of nearly three pages in length, carefully and formally executed and witnessed. The fact that the testator could inscribe the codiciliary matter in such an enduring form in such a place strongly indicates that her mind had finally crystallized in an intention to alter her will as originally executed. The finding of the two parts of the codicil in different rooms, and the fact that the paper containing the second part had been severed into two portions by a tear, are strong circumstances, it must be conceded, but the other matters we have mentioned are of a substantial character, and we are bound to say that we can see nothing more than a conflict of evidence upon the question.

[2] It is insisted that the codicil is not sufficiently "signed." In it the name of the testator appears twice, first, at the beginning of the document, thus, "I, Susan Mary Gowan Johnston"; second, near the commencement of the second part. It is probable that the writing of the name the first time is to be considered merely as an identification of the person. Estate of Manchester, 174 Cal. 417, 163 Pac. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227. Such appears to us, however, not to be the case as to the use of the name the second time. The use in that instance was not a part of a recital, as was the case in the first instance. The name stands by itself, and is at the right end of a line upon which nothing else appears. It is followed by a period, and the line next succeeding it is commenced with a capital letter. It is true that the second appearance of the name is not at the close of the codicil, but it is not necessary that it be found there in order to constitute it a valid signature to the document. The rule on this subject is stated in the opinion in Estate of Manchester, supra:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

What, in elucidation of the problem now before us, may we gather from an inspection of the codicil itself, under the rule just stated? As we have already observed, it is written in ink and commences at the foot of the formally executed will. It begins with the word "Codicil." The second part commences, "Continuation of the Codicil to my will," followed by a date. Then appears the second writing of the name, set down in the manner which we have already described. We are of the opinion that the face of the codicil itself thus shows an intent upon the part of the testator to execute the paper by the use of her name in the second place in which it occurs. We find support for these views in *Estate of McMahon*, 174 Cal. 423, 163 Pac. 669, L. R. A. 1917D, 778, and in *Estate of Streeton*, 183 Cal. 284, 191 Pac. 16, although it must be confessed that the facts in each of these cases, while similar in some respects to those we now consider, are different in others. We are convinced that by the second use of her name, at least, the testator intended to execute the codicil at the time she wrote it. We have already determined in effect, under another head, that she did not afterward change her mind.

It will be observed that we have said above that *Estate of Manchester*, supra, "probably" compels the views that the first use of the testator's name in the codicil here in question must be regarded solely for purposes of identification. We have employed that expression, for the reason that in that case the instrument before the court was a will, as distinguished from a codicil. Whether the Supreme Court itself will regard that case as positively controlling in the instance of a codicil penned at the foot of a will by the testator identified in and by the will is for that tribunal to determine upon due occasion. In view of the construction which we place upon the second use of the name of the testator here, we do not find it necessary to do more than suggest this question as to *Estate of Manchester*. There is surely some difference between the facts in that case and in this. Whether there is a dif-

ference in the law to be applied to those facts we do not venture an attempt to decide.

[3] One of the appellant's contentions is that the codicil is incomplete, for the reason that the second part is not connected with the first, and therefore may not be considered with it. Appellant says that the use of the expression "(over)" at the end of the first part requires that we look only at the other side of the sheet on which the first part occurs to find what is to follow. It is true that the term is sometimes, perhaps usually, employed to indicate a continuation of written or printed matter on the reverse side of a paper upon the obverse side of which the matter is commenced. It is, however, frequently employed to indicate a continuation of matter upon a separate sheet. We are furnished with no citation of authority upon this point, and have found none, but we do not hesitate to assert that the term in question is not to be given the limited meaning contended for by appellant. The second part of the codicil plainly connects with the first part, and all the circumstances of the case demonstrate that the two parts together make a consistent whole. No more is required to satisfy the testator's use of the expression "(over)."

We concur: FINLAYSON, P. J.; CRAIG, J.

64 Cal. App. 218

SMITH v. FLYNN et al. (Civ. 2729.)

(District Court of Appeal, Third District, California. Oct. 25, 1923.)

Appeal and error — 1011(1)—Finding on conflicting evidence not disturbed on appeal.

A finding of fact by the trial court that a deed absolute on its face was made without any reservation or condition of any sort, and being reached on a consideration of conflicting evidence, will not be disturbed on appeal.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action to quiet title by G. Albert Smith against Rhoda Park Flynn and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Weller, of Los Angeles, for appellants.

A. G. Park, of Los Angeles, Collins & Collins, of Fresno, and Levin Aynesworth, for respondent.

PLUMMER, J. The plaintiff above named began two actions in the trial court numbered, respectively, 4711 and 4712, to quiet title to a tract of land situated in Kings county embracing 240 acres. The actions were consolidated for the purpose of

trial. Plaintiff had judgment, and the defendant appeals. The testimony shows an unbroken chain of title from the patent issued for the premises in controversy down to and including the deed thereto now held by the plaintiff. One of the deeds, however, is in controversy, to wit, a conveyance executed by the defendant, then Rhoda Park, now Rhoda Park Flynn, in 1905 and by her delivered to her father, Andrew G. Park. This deed upon its face purports to be an absolute deed and is in the form of an ordinary grant, bargain, and sale instrument.

The complaint is in the ordinary form of an action to quiet title, alleging ownership in the plaintiff. The answer, after denying ownership in the plaintiff, alleges in paragraph 3 thereof, in substance, that in the year 1905 defendant executed and delivered to one Andrew G. Park, her father, a deed purporting to convey to him the fee to the premises in dispute, but that it was understood and agreed between the defendant and said Park that he would have but a life estate therein; that he should have the full and free use and occupation of said premises; should enjoy the income thereof during his natural life, and that upon his death the title to said premises should vest in his living children share and share alike, and that the said Andrew G. Park should not have the right to sell or dispose of said real property or any part thereof.

At the conclusion of the trial the court, among others, made the following finding of facts:

"That on or about July, 1905, the defendant executed and delivered to her father, Andrew G. Park, a deed to said premises, but that said deed was made for a valuable consideration and that there was not any promise, understanding, or agreement of any kind between the defendant and her father that said premises should be held upon any term or condition whatever, or that the said Andrew G. Park should have but a life estate. That said conveyance was made without any reservation or condition of any sort. That the plaintiff purchased said premises and paid therefor a good and valuable consideration without notice of any right of defendant in or to said premises."

The question before the court upon this appeal is whether there is any testimony to support this finding. The defendant's testimony is in line with the allegations of her

answer. To the contrary, however, is the testimony of her father, Andrew G. Park, her sister, Clara Park Oliver, and her brother, Theodore Park. These three witnesses testified to the effect that there was no such agreement or understanding. Theodore Park in his testimony states facts and circumstances showing that a 320-acre tract of land, which tract included the 280 acres in dispute, and 40 acres belonging to the defendant, were reclaimed by Andrew G. Park, who paid all the expenses of reclamation, building levees, etc., and that the 40-acre tract belonging to the defendant was reclaimed without any expense to her; the costs and expenses being borne by Andrew G. Park. The testimony of Andrew G. Park and also of Clara Park Oliver (a daughter of Andrew G. Park) all goes to the effect that on and after 1905 the title to the 280 acres was absolutely vested in Andrew G. Park without any limitations whatsoever. Upon this testimony the learned trial court made and entered the finding of facts referred to, holding that the conveyance from the defendant to Andrew G. Park was for a valuable consideration.

As said in *Sherman v. Sandell*, 106 Cal. 375, 39 Pac. 797:

"This issue is purely one of fact, and is to be determined by the trial court, and to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court."

Also it is stated in *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543:

"The authorities are uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, * * * such testimony must be clear, convincing, and conclusive—something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered."

The judgment of the trial court should be affirmed and it is so ordered.

We concur: FINCH, P. J.; HART, J.

(64 Cal. App. 279)

NEWMAN v. NEWBY. (Civ. 4429.)

(District Court of Appeal, First District, Division 2, California. Oct. 30, 1923.)

1. Account stated §19(3)—Set-off against account stated held not sustained by the evidence.

Evidence held to show that an account stated between an attorney and client represented the amount due and that a claim of set-off by the attorney was not sustained.

2. Attorney and client §128—Attorney asserting set-off against client's money in his hands must produce vouchers of his expenditures.

Where an attorney, acting for a client, makes expenditures in carrying out his client's business, but fails to obtain vouchers of such expenditures and to turn them over to his client with his accounts, he fails to meet the burden of proof resting upon him, to show that he is entitled to a set-off against money of his client in his hands.

Appeal from Superior Court, Alameda County; Eugene P. McDaniel, Judge.

Action by Mary E. Newman against W. L. Newby. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles H. Seccombe, of Oakland, for appellant.

H. Raymond Hall, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment for a balance of \$350 alleged to be due on a stated account; the defendant appeared and answered. In his answer he denied the material allegations of the complaint and pleaded counterclaims and offsets. The trial court made findings in which it found that all of the allegations of plaintiff's complaint are true, and that the denial and allegations in the defendant's answer are not true. The defendant moved for a new trial, his motion was denied, and thereafter the defendant appealed under section 953a of the Code of Civil Procedure.

[1] In his brief the appellant contends that no account stated was proved, and that the counterclaims set forth in the defendant's answer should have been allowed. Both of these points involve the sufficiency of the evidence. In the record there is evidence showing that prior to the month of July, 1919, the defendant was an attorney at law practicing his profession and engaged in some other lines of business. That some months prior to that date the plaintiff, an unmarried woman of the age of 70 years, or thereabouts, commenced her dealings with the defendant. She accepted the defendant's offer to occupy a room attached to the defendant's offices, and that room she oc-

cupied for small housekeeping purposes. From time to time she performed some services for the defendant, such as serving papers, etc. She had some moneys, and at least one piece of real estate. From time to time she loaned to the defendant small sums of money. On one occasion she employed the defendant to negotiate an exchange of her real estate for a piece of property known as the Judd property. The values of the two properties were such that the plaintiff was to pay the difference in value. At the time the transaction was taken up the plaintiff owned some United States bonds of the value of \$350. Those bonds she turned over to the defendant to be applied on the exchange of her property for the Judd property. The exchange was never consummated. The plaintiff in her testimony claimed that the deal fell through by reason of non-action on the part of the defendant. The defendant testified that the deal fell through because the plaintiff changed her mind and would not consummate the deal. On or about July 9, 1919, the defendant had converted the bonds into cash. On the date last stated the plaintiff went to the defendant and asked him for the \$350—the proceeds obtained from the sale of the bonds. According to her testimony, he said he did not have it at that time, but he would get it, or he would give her a receipt for it, saying that he owed it. Thereupon he wrote a receipt:

"7/9/1919 Prior to above date I received from M. E. Newman \$350 of Vic. Loan bonds to be converted into cash to be used in Judd purchase in exchange of property."

In rebuttal of the foregoing testimony, the defendant did not claim that he had actually consummated an exchange of the plaintiff's property for the Judd property, nor did he state facts showing her to be in default, or that the owners of the Judd property had received the proceeds of the bonds above mentioned. He vaguely testified that he caused a search to be made, and that he expended moneys therefor; but he did not produce any vouchers showing the expenditures nor the amounts thereof, nor did he produce any evidence that the search was ever made excepting his own uncorroborated testimony. In this behalf he testified:

"I have paid out about \$99—\$95, I believe. The searches on the property came to, I think, \$47.50, but the expenses of Mr. Garafola being removed from the premises under the terms of the written lease that Miss Newman had entered into with him was about \$47.50, as I remember it. That money was paid for the purchase of his lease and the paying of the draymen for his removal, as near as I remember it just at this date. It is not very far from that. I promised in writing to pay Mr. S. L. Fish \$100 commission, made that promise as her attorney and agent under her written instruc-

tions. * * * My attorney fees for services rendered to Miss Newman in this matter and other matters, prior to this time, up to the first of December, 1919, were \$200, and part of this service was rendered after July 9, 1919, and was the completion of the loan—I mean I went to Walnut Creek, made some three different trips over there trying to get some one to make the loan on this property."

As in surrebuttal of the foregoing testimony, the plaintiff testified that the defendant had agreed to conduct the real estate exchange without charge to her because of the fact that she had theretofore loaned him various sums of money and had performed services for him without charge.

[2] The claim of the appellant based on the counterclaim and offsets grew out of the purported expenditures and the service rendered by the defendant in the real estate deal. The appellant claimed that he had acted as the trusted attorney of the respondent. As such trusted agent, he was bound to obtain vouchers and deliver them to the respondent with his accounts. He never did so. Herein he failed to meet the burden of proof which rested on him. *Metropolis, etc., Sav. Bank v. Monnier*, 169 Cal. 592, 598, 599, 147 Pac. 265. Moreover, the story told by the appellant does not show on its face that he consummated the exchange and thus earned a commission, nor that he fully performed on his part, and that the exchange was not completed solely because of the arbitrary refusal of the respondent to perform on her part. *Jauman v. McCusick*, 166 Cal. 517, 522, 137 Pac. 254.

On his motion for a new trial the appellant claimed he had found the original papers and offered to bring them forward. His offer was refused. The refusal was proper, because the papers which he thus offered to produce showed on their face that the respondent had not repudiated the contract of exchange but had, in fact, fully performed by executing and delivering to appellant a deed in favor of the Judds. Moreover, the record shows that the evidence tendered by the appellant was not free from suspicion, and that the trial court did not accept it as true. We cannot say that the trial court erred in taking this view of the evidence.

As to the main issue, the appellant argues that there is no stated account unless the evidence shows that it was intended to be a final settlement up to date, and he cites *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397. We call attention to the facts of that case, and in particular to the testimony quoted on page 307 of 31 Cal. App., on page 397 of 160 Pac., and state that we consider that the case cited rules the point, under the facts of this case, in favor of respondent instead of in favor of the appellant.

We have not overlooked the fact that the

appellant claims that the real estate transaction had not been terminated July 9, 1919, the date of the receipt and the date of the conversation, which respondent relies on. But it will suffice to say that the evidence introduced by the appellant at the trial, and that which he offered to produce in his affidavit made in support of said motion, is not of such convincing force as to warrant us in holding that the trial court erred in disbelieving it.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 193

SMITH et al. v. WHYERS. (Civ. 4667.)

(District Court of Appeal, First District, Division 2, California. Oct. 22, 1923. Hearing Denied by Supreme Court Dec. 20, 1923.)

1. Landlord and tenant §290(5) — Tenant sued in unlawful detainer cannot file cross-complaint.

Tenants withholding premises in violation of their covenants cannot frustrate lessor's extraordinary remedy in unlawful detainer by a cross-complaint or counterclaim as to unpaid rent sued for.

2. Landlord and tenant §290(4)—Tenant not in possession cannot set up fraud in unlawful detainer.

The rule that a tenant fraudulently induced to execute a lease while in possession may set up the fraud in an action in unlawful detainer does not apply where he was not in possession when the lease was executed and his only right to possession is the lease claimed to be void.

3. Landlord and tenant §290(4) — Tenant setting up fraud cannot remain in possession.

The unlawful detainer statute being intended to provide a summary remedy for restitution of realty, a defendant claiming to have entered under a lease void for fraud cannot remain in possession thereunder while its validity is being litigated.

4. Appeal and error §1039(13)—No reversal merely to require plea of former adjudication of issue.

A judgment for plaintiffs in an unlawful detainer suit will not be reversed merely to require them to plead a former adjudication against defendant on the issue of fraud in execution of the lease.

5. Appeal and error §843(2) — Issue not raised by pleadings at time of trial not discussed.

Where the only issues under the pleadings at the trial of an action in unlawful detainer were plaintiffs' right to restitution of the premises and unpaid rent, the appellate court, on defendant's appeal, will not discuss the question whether a deed of trust deposited as

security for payment of the rent should have been offset against the amount thereof.

5. Appeal and error $\S$ 1151(2)—**Judgment modified by striking out concededly erroneous award.**

A judgment for plaintiffs in unlawful detainer modified by striking out a concededly erroneous award for each day's occupancy by defendant after the date of judgment.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Grace L. Smith and another against Alida I. Whyers. Judgment for plaintiffs, and defendant appeals. Affirmed as modified.

Elmer E. Robinson, of San Francisco (Frank A. Duryea, of Marysville, of counsel), for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

NOURSE, J. Plaintiffs commenced this action in unlawful detainer to obtain possession of an apartment house which the defendant held under a lease from the plaintiffs. The complaint was in the ordinary form demanding restitution of the premises and recovery of the unpaid rent. The defendant answered admitting the lease and setting up a special defense, counterclaim, and cross-complaint; each alleging that she had been fraudulently induced by the plaintiffs to enter into the lease and that she had rescinded it and was then ready to restore everything of value which she had received from the plaintiffs. The plaintiffs demurred to and moved to strike out the cross-complaint and the counterclaim and also moved to strike out all that portion of the answer containing the allegations of fraud on the part of the plaintiffs. All these motions to strike out were granted. The action was thereafter tried and judgment went for the plaintiffs awarding them restitution of the premises, the full amount of the rent found to be due up to the date of the judgment, and also the sum of $\$8\frac{2}{3}$ per day for each day's occupancy of the premises after the date of the judgment.

On this appeal the appellant assigns as error the order of the trial court granting respondents' motions to strike out the cross-complaint, counterclaim, and the special defense contained in the answer. It is also urged that the judgment is erroneous in that it did not give to appellant the right to offset against the judgment a deed of trust which had been deposited as security for her payment of the rent, and also that the judgment should not have contained an award for occupancy of the premises by the appellant after the date of the judgment.

[1] On the first point it is argued that both

under the Code of Civil Procedure and under the authorities relating to cross-complaints and counterclaims the appellant was authorized to plead both a cross-complaint and a counterclaim in this action in so far as the issue related to the recovery of money by way of unpaid rent. It is unnecessary to discuss the point. It is not a new one. The authorities all hold that in an action in unlawful detainer for the restitution of premises withheld by tenants in violation of the covenants of their lease they cannot frustrate the extraordinary remedy provided by the statute through the means of a cross-complaint or counterclaim. See *Knight v. Black*, 19 Cal. App. 518, 527, 528, 126 Pac. 512; *Arnold v. Krigbaum*, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370. What the rule would be if the tenant should relinquish possession and join issue solely on the rent money need not be determined, because the appellant here was not satisfied to make that issue, but insisted upon retaining possession throughout the litigation.

[2, 3] Appellant does not seriously argue that she should have been permitted to set up the special defense of fraud, but apparently concedes that she could not defeat respondents' right to immediate possession of the property by withholding the payment of the rents and offsetting her monetary claims against those of the respondents. Reference is made to cases holding that a tenant who, while in possession, is fraudulently induced to enter into a lease, may set up the fraud in an action in unlawful detainer. This rule does not apply to a case where the tenant was not in possession at the time the lease was executed, but where her only right to possession is the lease which she claims to be void by reason of fraud in its execution. It must be evident that, as the statute prescribing the proceedings in unlawful detainer was intended to provide a summary remedy for the restitution of real property, the very purpose of the statute would be defeated if a defendant who claimed that she entered under a void lease through the fraud of the plaintiff should be permitted to remain in possession under the lease while the validity of the lease was being litigated.

[4] There is some authority to the effect that in a case of this nature a defendant should be permitted to set up equitable defenses by way of answer. See *Knight v. Black*, 19 Cal. App. 518, 525, 126 Pac. 512. In that case the defense went directly to the issue of forfeiture raised in the complaint. Here the defense was a special plea of rescission of the lease and a claim for damages for fraud in its execution. It is conceded in the briefs that prior to the trial of this action the appellant had commenced an action for rescission based upon the same ground set up in her answer in this case. Judgment had been entered against her ad-

judging that there was no fraud and no ground for recovery of damages. Though this judgment was not pleaded in this proceeding, because it was not deemed to be final at that time, it is now conceded that it has become a final adjudication of the issue of fraud. Though it may be true, as urged by appellant, that we should not take notice of this fact in the absence of a proper pleading, the admissions of counsel are sufficient to satisfy us that we should not reverse the judgment merely to require the respondents to plead a former adjudication.

[5] The further point is made that the trial court erred in rendering judgment for the full amount of unpaid rent and in not allowing appellant to offset the deed of trust which she had deposited as security for the payment of the rent. The only issue before the court as the pleadings stood at the time of the trial was the right to restitution of the premises and the payment of the rent which was then due. If the appellant had asked for an adjustment of the security which had been deposited for the payment of the rent and the court had refused to allow any adjustment, then the question would be properly before this court on appeal. But the issue not having been raised, it is not incumbent upon this court to discuss the academic question as to whether an offset should be allowed in cases of this nature.

[6] The final point has been made that the trial court erred in awarding judgment for each day's occupancy of the premises after the date of judgment. The respondents concede that this award should not have been made. For this reason the judgment is modified by striking out the portion thereof awarding the sum of \$8²/₃ per day for each day's occupancy of the premises mentioned after the 7th of October, 1921, and as so modified the judgment will stand affirmed; the respondents to recover their costs.

Judgment affirmed as modified.

We concur. LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 221

PEOPLE v. HADLEY. SAME v. HADLEY et al. SAME v. ERNSTING. (Cr. 1031-1033.)

(District Court of Appeal, Second District, Division 1, California. Oct. 25, 1923.)

Criminal law — 1023(8)—Order sustaining demurrer not final and appealable.

Under provisions of the Penal Code, an order sustaining a demurrer to an indictment or information does not amount to a final judgment from which an appeal by the state will lie.

Appeals from Superior Court, Imperial County: M. W. Conkling, Judge.

Three prosecutions by the People against O. D. Hadley, O. D. Hadley and others, and Frederick Ernsting. Appeals by the People from order sustaining demurrers to informations. On motion to dismiss appeals. Motion granted.

U. S. Webb, Atty. Gen., for the People.

Robert G. Hill, of El Centro, for respondents.

CONREY, P. J. On motions to dismiss appeals.

Counsel have informed us that these motions and records are identical in their terms so far as the motions are concerned. Therefore we shall state the first case only (No. 1031), and allow the decision of the other cases to follow the decision in the stated case.

The notice of motion to dismiss announces respondent's intention to move for a dismissal of "the appeal of the plaintiff from an order made and entered by the superior court of the county of Imperial" in said action, and states that the motion will be made on a certified copy of the record and the order from which the appeal is taken.

Respondent also filed a written motion which by its terms and its statement of the grounds of motion shows that it is directed solely to an appeal attempted to be taken from an order sustaining the demurrer of defendant to the second amended information filed in said action for the purpose of prosecuting the defendant for the commission of an alleged misdemeanor.

The said certified copy of the record as filed by respondent for use on his motion to dismiss the appeal shows by the court's minutes that said demurrer was sustained and that at the time of announcement of the ruling there was given "notice of appeal by district attorney in open court." The said copy of the clerk's transcript was certified by the county clerk under date September 11, 1923, and contains nothing to indicate that judgment of dismissal or any judgment has been rendered by the superior court.

In *People v. Apple*, 57 Cal. App. 110, 206 Pac. 487, it was held that, by reason of stated provisions of the Penal Code as the same now exists, an order sustaining a demurrer to an indictment or information does not amount to a final judgment from which an appeal may be taken; that the appeal in such instances should be from the judgment when entered upon the order sustaining the demurrer and not from the order itself. Following that decision of the third district, which appears to be well reasoned, we conclude that the motions here presented should be granted.

To prevent misunderstanding by counsel, we will add that our attention has been drawn to the fact that in each of these cas-

es the clerk's transcript on appeal has been filed on the 13th day of October, 1923. In each case the transcript shows that the court on sustaining the demurrer dismissed the case, and that the notice of appeal given in open court was a notice of appeal "from order sustaining demurrer and judgment of dismissal." Therefore the orders now to be made will not affect the pending appeals from the judgments.

In each of the above-entitled cases it is ordered that the respondent's motion to dismiss the appeal from the order sustaining demurrer to second amended complaint is granted.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 210

Ex parte FLAHERTY. (Cr. 1015.)

(District Court of Appeal, Second District, Division 1, California. Oct. 24, 1923.)

Receiving stolen goods §9(3)—Verdict held sufficient.

A verdict finding the defendant guilty of receiving stolen property "as charged in the information" is sufficient without finding defendant's knowledge of the theft or her receipt of the goods for her own gain, or to deprive the owner thereof.

Habeas corpus by Annette Flaherty to secure release from custody after conviction for receiving stolen goods. Writ denied.

James Donovan and Edgar L. Bishop, both of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondent.

CURTIS, J. Petitioner claims that she is illegally imprisoned and restrained of her liberty by the sheriff of the county of Los Angeles. She bases the illegality of her imprisonment upon the following state of facts: Petitioner was accused by information in proper form of the crime of receiving stolen property. Upon trial the jury rendered the following verdict:

"We, the jury in the above-entitled cause, find the defendant guilty of receiving stolen property as charged in the information."

Petitioner thereupon moved the court for her discharge, which was denied. Thereafter said court rendered a judgment of conviction against her upon said verdict.

It is now urged on behalf of petitioner that the verdict is not sufficient to support the judgment of conviction, in that, while it finds her guilty of receiving stolen property, it fails to find the truth of the other necessary elements of the crime charged in the information—the defendant's knowledge of the theft, and that the property was received by her for

her own gain or to prevent the owner from again possessing it. Petitioner argues that the receiving of stolen property is not a crime without the person receiving it knew at the time of its receipt that it had been stolen and received it either for his own gain or to prevent the owner from again possessing it, and that as the jury only found her guilty of receiving stolen property it had not found her guilty of any crime whatever.

Petitioner relies upon the case of *People v. Tilley*, 135 Cal. 61, 67 Pac. 42, as sustaining her contention. In this case the verdict was:

"We, the jury in the above-entitled case, find the defendant, Charles H. Tilley, guilty of receiving stolen property."

And the Supreme Court, in reversing the case and discharging the defendant, held as follows:

"It cannot be said, therefore, that the verdict unequivocally finds the defendant guilty of the offense charged, or that it expresses an intent to do so."

It will be observed that the verdict in the case of *People v. Tilley*, supra, made no reference to the information or indictment, while the verdict against petitioner contains the words "as charged in the information." The difference in these two forms of verdict appears to be a matter of some consequence. In the case of *People v. Cornell*, 29 Cal. App. 430, on page 443, 155 Pac. 1026, 1032, this distinction is commented on in the following language:

"In *State v. Schweitzer*, 18 Idaho, 609 (111 Pac. 130), the verdict read: 'We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights, as charged in the complaint.' This was held sufficient, as the intent of the jury was clear in that it found the defendant guilty. The words, 'selling by short weights,' might be treated as surplusage, and still the verdict held good, for then it found the defendant guilty as charged in the complaint. This case distinguishes the general current of authority from the case of *People v. Tilley*, 135 Cal. 61 (67 Pac. 42), where it was held that a verdict in these words, 'We, the jury in the above-entitled cause, find the defendant, Charles M. Tilley guilty of receiving stolen property,' was insufficient, as it must, in order to constitute a crime, include the knowledge that the property was stolen, and also the intent to deprive the owner of the same. It may be stated, also, that the verdict in the *Tilley* Case did not refer to the indictment or information, which also distinguishes that case from the one at bar, where the indictment is clearly and distinctly referred to."

The form of verdict in the case of *People v. Cornell*, supra, was in many respects similar to that in the case in which petitioner was found guilty, and the District Court of Appeal for the Third District affirmed the judgment in that case. Judgments based up-

on verdicts similar to the one under attack have been sustained in the following cases: *People v. Morley*, 8 Cal. App. 372, 97 Pac. 84; *People v. Higuera*, 122 Cal. 466, 55 Pac. 252.

Petitioner has cited a number of well-considered authorities from other jurisdictions which support her contention that the verdict in this case is vitally defective and not sufficient to support a judgment of conviction. These authorities, however, appear to be in conflict with those of our own state which we have heretofore referred to.

The verdict in this case, in our opinion, was a valid verdict and sufficient to support the judgment of conviction rendered by the court against petitioner. It follows that the writ must be denied and the petitioner remanded, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 264

PEOPLE v. RABBIT. (Cr. 1005.)

(District Court of Appeal, Second District, Division 1, California. Oct. 29, 1923.)

1. Rape §54(1) — Prosecutrix's testimony need not be corroborated.

It is not essential to a conviction of statutory rape that prosecutrix's testimony be corroborated.

2. Witnesses §397—Prosecutrix's contradictory statements affect only weight and credibility of her testimony.

Contradictory statements by prosecutrix, before or during the trial of a rape case, affect only the weight and credibility of her testimony.

3. Criminal law §1159(4)—No reversal of conviction because appellate court might not have believed testimony on which based.

A conviction of rape will not be set aside because the appellate court might not have believed prosecutrix's testimony, on which it was based.

4. Criminal law §404(1)—Exhibition of child born of acts committed before that charged held not error.

In a prosecution of a negro for rape, where prosecutrix, a negress, testified that she had never had relations with any one except defendant, who testified that he found her in an automobile with a white man at about midnight on a date prior to that of the act charged, the court did not err in permitting exhibition of a child born of acts committed before that charged and admitted in evidence to establish guilty knowledge and criminal intent.

5. Witnesses §40(1)—Testimony of six year old child held properly admitted.

In a rape prosecution, the court did not err in permitting a six year old boy to testify as to an act committed before that charged, though he was unable to fix the date, where he clearly and intelligently stated the circumstances as observed by him; it being for the judge to de-

termine whether he was capable of receiving just impressions of facts or relating them truly. Code Civ. Proc. § 1880, subd. 2.

6. Criminal law §656(5)—Court's statement that he examined boy witness as to whether he would answer truthfully held not prejudicial error.

The court's statement, in the jury's presence, that he examined a six year old boy offered as a witness "particularly with a view as to whether he was competent to testify as to what he saw and as to whether he would answer intelligently and truthfully," held not prejudicial error, where the court disavowed any intention to state whether the jury should believe the boy, made it clear that he was ruling only on his competency, and particularly instructed the jurors that they were the sole judges of the facts and the testimony of such witness.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Burr Rabbit was convicted of rape, and he appeals. Affirmed.

W. C. Dorris, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., for the People.

CONREY, P. J. By information the defendant was charged with the crime of felony, to wit, rape, in that on or about November 16, 1922, in the county of Kern, he committed an act of sexual intercourse with and upon a certain named female person under the age of 16 years, and not then and there the wife of the defendant. Having been convicted and sentenced upon that charge, he appeals from the judgment and from the order denying his motion for a new trial.

Appellant contends that the judgment should be reversed because the only evidence of the commission of the offense on the day charged is that of the complaining witness, and because there is no evidence of penetration, and because there is no evidence to show that no marriage ceremony had been performed between the defendant and the prosecuting witness. We have read the evidence. We deem it not necessary to set it forth in this place. The prosecuting witness, a girl 15 years old, testified in general terms that, at the time and place stated, sexual intercourse between herself and the defendant did occur, and that she herself was not and never had been married. Sufficient details were shown in the testimony, and there was no contention that the statements of the witness did not cover the essential facts of sexual intercourse.

[1-3] It was not essential to a conviction that the testimony of the prosecuting witness be corroborated by other evidence. *People v. Akey*, 163 Cal. 54, 124 Pac. 718; *People v. McMillan* (Cal. App.) 212 Pac. 38. The fact that she made contradictory statements at

other times prior to the trial and even during the course of the trial affects only the weight and credibility of her testimony. Nevertheless, since the jury believed that part of her testimony upon which the conviction rests, it is not for this court to take the place of the jury and set aside the verdict because, perchance, we might not have believed the testimony of the witness.

[4] Appellant contends that the court erred in allowing the illegitimate child of the prosecuting witness to be exhibited to the jury; and that the court erred in permitting her six year old brother, Albert Rabbit, to testify. The evidence established the fact that the illegitimate child was born in March, 1923. The prosecutrix had testified that a series of acts of intercourse had occurred between herself and the defendant beginning in July, 1922. At another time she said that they began in June, 1922, fixing the date by the fact that it was before the close of the school term in June. The evidence of these acts prior to November 16, 1922, was received only for the purpose of establishing a guilty knowledge and criminal intent, and the jury was so instructed. Upon the point that the court erred in permitting the district attorney to exhibit the said child before the jury, counsel relies upon *People v. Soto*, 11 Cal. App. 436, 105 Pac. 422, where the court expressed the opinion that the rule permitting the admission of evidence of other acts as tending to sustain the main allegation in a case of this kind, should not be extended so as to include the right to "produce and exhibit before the jury a child born of someone of the collateral acts of intercourse six or more months removed from the act constituting the offense."

The record does not directly show the basis of the court's ruling in this matter in the present case. We infer that it was allowed because the prosecutrix had testified that she never had such relations with any person other than the defendant, whereas the defendant had testified that along about July he had found the prosecuting witness in an automobile with a white man at about 12 o'clock at night. He did not produce any further evidence in support of that apparent innuendo. He further stated that that was both the first and the last time that this man took the girl out, "because he left here the next morning." The defendant and his step-daughter, the prosecuting witness, were of the colored race. On this state of the record, we are of the opinion that the court did not err in permitting the child to be exhibited to the jury. Moreover, there is nothing to show that the defendant was prejudiced thereby.

[5] The court did not err in permitting the six year old child Albert to testify, or in refusing to strike out his testimony, which

related to one of said acts of intercourse which occurred prior to November. The fact that the child was unable to fix the date is not sufficient to exclude such testimony. He clearly and intelligently stated the circumstances as observed by him. It was the proper province of the judge to determine whether the child was capable of receiving just impressions of the facts or of relating them truly. Code Civ. Proc. § 1880, subd. 2; *People v. Stouter*, 142 Cal. 146, 151, 75 Pac. 780.

[6] Finally, it is claimed that the judge of the trial court committed prejudicial error in that he stated in the presence of the jury that he had examined the boy Albert quite carefully, "particularly with a view as to whether he was competent to testify as to what he saw and as to whether he would answer intelligently and truthfully." Thereupon, counsel having taken exception to the remarks of the court "on the proposition that you examined him and found him to be truthful," the court disavowed any intention to state whether the jury should believe the boy or not and made it clear that he was ruling only on the matter of his competency. He then particularly instructed the jurors that they were the sole judges of the facts and of the testimony of said witness. Under these circumstances, we are satisfied that the point attempted to be made by appellant with reference to this matter is without merit.

The judgment and order are affirmed.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 287

VICKERSON v. STANDARD AUTO SALES CO. et al. (Civ. 4477.)

(District Court of Appeal, First District, Division 2, California. Oct. 31, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

1. Municipal corporations ⇨705(2)—Rule of right of way at street intersection stated.

The question of right of way of vehicles at a street intersection under the statute is to be determined when the vehicle approaching from the right enters the intersection or crosses the curb line, and at that point such vehicle has the right of way unless the vehicle approaching from the left is nearer the point at which the collision would occur.

2. Appeal and error ⇨882(12)—Erroneous instruction held not ground for complaint.

Error in an instruction cannot be complained of where the same error is present in an instruction given at the request of the complaining party.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Percy Vickerson against the Standard Auto Sales Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Sloss, Ackerman & Bradley, of San Francisco, for appellants.

Jesse H. Miller and Walter H. Linforth, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff was injured in an automobile collision at the intersection of Polk and Ellis streets, in San Francisco. The jury brought in a verdict in his favor, and from the judgment the defendants have appealed, bringing up the judgment roll and a bill of exceptions.

At the time of the accident, on the 24th day of February, 1921, the plaintiff was in an automobile approaching from the left, traveling easterly on Ellis street, and the defendant Thomas C. Robinson, as agent of his codefendant, was operating an automobile on the right, going north on Polk street. The collision occurred in the intersection of the two streets mentioned. The only question involved in the record is as to the correctness of the court's instructions relating to the right of way at the point where the accident occurred. The court gave, acting on the request of the plaintiff, four instructions, which we have numbered consecutively, and which are as follows:

I. "The law of this state also provides that the operator of an automobile shall yield the right of way at the intersection of their paths to an automobile approaching from the right, unless such vehicle approaching from the right is further from the point of the intersection of their paths than such first named automobile."

II. "If, therefore, you find that plaintiff's automobile was nearest the point of such intersection, then the plaintiff was not required in law to yield such right of way to the driver of the Chevrolet automobile, but in the law it was the duty of the driver of the Chevrolet automobile, under these conditions and circumstances, to have yielded the right of way to the automobile being driven by plaintiff."

III. "You are instructed that the rule of the right of way has application only to cases where automobiles reach the crossing at substantially the same time."

IV. "If you find from the evidence that the automobile driven by plaintiff reached the intersection of Ellis and Polk streets, substantially in advance of the Chevrolet automobile, then I instruct you that the plaintiff had the right of way over the intersection of said streets, and that the driver of the Chevrolet automobile should have yielded the right of way to him."

And, acting on the request of the defendants, the court gave another instruction, which we have numbered 5, and which is as follows:

V. "You are instructed that if defendant's automobile reached the intersection of Ellis and Polk streets substantially in advance of the automobile which plaintiff was driving, that de-

fendants had the right of way over the intersection of the streets, and plaintiffs should have yielded the right of way to defendants."

[1] The instruction numbered I is a quotation from the statute and is conceded to be correct. The instruction numbered II is not necessarily incorrect. As the respondent argues the language therein used, "such intersection" refers back to, and adopts "intersection" as that word is used in No. I; that is, in the statute. The instruction numbered III is not only incorrect, but conflicts with the first instruction given. The statute does not specifically fix the point at which the right of way is determined, for, obviously, if two machines are approaching a point of intersection at different rates of speed, their relative distances from that point would be constantly changing. We think the true construction of the statute is that the question as to who has the right of way is to be determined when the vehicle approaching from the right enters the intersection of the street, or crosses the curb line. Up to that point there is no possible danger of collision. At that point the vehicle approaching from the right has the clear right of way, unless the vehicle approaching from the left is nearer the point at which the collision would occur. *Whitworth v. Jones*, 58 Cal. App. 492, 209 Pac. 60.

Where the intersection is square, that is to say, where the two intersecting streets are of the same width, under the rule as we have stated it, the vehicle approaching from the right would have the right of way unless the vehicle approaching from the left had passed the center of the intersection before the vehicle approaching from the right entered the intersection, or passed the curb line. The rule announced by the trial court that the vehicle first entering the intersection has the right of way would mean that the vehicle approaching from the right would have to wait for one approaching from the left, although the vehicle approaching from the left in the case of a square intersection would be three times as far away. Or, in the case of an intersection like that of Post and Van Ness, the vehicle traveling north on Van Ness would have to wait for the vehicle traveling east on Post, although the vehicle traveling north was, perhaps, within 10 feet of the point of a possible collision, and the vehicle traveling east was, perhaps, 75 feet away. This, of course, would be an absurdity, and it would be impossible to regulate traffic under any such rule, particularly as each vehicle approaching an intersection has to consider conflicting rights of way. And bearing in mind the rule that requires a driver to travel on the right-hand side of the street, each vehicle having the right of way in the first half of the street is compelled to yield the right of way in the second half of the street as it crosses. From the last con-

sideration it is also obvious that the question of the right of way only relates to the quarter of the intersection in which the paths of approaching vehicles intersect.

[2] Appellants also challenge the soundness of the instruction which we have numbered IV. In reply, the respondent states that the same rule is declared in the instruction numbered V, which was given at the request of the appellants, and, therefore, whether the proposition therein stated is sound or unsound, the appellants may not complain. *Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, 51, 186 Pac. 772. That reply is well founded.

For the errors contained in instruction numbered by us III, the judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 223

PEOPLE v. PATTERSON. (Cr. 975, 2637.)

(District Court of Appeal, Second District, Division 1, California. Oct. 25, 1923. Hearing Denied by Supreme Court Dec. 24, 1923.)

1. Criminal law §417(2), 1169(1)—Confessions of defendants in other prosecution not in presence of accused held inadmissible and prejudicial in perjury prosecution.

In a prosecution for perjury, wherein defendant was charged with testifying that defendant in a former prosecution was at his house at the time he was charged to have committed murder, it was not only error, but prejudicial, to admit in evidence the confessions of the defendants in the former prosecution, tending to show that neither of them was at defendant's house at the time of the murder, such confessions not having been made in his presence, though shown to him after his arrest for perjury.

2. Perjury §11(2)—False testimony need not be material to main issue.

While it is necessary that the false testimony be material to the issue being tried, or to the point of inquiry, it is not necessary that it be material to the main issue; the test being whether the statement made could have influenced the tribunal on the issue before it.

On Hearing in Supreme Court.

3. Criminal law §1179—Supreme Court bound by what appears on face of opinion.

On application for hearing in the Supreme Court, after a hearing in the District Court of Appeal, the Supreme Court is bound by what appears on the face of the opinion. (Per Lawlor, J.)

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Edward Patterson was convicted of perjury, and appeals. Reversed.

Walters & Mauk, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. The defendant was found guilty of the crime of perjury. On April 19, 1922, in the trial of a criminal action entitled "People of the State of California v. James Wheaton and Calvin Rowell," in the superior court of the county of Los Angeles, appellant testified on behalf of defendant Wheaton in said action. The defendants Wheaton and Rowell were on trial for the crime of the murder of two policemen of the city of Los Angeles, alleged to have been committed in said city on the night of December 6, 1921, between the hours of 10 and 11 o'clock of said night. The defendant testified in said action that Wheaton, one of said defendants in said action, was at the home of said defendant Patterson in the city of Los Angeles on the night of December 6, 1921, from about the hour of 7 o'clock until the hour of 11 o'clock of said night. On the trial of the defendant Patterson for the crime of perjury, his testimony, given in the Wheaton-Rowell Case, was introduced in evidence. The prosecution then called as a witness Harry C. Hickok. Hickok testified that he was a police officer, and that he was present at a conversation between the defendant Patterson and a deputy district attorney of the county of Los Angeles, which conversation took place shortly after the arrest of the defendant, on the 19th day of April, 1922, immediately following the giving of his testimony in the Wheaton-Rowell Case. The witness Hickok further testified that the deputy district attorney on this occasion asked the defendant Patterson if he realized what a serious situation he had gotten himself into by testifying before the superior court, under oath, to facts which he did not believe to be true; that the deputy district attorney then read to the defendant purported confessions of Wheaton and Rowell, in which each stated that on the night of December 6, 1921, they were present at the scene of the murder, and were in a Ford car with three other men, who killed the two policemen. After the witness Hickok had testified to the reading of these confessions to the defendant by the deputy district attorney, the prosecution then offered them in evidence, stating that "They are offered in connection with the statements made by the defendant, and for the light that they throw on what he subsequently said." Over the objections of the defendant, the court ruled that the witness Hickok might read these confessions to the jury as a part of the conversation between the deputy district attorney and the defendant. The witness Hickok then read to the jury two purported confes-

sions signed by Wheaton, and one signed by Rowell. These confessions of Wheaton and Rowell contained statements, which, if true, tended strongly to show that Wheaton was not at the defendant's home on the evening of December 6, 1921. After the reading of each of these documents, the defendant moved to strike them out on the ground that they were not binding upon the defendant, and that, as against him, they were incompetent. These motions the court denied.

No attempt is made by the Attorney General, in his brief in this case on behalf of the respondent, to justify the ruling of the court in permitting these confessions to be read to the jury upon the ground that they were admissible as parts of the conversation had with the defendant. In fact, it would be a difficult matter, from the evidence before us, to justify the admission of these confessions for such purpose. They could not, of course, explain anything said by the defendant prior to their being read to him, as there is no evidence that he had any knowledge of their contents before he heard them read. As to explaining statements made by the defendant after the confessions were read to him, they are equally unavailing, as the testimony in the case shows that, in response to a question made by the deputy district attorney immediately after the reading of the confessions, the defendant stated, "I have told you the truth about it." It is true that the witness Hickbk testified that the defendant had said, both before and after the reading of the confessions to him, that he knew he had done wrong, and only trouble could come out of it. Just what defendant may have meant by this statement may or may not be apparent, but the confessions shed absolutely no light upon the meaning which the defendant intended to convey by this statement.

[1] It is attempted to justify the reading of these confessions, on the ground that they contradicted the testimony of the defendant, and showed that he testified falsely. They undoubtedly had this effect upon the jury, and in a marked degree. Between the testimony of defendant that Wheaton was at his home, and the admissions of Wheaton and Rowell that they participated with others in the killing of the two policemen on the night of December 6, 1921, the jury would, in all probability, accept the statements of the latter, and, believing that the defendant had falsified in his testimony in this important respect, they would accept with reluctance his evidence in other matters. In other words, the reading of these confessions to the jury tended to impeach the defendant as a witness upon his own trial. The consequences, therefore, to him of the action of the court in permitting the reading of these confessions to the jury, were of a most serious nature. This result,

however, would not make the confessions competent evidence. Their effect upon the jury would go to their materiality, and not to their competency. Their competency as against the defendant would be determined by the well-established rules of evidence. No rule of evidence is better established or more frequently applied than that which forbids the admission, as against the defendant, of statements or conversations made without his hearing or presence. It is not claimed that the defendant was present at the time Wheaton and Rowell made their purported confessions, nor that the defendant was in any way responsible for the acts or statements of Wheaton and Rowell at any time, nor that he ever knew, before the documents were read to him, that these men had ever made any statements regarding their part in the murder of the two policemen. These confessions, therefore, as against the defendant, were incompetent evidence, and the reading of them to the jury, in our opinion, greatly prejudiced the defendant in his defense. We have already alluded to the serious consequences, which, in our opinion, would naturally follow the reading of these confessions to the jury. So serious were these consequences that we feel that the defendant was thereby deprived of his right to a fair and impartial trial, and for this reason the judgment should be reversed.

Outside of these confessions there is no evidence in the case that Wheaton was not at the defendant's house on the night of December 6, 1921, at the time defendant testified in the Wheaton-Rowell Case that he was there, and therefore there was no evidence that the defendant had falsified in his testimony as to the whereabouts of Wheaton on this night. The jury undoubtedly, in determining the guilt or innocence of the defendant of the charge of falsely testifying to Wheaton's presence at his house on the night of December 6, 1921, took into consideration the statements contained in the confessions of Wheaton and Rowell. This was greatly to the prejudice of the defendant, and furnishes an additional reason why a new trial should be granted defendant on account of the error committed in permitting these confessions to be read to the jury.

[2] The information charges that the defendant falsified in his testimony given in the Wheaton-Rowell Case in three particulars: First, when he testified that Wheaton was at the home of defendant on the night of December 6, 1921; second, when he testified that defendant was playing a phonograph on the evening of December 6, 1921, when Wheaton came to his house; and third, when he testified that Wheaton spent the evening of December 3, 1921, at defendant's house. The fact that Wheaton spent the evening of December 3d at defendant's house was brought out on cross-examination

presumably for the purpose of testing the recollection of the witness of events transpiring on or about December 6, 1921, and on cross-examination defendant testified that Wheaton spent the evenings of December 3d, 4th, and 5th at defendant's house. Defendant's testimony relative to the playing of the phonograph on the evening of December 6th was substantially as follows:

"I was playing the phonograph when the defendant (Wheaton) came in, and was sitting down reading a book. I had commenced playing the phonograph when he came in. The phonograph was playing when he rapped on the door. After we played a piece on the phonograph, we played another, and then talked a while."

It is now claimed by appellant that his testimony relative to the playing of the phonograph on the evening of December 6th, and that Wheaton spent the evening of December 3d at defendant's house, was upon collateral matters in the Wheaton-Rowell Case; that this testimony was not material to the charge involved in the Wheaton-Rowell Case, and therefore no charge of perjury could be based upon such testimony. The rule upon this subject is given in Ruling Case Law as follows:

"While it is necessary that the false testimony be material to the issue being tried or to the point of inquiry, it is not necessary that it be material to the main issue. The test is whether the statement made could have influenced the tribunal on the issue before it. It is sufficient if it is material to any proper matter of inquiry, and is calculated and intended to prop or bolster the testimony of a witness on some material point, or to support or attack the credibility of such a witness. It may be laid down as a general rule that any testimony which is relevant in the trial of a case, whether to the main issue or some collateral issue, in so far material as to render a witness who knowingly and willfully falsifies in giving it guilty of perjury. It is but common knowledge that it frequently occurs in the trial of causes that inquiries are made of witnesses touching matters which do not directly concern the commission of the acts which constitute the offense, yet such inquiries and answers may be material and highly important to the end that the triers of the fact may properly and intelligently weigh the testimony in the cause. If it is so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material by giving weight or probability to, or detaching from, the testimony of a witness thereto, it is sufficient and makes the testimony material." 21 R. C. L. p. 259.

The courts of our own state have expressed this rule in the following language:

"The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or prob-

ability to the testimony of a witness testifying thereto, or otherwise." *People v. Barry*, 63 Cal. 63; *People v. Senegram*, 27 Cal. App. 302, 149 Pac. 786; *People v. Phillips*, 56 Cal. App. 291, 205 Pac. 40.

Measured by the rule laid down by these authorities, we are of the opinion that the testimony of the defendant relative to the playing of the phonograph and to the whereabouts of Wheaton on December 3d were upon material issues raised in the Wheaton-Rowell Case, and therefore it was sufficient upon which to base a charge of perjury.

For the error in permitting the confessions of Wheaton and Rowell to be read to the jury, the judgment and order denying a motion for a new trial are reversed.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. Rehearing denied.

LAWLOR, J. [3] I concur in the order denying the petition for a hearing herein, solely on the ground that under the decisions we are bound by what appears on the face of the opinion. *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440.

64 Cal. App. 249

GORNSTEIN v. PRIVER. (Civ. 4251.)

(District Court of Appeal, Second District, Division 2, California. - Oct. 26, 1923.)

1. Carriers ⇐235—One renting freight trucks for carriage of passengers held not common carrier.

One occasionally renting motor trucks, used by him in his general transfer business for transferring freight, to carry passengers to and from picnic grounds on Sundays and holidays, held not a common carrier of passengers, but a private carrier for hire.

2. Carriers ⇐280(1)—Care required of private carrier for hire stated.

A private carrier for hire is not bound to exercise the highest degree of care for the safety of his passengers, as in the case of a common carrier, but must exercise ordinary care and diligence.

3. Master and servant ⇐301(4)—Private carrier liable to passengers for injuries by driver's negligence.

One letting a vehicle for hire in charge of a driver in his employ to persons who control the movements thereof, only in so far as to direct the driver where to go, is liable to passengers for injuries due to the driver's negligence, though he exercised due care to employ a careful and prudent servant.

4. Municipal corporations — 706(3)—Running down vehicle ahead evidence of negligence.

The mere fact that a truck driver runs down a vehicle ahead of him on a highway crowded with other vehicles is some evidence that he was driving at too high a rate of speed, or was following too closely the machine ahead.

5. Municipal corporations — 706(6)—Negligence of driver of truck colliding with truck ahead question of fact.

Whether the driver of a truck colliding with a truck ahead was negligent depends on the circumstances, and is almost invariably a question of fact for the jury, or trial judge sitting without a jury.

6. Carriers — 318(7)—Finding that driver of truck colliding with truck ahead was negligent held warranted.

A finding that the driver of a truck, rented for transportation of passengers, and colliding with one ahead, which suddenly stopped, was negligent, *held* warranted, in the absence of evidence that the collision was due to the negligence of the other driver; the driver of the rear truck being bound to anticipate that the other might be obliged to stop suddenly and to have his machine under control.

7. Appeal and error — 1071(6)—Failure to find that defendant was not common carrier held not injurious.

Where the court, on sufficient evidence, found that the driver of one of two trucks rented out by defendant for carriage of passengers was negligent and that injured passenger was not contributorily negligent, thus necessitating a judgment for plaintiff, defendant was not injured by the court's failure to find expressly that he was not a common carrier, though plaintiff alleged that such was defendant's status.

8. Appeal and error — 1071(6)—Failure to find on issues not reversible error, where findings made controlling.

Where findings on certain facts necessarily control the judgment, failure to find on other issues is not reversible error.

9. Negligence — 82 — Contributory negligence defeats recovery.

Plaintiff cannot recover for defendant's negligence, if his own negligence contributes in any degree to the result.

10. Master and servant — 301(4)—Knowledge and acts of drivers of rented truck are those of owner.

The owner of motor trucks rented for the carriage of passengers must be held to have been present, at the time of an injury to a passenger, in the persons of his servants, whose knowledge and acts are his.

11. Carriers — 336—Passenger on truck held not contributorily negligent in sitting with legs hanging over end with driver's permission.

One of several passengers on a truck, rented for the carriage of passengers, permitted to seat themselves with their legs dangling over the end, from which the staves were taken out,

with the knowledge of the driver, who gave no warning of danger, *held* not guilty of negligence contributing to her injury, when another rented truck, which was following collided with that on which she was riding.

12. Carriers — 331(6)—Truck passenger sitting with legs hanging over end held not to have assumed risks of danger created by negligence.

One seating herself on a truck, on which she was a passenger, with her legs hanging over the end, with the owner's tacit approval and consent, did not assume the risk of danger created by the negligence of the owner's drivers in a collision, though she assumed the risks ordinarily incident to such position; the contract of carriage not being dissolved, so as to relieve the owner, as a private carrier for hire, from his duty to exercise ordinary care for her safety.

13. Carriers — 305(4)—Negligence of truck driver held sole proximate cause of injury to passenger on truck ahead.

Failure of the driver of a passenger carrying truck colliding with a truck ahead to exercise such reasonable care in regulating the speed of his vehicle and its proximity to the other as was necessary to protect a passenger seated on the latter with her legs hanging over the end, *held* the sole proximate cause of her injury; her perilous position being only the condition or remote cause.

14. Negligence — 68—Care required as against negligence.

That certain conduct is customary or usual does not necessarily absolve one so acting from a charge of contributory negligence; the test being what an ordinarily cautious, prudent, and careful person would have done under the same circumstances.

15. Negligence — 68—Duty to look out for danger.

It is not contributory negligence to fail to look out for danger, where there is no reason to apprehend any.

16. Carriers — 331(6)—Passenger seated on truck with legs hanging over end held not contributorily negligent in not observing imminence of collision with another truck.

A passenger seated on one of two passenger carrying trucks, with her legs hanging over the end, *held* not contributorily negligent in permitting her attention to be diverted while conversing with a fellow passenger, with the result that she did not see the imminence of a collision with the other truck; she not being required to exercise extraordinary precaution to anticipate negligence, but only such ordinary precaution as persons of reasonable care and prudence usually exercise.

17. Negligence — 67—One may assume performance of duty owing by another.

One to whom a duty of care is owing by another may assume that the latter will perform it, and, in the absence of reasonable ground to think otherwise, is not negligent in assuming that he will not be exposed to a danger, which can arise only by violation of such duty.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edna Gornstein against Max Priver. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Baird and J. A. Adair, both of Los Angeles (Henry O. Wackerbarth, of Los Angeles, of counsel), for appellant.

Will H. Light and Wm. T. Blakely, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for personal injuries alleged to have been sustained through the negligence of defendant while plaintiff was a passenger on an auto truck owned by defendant and operated by one of his servants. The answer denies the allegation of negligence on defendant's part, and pleads contributory negligence on the part of plaintiff. The case was tried by the court without a jury. Findings upon all the material issues were in favor of plaintiff, and judgment was entered for her accordingly. From that judgment the defendant appeals.

Defendant, who was engaged in the general transfer business in the city of Los Angeles, owned motor trucks which were used by him in that business for the transfer of freight. Occasionally, on Sundays and holidays, he would rent one or more of the trucks to carry passengers to and from picnic grounds. Plaintiff was a member of the Sinai Chapter of Young Israel. On June 6, 1920, she and certain other members of that religious organization were passengers on two of defendant's trucks, which had been hired of defendant for the purpose of carrying plaintiff and her companions to and from a place called Fish Canyon, where a picnic was to be held. Defendant furnished the driver for each truck. At the request of the person who was in charge of the arrangements on behalf of the picnickers, defendant's servants took the staves off the sides of the trucks, and a number of the passengers, including plaintiff, sat on the floor in such a manner that their legs hung over the sides or end of the truck on which they were riding. They sat thus both going to and returning from the picnic grounds. Plaintiff and three others sat in this manner on the rear of the truck on which they were riding—their legs hanging over the end. On the return trip one of the trucks followed the other; the rear truck being at times a block behind the one ahead and at other times in closer proximity to it. Plaintiff was seated on the foremost truck. As the two vehicles entered the city of Los Angeles, they proceeded along North Broadway, a much-traveled thoroughfare along which electrically propelled street cars are operated. The truck on which plaintiff was seated proceeded for some distance behind a street car traveling in the same direction. As the street car approached College street it stopped to dis-

charge passengers. As it came to a stop the foremost truck, the one on which plaintiff was seated, stopped suddenly. Its driver testified that he came to a stop "quite snappy"—to use his own language; that he stopped to permit persons to get on and off the street car; that he gave the usual signal of his intention to stop, but that he didn't know whether anybody behind him saw it; that he traveled a distance of about 20 feet from the time he started to stop his truck until it came to a full stop; that a truck as large and as heavy as the two which were that day hired of his employer cannot ordinarily be stopped in a distance short of this length; that the length of each truck was about 20 feet; that a second or two after his truck came to a standstill it was bumped into by the one behind it. The driver of the rear truck was not produced as a witness. It seems he could not be found at the date of the trial. In the collision plaintiff received injuries to her feet and legs before she could raise them to a place of safety. The part of the floor of the foremost truck which plaintiff occupied was close to that side of the truck, which was on her right as she faced the rear. Three of her companions who sat with her on the rear of the truck were seated on the floor to her left. Just prior to the impact plaintiff was leaning over the lap of the person seated next to her, talking to the second person to her left. As she finished her conversation with that person she turned her head toward the direction from which the second truck was coming, and then observed for the first time that it was about to collide with the truck on which she was seated—too late, however, to enable her to draw up her legs and avoid the injury.

Appellant's principal contentions are: (1) That there was no showing of negligence on his part; and (2) that the evidence affirmatively and indisputably shows that plaintiff was guilty of contributory negligence.

[1-3] Taking all the evidence together, it clearly is sufficient to sustain the finding that the driver of the second truck—a driver who was furnished by defendant for the occasion—was guilty of negligence, in that he failed to exercise ordinary care to avoid the collision. Defendant, it is true, is not a common carrier of passengers, and his liability, therefore, is not that of a common carrier. He was, however, on this occasion a private carrier for hire. Hutchinson on Carriers, vol. 1, § 35. While a private carrier for hire is not bound to exercise the highest degree of care for the safety of his passengers, as in the case of a common carrier, he is bound to exercise ordinary care and diligence to carry his passengers safely. Hutchinson on Carriers, vol. 1, § 37; Forbes v. Reinman, 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164. And if he lets a vehicle for hire, in charge of a driver in his employ, to persons who control the movements of the machine

only so far as to direct the driver where to go, he is liable to the passengers for injuries due to the driver's negligence, although he may have exercised due care to employ a careful and prudent servant. *Forbes v. Reinman*, supra; *Meyers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N. W. 184, 44 L. R. A. (N. S.) 113.

[4-6] The driver of the truck which was following the one on which plaintiff was seated, and who unquestionably must have seen the street car which the truck ahead of him was following, as well as the manner in which plaintiff was seated on the foremost truck, was bound to anticipate that the truck which he was following might be obliged to come to a sudden stop if compelled to do so by the street car or by any of the numerous other vehicles which were using the highway in common. Observing the manner in which plaintiff and her companions were seated on the truck ahead of him, it was his duty to have his machine under such control that he would be able to avoid a collision if the foremost truck were obliged to come to a halt by reason of the stopping of the street car which it was following. It must be apparent that in operating an auto truck over a public street the driver, under ordinary circumstances, cannot run down a vehicle proceeding in the same direction without having been negligent in the operation of his own vehicle, unless it appears that the collision was due to the negligent conduct of the driver of the other vehicle, which is not the case here. The mere fact that he does run down the vehicle ahead of him furnishes some evidence that he either was traveling at too high a rate of speed for a highway crowded with other vehicular travel or that he was following too closely the machine ahead of him. See *O'Connor v. United Railroads*, 168 Cal. 47, 141 Pac. 809. True, the mere fact that a vehicle is moving in close proximity to another one ahead of it, and keeping up with it, does not of itself constitute negligence per se; but whether in any particular case the operator of the rear vehicle is negligent if he drives his machine so as to cause a collision with the one ahead depends upon all the circumstances surrounding the happening of the accident, and almost invariably presents a question of fact for the decision of the jury or of the trial judge where, as here, the case is tried without a jury. Our conclusion is that the lower court was warranted in finding that defendant's driver was guilty of negligence.

[7, 8] Appellant was not injured by the court's failure to find in so many words that he is not a common carrier—even though plaintiff did allege in her complaint that such was defendant's status. As a private carrier for hire, defendant was liable for injuries to his passengers proximately caused by his own or his servant's ordinary negligence. Upon evidence sufficient to justify

it, the court found that defendant's driver was guilty of negligence—that is, that he failed to exercise ordinary care. This finding of negligence, coupled with the finding that there was no contributory negligence, necessitated a judgment for plaintiff; and the rule is that, where the findings on certain facts necessarily control the judgment the failure to find upon other issues does not constitute reversible error. *Southern Pacific R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783.

[9-11] Appellant's theory of contributory negligence is based upon the claim (1) that plaintiff placed herself in a position of danger by sitting with her legs hanging over the edge of the truck, and (2) that, because she leaned over and talked to the person seated near her on the rear of the truck, she negligently failed to use her senses to perceive the impending danger.

The general rule that a plaintiff cannot recover for the negligence of the defendant if his own want of care or negligence has in any degree contributed to the result is of course indisputable. But we do not think the circumstances here indicate any want of ordinary care on the part of plaintiff. In disposing of this question, we must keep in mind that as to the passengers on the trucks defendant must be held to have been present in the persons of his servants, and that what the latter knew and did he knew and did. Defendant's bookkeeper testified that it is his employer's custom to furnish the trucks with the staves taken out, when that is the wish of the persons hiring them. Defendant's servants not only knew that the staves were taken off these trucks, but, without giving any warning, admonition, or suggestion of danger, they permitted plaintiff and the other members of the picnic party to seat themselves on the edges of the trucks with their legs and feet dangling over the sides. By their silence, as well as by their acts, defendant's servants threw plaintiff and her fellow passengers off their guard and gave them reason to believe that their positions on the trucks were not perilous. The effect of the conduct of defendant's servants is the same as if they had expressly invited plaintiff to ride on the truck in the manner that she did, and had assured her that it was a suitable and safe way for her to seat herself. *Clark v. Eighth Ave. Ry. Co.*, 36 N. Y. 135, 136, 93 Am. Dec. 495.

[12] If plaintiff was imprudent in seating herself as she did, then, while she may be deemed to have assumed all the risks of danger ordinarily incident to such position of peril, she did not assume the risk of danger created by the negligence of defendant's drivers in their operation of the trucks. Her position on the truck, however perilous it may have been, was taken with defendant's tacit approval and consent, and it did not

dissolve the contract of carriage. It did not sever plaintiff's relation of passenger to defendant as a private carrier for hire. Nor did it relieve defendant from that duty of protection which he owed plaintiff as a passenger on one of his trucks. For her safety while she was such passenger, defendant owed plaintiff the right to ordinary care on the part of his servants; that being the degree of care which is due by a private carrier for hire and was the degree of care which plaintiff was entitled to demand and to expect. In other words, though she assumed all the risks ordinarily incident to the position in which she seated herself on the truck, whether it was known to her to be dangerous or not—such risks, for example, as might be due to the ordinary and usual swaying of the truck or its ordinary and usual movements—still she did not forfeit her right to exact from defendant and his servants the same care to which she would have been entitled had she taken the safest seat on the vehicle. See *Willmott v. Corrigan, etc., Ry. Co.*, 106 Mo. 535, 17 S. W. 490. Had plaintiff sustained injury solely because of the position in which she had seated herself, and without any negligence on the part of defendant's drivers in their operation of the trucks, she probably could not have recovered any damages from defendant. Thus, for example, if, during the usual and ordinary movements of the truck on which she was riding and without any negligence on the part of defendant's drivers in their management of the machines, plaintiff, solely by reason of the position which she had taken, had been bounced off the truck, she probably would have had no remedy against defendant, for the very good reason that in that case she would have to attribute her injury solely to her own voluntary conduct. That would be one of the risks ordinarily incident to plaintiff's position on the truck. But, while assuming risks of that character, plaintiff did not assume the risk of danger created by the negligent misconduct of defendant's drivers; and for injury caused by such misconduct defendant is liable.

[13] As we have stated, plaintiff's position must have been observed by the driver of the rear truck. The care which the law demanded of him was commensurate with the peril incident to the position in which he knew that plaintiff had placed herself, and it was his duty to exercise such reasonable care in regulating the speed of his vehicle and its proximity to the truck ahead as might be necessary to protect plaintiff from injury during all the time that she was a passenger on the foremost truck. His failure to exercise such reasonable care in the operation of his truck must be considered the sole proximate cause of the injury, notwithstanding the perilous position in which

plaintiff, with defendant's permission, had placed herself. Her position on the truck was only the condition—the remote cause of the injury. See *Willmott v. Corrigan, etc., Ry. Co.*, supra—a case the reasoning of which is applicable here, notwithstanding the defendant in that case was a common carrier; for the only difference between the duty owing to his passenger by a common carrier and the duty owing by a private carrier for hire is in the degree of care which each must exercise, the one owing to his passenger the utmost care and diligence, the other owing but ordinary care and diligence, each being liable, however, for injuries proximately caused by his failure to exercise that degree of care which his passenger may rightfully demand and expect of him.

This action bears no resemblance to those cases in which it is held that a passenger on a railroad car is guilty of contributory negligence if he places his arm or head or some other part of his body outside of the car window and is injured by being struck by some obstacle which is properly near the railroad tracks—such, for example, as a woodpile situated near the rails. In those cases it is held that the passenger has no remedy for the reason that his injury is attributable solely to his own voluntary act. By his conduct he assumes all such risks as arise from the usual and ordinary movements of the car. In the instant case it was not the usual and ordinary movements of the truck, but the active negligence of defendant's driver which caused the injury. And that, as we have seen, was a risk which plaintiff did not assume. On the contrary, the relation of carrier and passenger, with all that those terms connote, continuing up to the time of plaintiff's injury, she was entitled to rely upon the assumption that no harm would come to her through any negligent misconduct on the part of defendant or his servants.

[14-16] Was respondent guilty of contributory negligence because she permitted her attention to be diverted while conversing with her fellow passenger, with the result that she did not see the imminence of the collision in time to draw her legs up out of harm's way? To engage in animated conversation with each other, with consequent inattention to many of the happenings about them, is conduct which doubtless is usual and customary with young folk and merry-makers returning from a day's outing in the country. Of course, the mere fact that such conduct may be customary or usual would not necessarily absolve plaintiff from the charge of contributory negligence, the test to which her conduct must be put being this: What would an ordinarily cautious, prudent, and careful person have done under the same circumstances? But if we put her conduct to that test we cannot say, as a mat-

ter of law, that her inattention was contributory negligence. It is not contributory negligence to fail to look out for danger where there is no reason to apprehend any. *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549. Here the defendant owed plaintiff a particular duty. He and his drivers were in duty bound to exercise ordinary care not to injure plaintiff, who had the right to expect that reasonable care and caution would be exercised by the drivers to avoid a collision of one truck with the other. She was not required to exercise extraordinary precaution to anticipate the possibility of negligence on the part of defendant or his servants. She was required to use only such ordinary precaution as persons of reasonable care and prudence usually exercise under the same circumstances.

[17] The general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and, in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it. 29 Cyc. pp. 516-517. See, also, *Robinson v. Western Pacific R. Co.*, 48 Cal. 421; *Harris v. Johnson*, 174 Cal. 58, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560. A like principle is stated in *Ruling Case Law* as follows:

"While a person who asserts a right of recovery on the ground of negligence must be prepared to show that he exercised vigilance to discover and avoid the danger embodied in the offending instrumentality, he excuses himself for an omission to take active measures—such as looking, listening, and making inspections—by proof that the defendant owed to him a duty of care, and that he relied upon the performance thereof. The presumption is that duties fixed by law or custom will be discharged in due form; and every one to whom a duty is due has a right to assume that it will be performed—he need not anticipate negligence on the part of his obligor, even though the latter has been negligent on other occasions." 20 R. C. L. title Negligence, § 101.

The authorities cited by appellant are not in point. Most of them are cases involving the application of the universally recognized doctrine that where no special duty of care is owing by the defendant upon which the plaintiff is entitled to rely, ordinary prudence requires the plaintiff to make use of his faculties of seeing and hearing before attempting a dangerous act or operation, such, for example, as crossing the tracks of a steam railroad. But that is not this case.

One or two other points are suggested by appellant. Suffice it to say that we have examined them with care, but do not think

they possess sufficient merit to be entitled to any special discussion.

The judgment is affirmed.

We concur: WORKS, J; CRAIG, J.

64 Cal. App. 283

MARSHALL et al. v. BERNHEIM et al.
(Civ. 4565.)

(District Court of Appeal, First District, Division 2, California. Oct. 30, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

Evidence ~~to~~ 418—Principal and agent ~~to~~ 145 (4)—Principal liable for contracts in agent's name where third party does not elect to hold agent alone; parol evidence admissible to show purchases from agent under written contract intended to hold both agent and principal.

Though a written contract for sale of an automobile was made by agent in his own name in principal's presence, if purchaser intended to take both principal and agent as obligors, there was no election to hold the agent alone, thereby releasing principal, and such intention may be shown by parol.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by V. L. Marshall and another against J. H. Bernheim and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Brownstone & Goodman, of San Francisco, for appellant.

A. S. Newburgh and E. J. Mooslin, both of San Francisco, for respondents.

NOURSE, J. Defendant Bernheim appeals from a judgment rendered against him and defendant Taylor in the sum of \$2,833.19. Defendant Taylor failed to appear in the action, and judgment went against him by default. Defendant Bernheim concedes that the sum of \$472.30 was due from him to plaintiffs, and on the trial offered to have judgment entered against him for that amount.

The complaint is in two counts. The first is for the recovery of money paid under a written agreement for the purchase of an automobile upon the ground that the vendors therein did not have title and the consideration for which the money had been paid had wholly failed. The second is for money had and received. The automobile which was the subject of the contract was stolen from its lawful owner in Chicago on May 29, 1920, and taken to San Francisco, where it was sold to defendant Taylor, a jewelry salesman. Thereafter, and on July 10, plaintiffs purchased the automobile under a written lease or conditional sale contract with Taylor, and

it was delivered to them. The following October it was taken from them in a replevin action brought by the owner against the plaintiffs and defendants here, and in May, 1921, plaintiffs instituted this action for recovery of the money paid on account of its purchase. The complaint alleges that on the 10th day of July, 1920, "the defendant Verne Taylor, acting for himself and as the agent for the defendant J. H. Bernheim, entered into a written agreement with plaintiffs, wherein and whereby defendants agreed to sell plaintiffs said automobile" for \$4,250, \$2,250 to be paid upon the execution of the agreement and the remainder in ten monthly installments of \$200 each; plaintiffs to have the use and possession of the automobile, but title to remain in seller until fully paid for. Bernheim's answer denies that he was a party to the agreement alleged in the complaint, or that defendant Verne Taylor, as agent for him, or in any other capacity on his behalf, entered into an agreement with plaintiffs, but admits that defendant Taylor and plaintiffs entered into such an agreement. He also, by way of separate defense, alleges the payment by plaintiffs to Taylor at the time of the execution of the agreement of the sum therein provided for as a first payment; that the contract and automobile were thereafter on said day assigned by Taylor to him; and that on the 12th day of August and the 10th day of September following plaintiffs made payments to him on account of the contract. These two latter payments are the amounts for which he admits liability. The trial court found, in accordance with the allegations of the complaint, that "defendant Verne Taylor, acting for himself and acting for and on behalf and as agent of the defendant J. H. Bernheim," entered into the said agreement with plaintiffs, that defendant Bernheim delivered the automobile to plaintiffs, and that all the payments were made to him. The contract was introduced in evidence by plaintiffs. It is executed in the names of defendant Taylor, as lessor, and plaintiffs as lessees, and bears on the back an assignment of the same date to Bernheim & Levy. There is nothing on the face of the instrument to indicate that Taylor was acting for Bernheim or for any one other than himself. But to support their claim that the contract was made with Taylor as the agent of Bernheim, plaintiffs introduced evidence over the objection of defendant that Bernheim represented to them before the contract was made that he owned the automobile. The evidence discloses that Bernheim's connection with Taylor and the automobile began about July 1, 1920, when he (an automobile finance broker), through the agency of one Stackhouse, loaned Taylor \$1,500 and took as security a lease contract on this automobile. Later in July Stackhouse (who was treated by the trial court as the agent of Bernheim) entered into negotiations

with plaintiffs for the purchase of the automobile by them. As a result, on July 10th, Stackhouse, plaintiff Marshall, and defendants Bernheim and Taylor all met at the store where Taylor was employed, and the contract referred to between Taylor and plaintiffs was entered into.

Appellant argues that, as the respondents entered into the contract with Taylor in the presence of Bernheim, and with full knowledge that Bernheim was the principal, they cannot now hold Bernheim liable under it. The case of *Ferguson v. McBean*, 91 Cal. 73, 27 Pac. 518, 14 L. R. A. 65, is cited as authority for this position. There can be no doubt that this case fully supports the rule on which appellant relies. The theory of the *Ferguson* Case was that to permit a party to change his written contract in order to hold a known but unnamed principal would violate the parol evidence rule. Though the rule is not accepted generally in other jurisdictions, it has been followed in this state until the recent case of *Geary Street, etc., R. R. Co. v. Rolph*, 189 Cal. 59, 207 Pac. 539, where the Supreme Court implied that it should be qualified to the extent that it must appear that the contracting party elected to hold the agent instead of the principal. The *Geary Street* Case involved an oral contract and the Supreme Court has left uncertain the application of the rule in a case involving a written contract. Unless the execution of the contract with the agent when the principal is known and present is in itself evidence of an election to hold the agent, we cannot imagine a case in which the election could be proved by other than parol evidence. Here the trial court admitted parol evidence to show that the respondents dealt with Taylor as the agent of the appellant, and it found that Taylor executed the contract "acting for himself and acting for and on behalf and as the agent of the defendant J. H. Bernheim."

The case at bar is on all fours with the *Ferguson* Case and ordinarily we would feel bound to follow that decision, as we did upon the original hearing. That case has not been overruled by the Supreme Court, but the decision in the *Geary Street* Case is of such a character that we cannot but conclude that, if the Supreme Court were disposed to pass on the question directly, it would disapprove the rule announced in the *Ferguson* Case.

In the *Geary Street* Case the Supreme Court say (189 Cal. 66, 207 Pac. 542):

"That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract."

From this we assume that, if the trial court should find, upon substantial evidence, that the obligee, at the time the contract was made, elected to hold the agent rather than the principal, the appellate court would be bound by the finding; but where, as here, the trial court found that the obligee took both the agent and the principal, there was no election at the time the contract was made, and, of course, we are bound by that finding. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 243

PEOPLE v. BETTENCOURT. (Cr. 728.)

(District Court of Appeal, Third District, California. Oct. 26, 1923.)

1. Indictment and information $\S$ 41(1)—Failure to file commitment until after information held not ground for setting aside information.

Failure to file a commitment of magistrate with the clerk of the Supreme Court or to deliver it to the officer having custody of accused until after the information had been filed in the superior court, as required by Pen. Code, $\S$ 876, was not ground for setting aside the information, where the commitment had been duly made.

2. Criminal law $\S$ 511(6)—Larceny $\S$ 64(1)—Proof of possession of stolen goods sufficient corroboration of accomplice's testimony, though not alone sufficient to support conviction.

Proof of possession of stolen articles by accused a few days after the commission of a theft with which he was charged is sufficient corroboration of testimony of an accomplice to satisfy Pen. Code, $\S$ 1111, and sustain conviction, though such possession alone is not sufficient.

3. Criminal law $\S$ 829(1)—Denial of requested charges covered by others given not error.

Denial of requested charges covered by others given not error.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

J. J. Bettencourt was convicted of grand larceny, and he appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was accused by the district attorney of Butte county of the crime of grand larceny, in that, on the 1st day of May, 1923, he did then and there "wrongfully, willfully and feloniously steal, take and carry away one magneto of the value of \$90, * * * the personal property of Cal Jackson," etc. The jury convicted him of the charge so made, and he appeals

from the judgment of conviction and the order denying his motion for a new trial.

The points urged for a reversal of the judgment and the order appealed from are: That error was committed in the order denying the defendant's motion to set aside the information on the ground that he was not legally committed by a magistrate, "and that no commitment was on file or in the clerk's office at the time the information was filed against the defendant"; that the evidence was insufficient to justify the verdict; that error was committed in the act of the court in refusing to give certain instructions preferred by the defendant.

[1] The motion to set aside the information was properly denied. The showing made on the motion was that the defendant was given a preliminary hearing on the charge stated in the information before the justice of the peace of Oroville township, Butte county, acting as a committing magistrate, on the 17th day of May, 1923; that, upon the conclusion of the taking of the depositions, the magistrate made an order committing the accused for trial in the superior court for the crime with which he was charged in the complaint filed with the magistrate; that on said day the magistrate entered the order of commitment upon his docket and indorsed the same on the complaint. It was further shown at the hearing of said motion that the depositions were filed by the phonographic reporter who took them with the clerk of the superior court. It was made to appear, however, that it was not until after the information against the defendant was filed in the superior court that the commitment was either filed with the clerk of said court or even delivered to the sheriff, to whose custody a person held for trial on a felony or a high misdemeanor charge must, together with the commitment, be delivered (Pen. Code, $\S$ 876), and it is for this reason that the attorney for the defendant made the claim in the court below, in support of his motion to set aside the information, and which he renews on this appeal, that the district attorney prematurely filed the information, or, in other words, filed it before there existed the legal groundwork therefor, and that therefore the filing of said accusatory pleading was a futile and nugatory act. Practically the same point has been before the higher courts on several different occasions in the past, and it has in each instance been held, and we doubt not properly so, that it possessed no merit.

In *People v. Wallace*, 94 Cal. 499, 29 Pac. 950, it is said, in reply to the proposition that the district attorney was without authority to file the information because the commitment was not indorsed "upon the complaint" or upon any of the other depositions taken before the magistrate:

"It is doubtless true that the order holding to answer must be in writing, * * * but when, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary to authorize the district attorney to file an information against a defendant for the offense named in the order."

In *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896, the information was filed in the superior court on March 9, 1896, and the depositions, transcript, and order of commitment were not returned to the superior court by the examining magistrate until March 10, 1896. The defendant moved to set aside the information upon the same ground as the motion by the defendant here is based upon, said motion being urged for precisely the same reason as that by which it is sought to support the motion here. The Supreme Court in that case disposed of the point as follows:

"The question arising under the first subdivision above stated [subdivision 1, § 995, Pen. Code] is, When is the defendant legally committed? We think that occurs when the magistrate has acted judicially, and has made and signed the order of commitment. His judicial functions then cease, and the return of the depositions and order of commitment is a mere ministerial duty."

The court in that case then quotes approvingly the above excerpt from the case of *People v. Wallace*, supra. See, also, *People v. Sac. Butchers' Ass'n*, 12 Cal. App. 471, 479, 480, 107 Pac. 712.

[2] The contention that the jury was not justified in arriving at and returning a verdict of guilty upon the evidence before them is based upon the proposition that the chief inculpatory testimony introduced against the accused was given by an accomplice of the latter in the crime charged, and that said testimony was not corroborated as is required by section 1111 of the Penal Code.

It appears that during the night of the 1st day of May, 1923, the magneto of a tractor belonging to Calvin Jackson, a farmer living about two miles south of Palermo, in Butte county, was removed and taken away by some party or parties unknown to said Jackson, and without his consent. The magneto was of the value, approximately, of \$85, according to the testimony of Jackson. The theft was reported to the sheriff of Butte county, who immediately proceeded to investigate the matter, and, finally, and on the 8th day of May, 1923, armed with a search warrant, and accompanied by a deputy, went to the rooms occupied by the defendant at 106 Washington avenue, Oroville, and, after making a search found the magneto among other articles under a bathtub in one of his rooms. The defendant was at the house at the time the officers called

there, but remained in a room adjoining the one in which the sheriff found the magneto while that officer was searching said room. The defendant said nothing and made no explanation to the officers as to how he acquired possession of the stolen article. He was arrested at the time the magneto was found and taken to and confined in the county jail.

At the trial Jackson identified the magneto by the number of the same. He testified that he had had considerable experience in the use of magnetos, and that he knew that each magneto bore a different number.

A young man by the name of Cowan, who stated that he was 20 years of age, testified that he had known the defendant for some time, having first made his acquaintance in 'Red Bluff'; that late in the afternoon of the 1st day of May, 1923, he visited the defendant at his rooms at 106 Washington avenue, in Oroville; that the defendant remarked to him that he (defendant) had been out in the country and had seen the magneto on Jackson's tractor and suggested that "we would go and get it that night"; that he, upon the request of the defendant, accompanied the latter in his automobile during said night to the place on Jackson's farm where the tractor had been left by its owner that day. He stated that when they arrived at the spot where the tractor was standing the defendant told him to get out and secure the magneto, and that he got out and proceeded to the tractor and to remove the magneto therefrom; that the moment that he alighted from the automobile the defendant drove on some distance and waited for a few minutes, when he returned to where the tractor was, but the witness had not then succeeded in removing the magneto; that the defendant again drove away from where the tractor was, and a short while thereafter returned, the witness by that time having removed the magneto; that he passed the magneto over to the defendant, who threw it into the back part of the automobile, and they then started on their return to Oroville. Arriving at Oroville, the defendant went to his rooms and therein left the magneto. The witness identified the magneto which was offered in evidence as the one which had been taken by him from the Jackson tractor.

The defendant did not take the witness stand.

We think that the fact that the defendant had possession of the stolen article within a few days after the commission of the larceny is sufficient corroboration of the testimony of the accomplice to measure up to the requirements of section 1111 of the Penal Code. The rule is that, the crime having been proved, the corroboration of an accomplice must be such only as will tend to connect the defendant with the commission of

the offense. The defendant, as seen, did not testify in his own behalf, and neither at the time of his arrest nor at any time thereafter did he explain or attempt to explain how he secured possession of the magneto. It is true that the unexplained possession of stolen property by a party within a short time after the larceny has been committed is not by itself or alone sufficient to warrant a conviction of the accused of the asportation thereof; but it has never been held that the unexplained possession of stolen property does not afford an inference, slight though it may be, of the guilt of the accused. It is an incriminating circumstance which may be considered with any other incriminating facts and circumstances introduced in the case for the purpose of determining whether the defendant was guilty of the larceny of the property so possessed, and therefore is sufficient corroboration of the testimony of the accomplice in this case as to the defendant's connection with the commission of the crime. See *People v. Grundell*, 75 Cal. 301, 305, 17 Pac. 214; *People v. Wagner*, 36 Cal. App. 41, 171 Pac. 699.

[3] The instructions submitted by the defendant which the court refused to read to the jury, and which refusal it is here contended involved prejudicial error, were based upon section 1111 of the Penal Code, containing the statement that a person charged with crime cannot be convicted of the offense upon the uncorroborated testimony of an accomplice in the commission of the crime charged. The court in its charge fully instructed the jury upon that subject. In fact, the court used, substantially, the language itself of section 1111. The court further instructed the jury, in accordance with said section, that an accomplice was one "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." There was no necessity for repeating these instructions, and, therefore, the refusal to give the instructions upon the same subject preferred by the defendant did not involve error. No other points are presented.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

(64 Cal. App. 344.)

PEOPLE v. SMITH. (Cr. 1013.)

(District Court of Appeal, Second District,
Division 1, California. Nov. 5, 1923.)

1. Criminal law §1186(4)—Admitting evidence of similar offenses held prejudicial error.

In prosecution for selling intoxicating liquor, where evidence was admitted showing de-

fendant's offenses of the same character, on days other than the one charged, and defendant objected to such admission and made motion to strike, which was followed by his own denial of the alleged transactions, and by independent evidence tending to establish his innocence, an instruction that the testimony was received merely as a circumstance indicating the probabilities as to whether defendant did make the sale charged, did not remove the prejudice created, so that an affirmance could not be had under Const. art. 6, § 4½, on the ground that there was no miscarriage of justice.

2. Criminal law §1134(8)—Appellate court may review any question of law involved at trial, affecting substantial rights of defendant.

Pen. Code, § 1259, providing that on appeal by defendant the appellate court may review any question of law involved at trial, which affects substantial rights of defendant, on appeal from the judgment only, it may consider whether, in prosecution for selling intoxicating liquor, admitting evidence of other offenses, under instruction that they were received as a circumstance indicating whether defendant made the sale in question, was prejudicial.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Hugh Smith was convicted of selling intoxicating liquor, and he appeals. Reversed.

Shreve, Dorn & Shreve and B. F. Tyler, all of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted of the offense of selling intoxicating liquor contrary to the statute in such cases made and provided. He appeals from the judgment only.

[1] On the trial, over the objection of defendant, evidence was introduced showing the commission by defendant of offenses of the same character as that with which he was charged and occurring on separate days from the one specified in the information. This evidence was rebutted by several witnesses on behalf of defendant. A motion by defendant to strike out the testimony to which he had objected was denied by the court. In connection therewith and at the close of the case, among other instructions, the jury was charged that—

"That testimony was received, not for the purpose of establishing a separate misdemeanor or offense, but merely as a circumstance indicating what the probabilities are as to whether or not he did make the sale in question. * * * This is, as I say, that testimony as to those other sales or that other sale is merely for the purpose of helping you determine whether or not he did sell on the 4th day of February."

In the case of *People v. Morales*, 45 Cal. App. 553, 188 Pac. 58, the charge contained in the information was that on a certain date defendant had illegally sold alcoholic

liquors. On the trial of that case, as here, evidence of sales of alcoholic liquor on other days than that specified in the information was admitted over defendant's objection; and the court, after citing California authorities bearing upon the matter, reached the conclusion that the error was so prejudicial to defendant's rights as to require a reversal of the judgment. The cases of *People v. Amort* (Cal. App.) 212 Pac. 50, *People v. Clark*, 28 Cal. App. 670, 153 Pac. 719, and *People v. Dial*, 28 Cal. App. 704, 153 Pac. 970, uphold the same principle, although in the latter case (in which the authorities generally are reviewed), where it appeared that there was no denial by defendant of the commission of the offenses other than the one of which he was accused in the information, and that defendant's guilt was clearly established, under the provisions of section 4½ of article 6 of the Constitution, the judgment was affirmed on the ground that there had been no miscarriage of justice. The "saving grace" of the constitutional provision cannot be here invoked. Defendant used every means within his power in the way of objections to the admission of the evidence regarding other offenses, as well as by making a motion to strike the evidence, which was followed not only by his own denial of the alleged transactions, but also by independent evidence tending to establish his innocence thereof. Neither did the instructions given by the court to the jury remove the prejudice against defendant which must have been created by the reception of the objectionable evidence of such former sales of liquor by defendant. While it may be that without such evidence of other sales the case made out against defendant is strong enough to support the judgment, the great probabilities are that the evidence of other violations of the statute contributed to the verdict, if such evidence was not the controlling factor in its inducement. It is a dangerous practice, and one which is not in keeping with American ideals, to charge a man with one offense and on his trial therefor either to prove, or offer to prove, that he has at other times and places committed offenses of a nature similar to the one of which he is accused. There are certain cases in which the courts have held that, where the evidence of other offenses tends to establish a motive, or a system, or the inclination of the accused to commit a particular crime, or even for the purpose of establishing a fact material to the offense charged, such evidence is admissible; but, if such principle be once extended to cases which do not include anything involving the characteristics to which reference has been made, rights of persons may be placed in jeopardy by reason of the temptation on the part of prosecuting officers, where they may be entirely and honestly, although

perhaps erroneously, convinced of the guilt of a defendant, to use evidence tending to show the commission by the defendant of other crimes, for the purpose of assuring a conviction in the case on trial. To charge a man with murder, and on his trial to be permitted to prove the commission by him of a long line of other disconnected offenses, which course has been unanticipated by the defendant and regarding which he is utterly unprepared to make defense, might, and in many cases would, result in unjustly exacting the supreme penalty on slight evidence of guilt, or, on an accusation of a lesser offense, bring about an entirely undeserved punishment.

[2] Respondent's contention that the matter to which we have referred cannot be considered by this court on an appeal from the judgment is not well founded. Section 1259 of the Penal Code, among other things, provides that upon an appeal taken by the defendant—

"the appellate court may, * * * review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant."

Without considering other reasons urged by appellant, it is ordered that the judgment herein be, and the same is, reversed

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 213

ROSE v. PETALUMA & S. R. RY. CO. et al.
(Civ. 4749.)

(District Court of Appeal, First District, Division 1, California. Oct. 25, 1923.)

1. Master and servant — 403—Burden of proof on compensation claimant invoking saving clause of limitations.

A claimant under the Workmen's Compensation Act who invokes the saving clause of section 11, subd. (c), in aid of his claim, which would otherwise be barred by limitation, has the burden of bringing himself within such provision.

2. Master and servant — 398—Compensation claimant held not within provision suspending limitations; "totally disabled and bedridden."

A showing that claimant after injury was able to be about for some weeks, and that later, while at a hospital, he was up from one to three hours a day, precluded him from taking advantage of Workmen's Compensation Act, § 11, subd. (c), suspending the running of limitations in case of an employee who is "totally disabled and bedridden" as a result of his injury during the continuance of such condition, since the statute commenced to run and would

continue to run notwithstanding he may subsequently have become totally bedridden.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Totally Disabled.]

3. Limitation of actions ⚡76(1)—**Statute, having commenced to run, not suspended by subsequent disability.**

Generally, when the statute of limitations has commenced to run, it will continue, notwithstanding subsequent disabilities, in the absence of a saving clause.

4. Limitation of actions ⚡76(1)—**Disability to toll running of limitations must be continuing from first.**

One seeking to establish that he has been laboring under a disability which tolled the running of limitations against him must prove that the disability was a continuing one from the first, for the statute, having commenced to run, is not suspended by a subsequent disability.

5. Limitation of actions ⚡78—**Succession of disabilities cannot be relied upon to toll running of limitations.**

One disability cannot be tacked to another or a succession of disabilities relied upon to prevent the running of limitations against a claim.

Application by Frank Rose for a writ of certiorari to review an order of the Industrial Accident Commission in proceeding against the Petaluma & Santa Rosa Railway Company and the State Compensation Insurance Fund, denying him compensation. Award affirmed.

Emil G. Buehrer, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

Frank J. Creede, B. E. Pemberton, and Daniel W. Burbank, all of San Francisco, for respondent State Compensation Insurance Fund.

TYLER, P. J. This is a petition for a writ of review to determine the lawfulness of an original award made by the Industrial Accident Commission in favor of respondent railroad company and the State Compensation Insurance Fund, denying petitioner relief for an injury claimed to have been sustained while he was in the employ of respondent company. It is also sought by the petition to determine the lawfulness of an order denying an application for a rehearing in the matter of said award and the finality resulting from such denial.

Petitioner was employed by defendant company as a stevedore for about four years prior to December 13, 1921. On the last-named day, while loading freight on a steamer in San Francisco, he felt a sharp pain, so he claims, in his left side just below the ribs. Shortly thereafter he reported the matter

to the captain of the vessel, but continued in his work for the day. On January 9, 1922, he visited the office of defendant company and reported that he was not able to work, and demanded treatment for his injury. The superintendent of the floating equipment of the company had him removed to the Marine Hospital in an ambulance. On January 24, 1922, he was transferred from there to the Palo Alto Base Hospital, where he remained until February 28, 1922, when he was discharged. During the time he was at the Palo Alto hospital his limbs were paralyzed. Upon the day of his discharge he was using a wheel chair, and was brought to his home in San Francisco in an automobile.

The evidence shows that within a few weeks after his injury petitioner presented to a druggist a prescription dated December 27, 1921, calling for salve composed of oxide of mercury, ammoniated mercury, and zinc oxide, and a large piece of gauze, to be applied externally. The medical testimony indicates that petitioner was suffering from locomotorataxia, brought on through a venereal disease. It also appeared in evidence that during the entire term of his employment petitioner was delicate in health, and had often and from time to time left his work on this account. Other evidence contradicted petitioner's statement that he had complained of having been injured prior to the time he applied for compensation, it being admitted, however, that he had complained of stomach trouble.

The Commission made no finding upon the fact as to whether the applicant was or was not injured in the course of his employment, that body being of opinion that petitioner was barred in his claim by section 11 of the Compensation Act (St. 1917, p. 831), relating to the limitation of time within which proceedings for the collection of benefits might be instituted.

There is no substantial conflict as to the facts upon this question, and the present writ is brought to review the findings of the Commission upon this subject, and to obtain a judicial construction of the limitation provisions in the Workmen's Compensation Act. These provisions are found in section 11 thereof. Subdivision (b), subsec. 1, provides:

"Proceedings for the collection of the benefit provided by subsection (a) of section nine or for the collection of the disability payment provided by subsection (b) of said section nine must be commenced within six months from the date of the injury, except as otherwise provided in this act."

The application was not filed within the time there provided for, but petitioner seeks to bring himself within the exception found

at the end of subdivision (c) of section 11 of the act, which reads as follows:

"Provided, further, that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter."

The petition on its face shows that the claim was barred by the statute; and unless it can be said that the facts bring the case within the exception relied upon, the finding of the Commission must stand, the statute of limitations having been specially pleaded as a defense.

It will be noticed that the qualification to the limitation here relied upon provides that the statute is tolled against one who is totally disabled and bedridden. The findings of the Commission upon this subject are as follows:

"(2) The employee claims to have been injured on or about the said 13th day of December, 1921. The application was filed on the 24th day of January, 1923, more than six months thereafter. The claim is barred by the provisions of section 11 of the Compensation Act, relating to limitation of time to make claim, paragraph (c) of said section not rendering said section of the act inoperative, as the employee was not bedridden immediately after the time of the alleged injury."

[1, 2] We are of the opinion that the finding on the subject is fully supported by the evidence. Having invoked the exception to the statute, the burden was upon the applicant to show that he came within its provisions. *Wood on Limitations*, § 252. There is positive evidence to the fact that after applicant had received the claimed injury he was able to be about, and that in the month of January, 1922, some few weeks thereafter, he called at the office of the defendant company on crutches, at which time he was sent to the Marine Hospital. Other testimony shows that during the time he was confined at the hospital at Palo Alto he moved about and sat by the fire sometimes an hour and sometimes three hours a day. Under these circumstances the statute must be held to have commenced to run; for, even if it be conceded that the evidence shows that at some period during his illness petitioner was bedridden, it certainly does not show that he was so immediately after the accident.

[3-5] Petitioner makes the contention that, admitting that the statute had commenced to

run, it was immediately tolled when he became bedridden, and, having been thus arrested, it was suspended until six months after the intervening disability had terminated. The general rule upon this subject is that, when the statute of limitations has commenced to run, it will continue unless there is a saving qualification in the statute. When a right of action has accrued and there are parties competent to sue and be sued at that time, the period of limitations begins to run, and it will continue to run notwithstanding any subsequent disability. 25 Cyc. 1267. The invariable construction which has been given to a saving clause is that, where it is incumbent upon a plaintiff to prove that he labored under any disability, he must show that it was a continuing one from the first, for, as stated, when the statute has once commenced to run, no subsequent disability will arrest it. *Angell on Limitations*, §§ 196, 197. It is a settled rule of construction that the exemption period cannot be extended by the connection of one disability with another; in other words, a succession of disabilities cannot be tacked upon the first disability so as to prevent the operation of the statute.

One of the purposes of the time limit imposed by the act is to cause an early submission to the Commission of the claim of the employee growing out of his injuries, so that by the observation of its members and with the aid of expert testimony the Commission may determine not only the condition of the applicant at the time, but the probable future results of the accident. Another object is to give the responsible employer a chance to alleviate the condition of his servant, to the end that the latter may the sooner be restored to full capacity for labor and the former relieved of the duty of paying indemnity. *Ehrhard v. Ind. Acc. Com.*, 172 Cal. 621, 158 Pac. 193, Ann. Cas. 1917E, 465. Here petitioner presented his claim more than 13 months after the alleged injuries, and the evidence conclusively shows that he was not totally bedridden immediately after the accident, even conceding that at some period during the illness he might be considered so.

There is abundant evidence in the record to show that petitioner's case does not come within the saving clause of the act in question.

The award is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

64 Cal. App. 330

PEOPLE v. MILLER. (Cr. 1001.)

(District Court of Appeal, Second District, Division 1, California. Nov. 1, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

1. Larceny ⚡68(2)—Whether one obtaining property intended to pay therefor question for jury.

Where defendant at the time he obtained possession of property had no intention of paying for it, he is guilty of larceny, and the existence or nonexistence of that intention is for the jury.

2. Larceny ⚡57—Evidence justified finding that defendant did not intend to pay for hay purchased for cash.

In prosecution for larceny, evidence held to justify a verdict that defendant at the time he made purchases of hay for cash had no intention of paying for it.

3. Criminal law ⚡1152(1)—Requiring witness to answer through interpreter not reviewed unless there was abuse of discretion.

In prosecution for larceny where the court concluded that witness was unable to understand and express himself in the English language and that an interpreter was necessary, denial of defendant's request that witness answer certain questions directly in English will not be reviewed; there being nothing in the record indicating an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

J. Miller was convicted of grand larceny, and he appeals. Affirmed.

Jesse R. Shafer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CURTIS, J. The defendant was found guilty of grand larceny upon two counts: One charging him with the larceny of 63 tons of hay of the value of \$1,008, the personal property of Sebastian de Costanze; and the other with the larceny of 128 tons of hay of the value of \$2,048, the personal property of Tomatis and Pizzo.

The testimony under the first count was that on August 15, 1922, the defendant verbally bought 63 tons of hay from Costanze at \$16 per ton, and agreed to pay therefor in cash as soon as the hay was weighed. Immediately thereafter defendant sent trucks to the premises of Costanze and hauled all of the said hay from said premises prior to August 30, 1922. On August 30th Costanze called upon defendant at his office in the city of Los Angeles and requested payment for the hay, and was informed by defendant that he could not pay him that day but would pay him on the 6th or 7th of September. About September 8th Costanze again called upon defendant at his office. The office was closed,

and Costanze then went to the barn of defendant on Aliso street, and later, on the same day, to defendant's mill at Perry station near Redondo Beach. Both the barn and the mill were closed, and Costanze found neither the defendant nor any other person at either of these places. A few days later he called at defendant's house and was informed by defendant's wife that the defendant was not at home and would not be back until the following Sunday and for him to call again Monday. On Monday Costanze again called to see defendant at his house. He was told by defendant's wife that the defendant had not yet returned, but would return that night. Costanze did not meet the defendant again, and the latter has never paid him anything for said hay.

The testimony under the second count was that on August 19, 1922, by written agreement, defendant purchased of Tomatis and Pizzo 100 tons of hay at \$16 per ton. The agreement is silent as to the time of payment. Tomatis and Pizzo both testified that it was to be paid for in cash as soon as the hay was weighed. Defendant removed the hay from the premises of Tomatis and Pizzo, amounting to 128 tons, about the 21st and 22d of August. Two days later Tomatis and Pizzo called upon the defendant at his place of business on Aliso street and asked payment for the hay. Defendant replied that he had not yet received the tags showing the weight of the hay and therefore could not pay them, and asked them to return two or three days later. They returned at the appointed time, and defendant informed them that they would have to wait until Saturday as the person to whom he had sold the hay had not yet paid him for the hay. They returned on the following Friday and again found the defendant at his place of business. The latter told them that the bookkeeper was sick and he could not make out a check and for them to wait two or three days longer. The next Saturday they returned and found defendant and his bookkeeper in an automobile near defendant's place of business. Defendant told them that he could not pay them and for them to come back in five or six days. They might have seen him on one occasion thereafter. The defendant has never paid them any part of the purchase price of the hay.

A witness by the name of W. M. Hilliker also testified that he lived in the San Fernando valley, and on August 5, 1922, he sold to the defendant a lot of hay, amounting to about a hundred tons, for which the defendant agreed to pay him in cash as soon as the same was weighed, \$17.50 per ton for the alfalfa hay, \$18 per ton for the barley hay, and \$19 per ton for oat hay. Defendant also agreed to send him a check for \$150 by the first driver who came to haul the hay. The

defendant immediately sent trucks to haul the hay from the Hilliker place. He failed to send his check for \$150, but on August 11th, and after a large portion of the hay had been hauled from the premises by the defendant, Hilliker called upon defendant at his office in the city of Los Angeles and demanded payment on account of the hay. The defendant thereupon paid him \$200. He never paid Hilliker anything more for the hay sold.

The defendant took the stand and denied that he agreed to pay cash for the hay, but, on the other hand, stated that he was to have from 10 to 30 days in which to pay for the same, and in other respects he contradicted the testimony given in behalf of the prosecution. He testified that he sold 35 tons of the hay to a person who paid him a small cash payment and gave his note for \$500 in settlement of the balance. He made no further explanation as to why he had not paid for the hay purchased from the several parties. The jury, however, having found the defendant guilty, it is presumed that they accepted the statements of the witnesses on behalf of the prosecution and found against the defendant upon all issues where the evidence was contradictory.

Appellant now contends that the evidence is not sufficient to justify a verdict against the defendant upon the charge of grand larceny.

A case very similar to the case at bar was before the court in *People v. Sing*, 42 Cal. App. 385, 183 Pac. 865, in which case the court said as follows:

"Where a sale is a cash sale, delivery of the goods and payment of the purchase money are concurrent acts, and the vendor, though he has made delivery, supposing that he would immediately receive the purchase price, may reclaim the property from the purchaser if the purchase money be not paid according to the terms of the sale, provided he has not waived the cash payment or been guilty of laches or such conduct as would estop him. If the condition of cash payment is not waived, the title does not pass until the price is paid. * * * It frequently happens that the seller will deliver the goods notwithstanding the failure to fulfill the condition of payment. In such cases, the question whether the delivery is to be considered a waiver of the condition that payment shall be made before the title passes may depend upon the attendant circumstances; for whether the condition has been waived or not is a question of intention. An absolute delivery of property to the buyer without a demand of the purchase price is presumptive evidence of a waiver of the condition of present payment and of a willingness to give credit to the buyer. This presumption, however, may be rebutted by the acts and declarations of the parties, or by the circumstances of the case. Whether the delivery without payment is absolute, so as to pass the title, or conditional, so that the title does not pass, depending as it does upon the intention of the parties, the intent that the delivery before payment shall be conditional and

not absolute may be inferred from the acts of the parties and the circumstances of the case, and is a question of fact for the jury."

In an early case, *People v. Smith*, 23 Cal. 280, the facts were as follows:

"The defendant was indicted and convicted of the crime of grand larceny, in stealing a horse. The evidence showed that the defendant hired the horse of the keepers of a livery stable and in that way obtained possession."

A judgment of conviction in this case was affirmed by the Supreme Court.

[1] The rule appears to be that if the defendant, at the time he obtained possession of the property, had no intention of paying therefor, he is guilty of larceny, and that the existence or nonexistence of this intention is a fact for the jury to decide.

[2] In the case at bar the jury, by its verdict of "guilty," has found that the defendant, at the time he made the purchases set forth in the information, had no intention of paying for the hay purchased, and we are of the opinion that the evidence warranted the jury in arriving at this conclusion.

Two other points are raised by the appellant as grounds for reversing the judgment. Appellant contends that the court erred in failing to excuse the juror Dewey H. Burden, challenged by the defendant on the ground of actual bias. We have examined the evidence of this juror taken upon his voir dire, and we find nothing therein that would have justified the court in sustaining defendant's challenge.

[3] Neither do we find any error in the ruling of the court denying appellant's request that the witness Pizzo answer certain questions propounded to him directly in English and not through an interpreter. This witness had attempted to give his testimony in English. During his examination the court came to the conclusion that an interpreter was necessary on account of his inability to understand, and express himself in, the English language. It was while he was giving his testimony through an interpreter that the defendant's attorney requested that he be directed to answer certain questions in English. The questions related to a conversation that the witness stated he had overheard between the defendant and Tomatis which was in English. The court refused this request and also the request of appellant to examine the witness regarding his knowledge of the English language and his ability to speak the same. In denying defendant's request the court stated that he did so under authority of *People v. Avila*, 50 Cal. App. 228, 194 Pac. 768, and that it satisfactorily appeared to the court that the witness, under the rule laid down in that case, should be permitted to give his testimony through an interpreter. The action of the court in this respect will not be disturbed by this court. "In each case the question is one for the

judicial determination of the trial court; its ruling thereon will not be disturbed unless the record clearly shows an abuse of discretion." *People v. Avila*, supra. There is nothing in the record before us that would indicate in the slightest degree that there was any abuse of discretion on the part of the court in denying appellant's request.

The judgment and order denying a motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 176

In re GRAVES. (Cr. 984.)

(District Court of Appeal, Second District, Division 2, California. Oct. 19, 1923.)

1. Attorney and client — 43—Unjustified assault on judge's character and conduct "moral turpitude" and violation of oath.

An unjustified assault upon the character or official conduct of a judge, consisting of the publication of charges which, if true, constituted misuse of judicial office or misconduct in office, is "moral turpitude" within Code Civ. Proc. § 287, subd. 5, and a violation of the attorney's oath, section 282, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

2. Attorney and client — 43—Libel of judge concerning official acts ground for disbarment.

Libel of judge concerning his official acts by an attorney constitutes a ground for suspension or disbarment.

3. Attorney and client — 53(1)—Showing held prima facie case for disbarment imposing burden of establishing defense on defendant.

Where the publication by an attorney of charges against a judge of such a character, if true, as to constitute a misuse of judicial office and misconduct in office has been established, a presumption of falsity arises imposing the burden on defendant to establish their truth or show good faith or justification.

4. Attorney and client — 53(2)—Refusal to testify held evidence of malice and absence of good faith.

Defendant's refusal to testify in explanation or justification of charges against a judge may be considered as evidence of malice or lack of good faith.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Disbarment proceedings against M. O. Graves. From a judgment of disbarment, he appeals. Affirmed.

See, also, 216 Pac. 386.

M. O. Graves, of Los Angeles (Kimball Fletcher, Dudley Robinson, James Westervelt, and Henry E. Carter, all of Los Angeles, of counsel), for appellant.

Frank C. Collier and Edwin A. Meserve, both of Los Angeles, for respondents.

CRAIG, J. Appellant was charged in the superior court by the Los Angeles Bar Association with violations of subdivisions 2 and 6 of section 282, and subdivision 5 of section 287, of the Code of Civil Procedure, which provide as follows:

"282. Duties. It is the duty of an attorney and counselor: * * * (2) To maintain the respect due to the courts of justice and judicial officers. * * * (6) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged."

"287. An attorney and counselor may be removed or suspended by the supreme court, or any department thereof, or by any district court of appeal, or by any superior court of the state, for either of the following causes, arising after his admission to practice: * * *

(5) For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same shall constitute a felony or misdemeanor or not; and in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor."

The specific grounds of these charges were that appellant caused to be printed and distributed through the mails among citizens of Los Angeles county circulars attacking the official and personal acts and conduct of Charles Monroe, a judge of the superior court of said county, certain portions of which circulars were selected and quoted in the accusation. The case was predicated principally upon the quoted excerpts, and those only are here reproduced, to the exclusion of remaining portions of a similar import, all of which constituted a somewhat lengthy article:

"Recall Judge Charles Monroe and Save the Jury System.

"* * * In Case B-S4060, Margaret Clark, a check clerk at the Alexandria Hotel, sued the hotel company to recover tips which she had been given by patrons and had been forced by the hotel company to turn over to its treasurer. Judge Monroe personally secured the transfer of this case from Department II, where it was set for trial, to his department; on hearing the testimony he expressed the utmost disgust with the greed of the hotel company in exacting its tribute in tips from patrons and employees, but refused to allow the jury to pass on the question and ordered judgment in favor of the company. The young lady was not financially able to appeal.

"* * * It is also his custom to talk with prospective jurymen and women, practically to exact from them promises to do as he says. It is also common practice for him to pry into the secrets of the jury room and find out how each juror voted. He is said to keep a list from which he can determine how every jurymen voted, who ever sat in his department.

"In *Metcalfe v. Pacific Electric Railway*. No. B-87332, Judge Monroe refused to set aside a verdict in favor of the defendant and grant a new trial, which judgment had been entered by mistake on a verdict to which only eight jurors agreed. See affidavits in the office of the clerk of the superior court.

"Query: Would he have set it aside if the judgment had been for the plaintiffs. The answer is, that he has never failed to set aside a judgment against a railroad; if the slightest flaw could be found in any stage of the proceedings."

The parties stipulated that said Charles Monroe at the times mentioned in the circulars, and at the time of the trial, was a judge of the superior court of the state of California, in and for the county of Los Angeles; and that M. O. Graves, at all of said times, was a member of the bar, duly admitted and licensed to practice in all courts of the state.

Respondents alleged that the statements italicized herein were and each of them was false and untrue, and known by appellant to be untrue when said communication was published, and that the publication of them was libelous and dishonest, and in violation of those provisions of the Code which require attorneys and counselors to maintain the respect due to courts of justice and judicial officers, and to abstain from all offensive personalities; and, also, that it constituted dishonesty and moral turpitude in the course of appellant's relations as an attorney or counselor at law, or otherwise.

Appellant asserts in his brief that he entertained the highest motives in anything which he may have said about the judge or his official conduct, asserting that as a citizen and attorney he harbored the noblest ideals, and cherished due respect for all tribunals before which he was privileged to appear; but that faithfully and honestly relying upon an abiding consciousness that justice was being besmirched by the practices which he denounced, he deemed it a sacred right and solemn duty to warn the public, and correct the asserted evil. He contends that his incentive entitled the questioned publication to privilege, and that any curtailment of his right of free speech in this regard infringed prerogatives guaranteed by the Constitutions of both state and nation. He quotes eminent authorities in support of the right and duty of electors to comment upon and criticize the acts and conduct of candidates for public office.

At the trial appellant was called to the stand by his accusers. His counsel objected that the usual rights, immunities, and presumptions which abide with a defendant in criminal proceedings dwelt with him throughout the trial, and when overruled in this he refused to answer questions on the ground that his evidence might tend to incriminate him, declaring that the published circulars might be stretched into criminal

libel. He introduced no evidence as to the truth of any assertion embodied in his circular, or to refute any charge made against him in the accusation. Evidence was offered tending to show that appellant composed and wrote the alleged documents, and several members of the bar and judges testified to having received them from the postoffice.

[1] The acts charged against Judge Monroe would, if true, clearly constitute misuse of his judicial office and misconduct in office. If these charges were false, the conclusion is equally impossible of escape that to have made them was an act of injustice and dishonesty. It is unfair, unethical, and immoral to falsely assail the character or official conduct of any officer. Such an assault as that contained in the attack here made upon Judge Monroe, if not justified by the facts, was therefore an act of moral turpitude. Bouvier's Law Dictionary, p. 2247. It was also a violation of the attorney's oath, as provided by section 282 of the Code of Civil Procedure, "to maintain the respect due to the courts of justice and judicial officers." When the facts heretofore recounted had been placed before the trial court, a prima facie case against the accused was established. It was then incumbent upon him, if he would successfully defend himself against the accusations, to have shown the existence of privilege, or to have defended upon the ground that the statements made were true. He did neither. There is nothing contained in the record to show that any election was imminent, or that the magistrate attacked had invited discussion or criticism as to his qualifications for any office, through having announced an aspiration to be elected thereto, or otherwise.

[2] It is unnecessary here to attempt the establishment of limitations within which one may be confined in casting aspersions upon an incumbent of the judiciary during a heated campaign for re-election. Judge Monroe was not running for office, and no such occasion was presented. However, there are such limitations, and these questions have been settled by the Supreme Courts of this and most of the other states. In the *Matter of Humphrey*, 174 Cal. 290, 163 Pac. 60, it is declared that even though the subject of attack was at the time a candidate for re-election to judicial office, an attorney at law was not privileged to falsely accuse the magistrate of acts amounting to misuse of his office. It must be remembered and recognized that the language alleged to have been used by appellant contained charges of specific conduct which, if warranted by the facts, would amount to an abuse of official authority. We have in these accusations not a criticism in the way of fair comment, or of expression of opinion, but definite charges amounting to misuse of office. Such charges can only be justified by proof of their truth; if they were untrue their

publication constituted libel, and for an attorney to libel a judge concerning his official acts is certainly ground for suspension or disbarment. *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216. In a disbarment proceeding, upon the question of proof, both as to the truth of the charges made, and also the good faith of an attorney making them against a judge, the law is clearly and unequivocally stated by the United States Circuit Court of Appeals in *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477. We quote from that decision:

"The plaintiff in error admitted in his answer that he wrote the communication and sent the same to the publisher, but he denied that he did so willfully or maliciously, or that the article was willfully or maliciously or otherwise false or untrue, or that he had any intent to scandalize or traduce or disgrace the court. Upon the issue so raised, the plaintiff in error might, had he so chosen, have adduced testimony to sustain his denials, but upon the refusal of the court to refer the case to a committee of three members of the bar the plaintiff in error by his counsel announced in open court that he would not further appear in the case, or have anything further to do with the same. The burden was upon him to show that statements made in the communication which were scandalous upon their face were not maliciously or willfully published, or were not false, and he cannot complain that upon his refusal to sustain such burden of proof, or to adduce any testimony whatever, the court took the information to be true."

[3, 4] In the instant case the burden was upon appellant to show the truthfulness of his published statements, and under the circumstances evidence in the nature of a presumption of falsity arose which appellant was called upon to meet; he was not clothed with any presumption as to the verity of his printed accusations, or of his own justification in broadcasting the alleged defamatory assaults upon the official or personal character and conduct of a magistrate. In addition to the presumption that the communication containing charges on their face libelous were maliciously and willfully published, the fact that the appellant refused to testify is evidence entitled to weight as showing the existence of malice and the absence of good faith. That his refusal to testify may be so viewed is expressly decided in *Re Wellcome*, 23 Mont. 450, 59 Pac. 445, which holding our Supreme Court quotes with approval in *Re Vaughan*, 189 Cal. 491, 209 Pac. 353, 24 A. L. R. 858.

A demurrer was interposed to the accusation herein, and appellant contends that it should have been sustained on the grounds that the publication of the circular was within his constitutional rights, that it was privileged and that he was performing his duty as a citizen and as a lawyer. These ques-

tions have been passed upon in this opinion. The demurrer was properly overruled.

Exception was also taken to the adverse ruling of the trial court upon appellant's motion for stay of the order of suspension pending appellate proceedings, but in view of our holding no ruling upon that question is necessary.

The order and judgment appealed from are therefore affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

2. Criminal law ⚡304(16)—Court does not take judicial notice of files on plea of former jeopardy and conviction.

Pleas of former jeopardy and conviction must be supported by evidence, even when both trials have been in the same court, under such circumstance the court not taking judicial notice of what is contained in its files, the records, or the evidence.

3. Criminal law ⚡576(5)—Application for dismissal for failure to try case within 60 days, not made before trial, waived.

The application of Pen. Code, § 1382, subd. 2, for dismissal of a prosecution because defendant was not tried within 60 days after filing of information, must be made in the court where it is pending, and, if not made therein before trial is begun, the right is waived.

4. Criminal law ⚡576(1)—No statutory requirement of time within which arraignment takes place.

There is no statutory or other requirement fixing the time within which arraignment shall take place after filing of information.

5. Criminal law ⚡1031(4) — Objection to seasonable arraignment made only in court below.

Objection by defendant that he was not seasonably arraigned after filing of information can be made only in the court below.

6. Criminal law ⚡1044—Objection to failure to file information within 30 days raised only in trial court.

Where relief under Pen. Code, § 1382, subd. 1, is sought because information was not filed within 30 days from time defendant was held to answer, defendant must first apply to the trial court for an order of dismissal, and if this be not done the right will be waived.

7. Criminal law ⚡152—Absence from state tolled limitation.

Where information alleged offense of passing fictitious draft as of January 22, 1919, 3 years and 9 days before its filing, but alleged that defendant fled the state and remained outside from October 5, 1921, to November 28, 1921, which was supported by evidence, Pen. Code, § 800, providing that information must be filed within 3 years was inapplicable.

8. Criminal law ⚡855(7)—District attorney's talk with juror in corridor not misconduct.

In prosecuting for passing a fictitious check, casual conversation between district attorney and a juror in the courtroom corridor, in plain view of bystanders, held not to be misconduct.

9. Criminal law ⚡1166½(12)—Court's statement that there was no difference between witness' evidence at trials not harmful.

In a second prosecution for passing a fictitious check, where, on cross-examination of a witness, his previous testimony was called to his attention, remarks of the court that there was no difference in the testimony as to the point in question, being apparently true, was not harmful, in view of instruction that jury should determine whether there was difference.

192 Cal. 659

PEOPLE v. NEWELL. (Cr. 2573.)

(Supreme Court of California. Dec. 21, 1923.
Rehearing Denied Jan. 17, 1924.)

1. Criminal law ⚡204—Failure to support pleas of former acquittal held waiver.

In prosecution for passing a fictitious draft, where defendant's special pleas of former jeopardy and conviction presented issues of fact, but no evidence was offered in support thereof, such failure was a waiver of the defense.

10. Criminal law §829(7)—Refusing instruction on alibi, covered by instruction given, not error.

In prosecution for passing a fictitious check, where proposed instructions on alibi were substantially given in other instructions, there was no error in their refusal.

11. Criminal law §829(9)—Instruction on burden of proof properly denied, where substantially given.

In prosecution for passing a fictitious check, where propositions in a proposed instruction on burden of proof were substantially covered in instructions given, notwithstanding that proposed instructions should have been added thereto, defendant's rights were not prejudiced.

12. Constitutional law §199 — Information not under amendment to statute, and therefore not under ex post facto law.

In prosecution for passing a fictitious check, where it was not charged in the information that defendant was an agent of the company drawing the draft, or whether it was a copartnership or corporation, but defendant was proceeded against for having personally issued the draft, the prosecution was under Pen. Code, § 476a, before amendment by St. 1919, p. 238, for an offense occurring prior to the amendment, and defendant was not therefore condemned under an ex post facto law.

13. Forgery §44(3) — Evidence sustained conviction of passing fictitious draft.

In prosecution for passing a fictitious draft, evidence held to sustain a conviction.

In Bank.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Hugh H. Newell was convicted of passing a fictitious draft, and he appeals. Affirmed. See, also, 206 Pac. 61; 220 Pac. 425.

T. L. Christianson, of Oakland, and Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rior-dan, Deputy Atty. Gen., for the People.

LAWLOR, J. The district attorney of Alameda county filed an information against the defendant, Hugh H. Newell, charging him with a violation of section 476a of the Penal Code in making, drawing, uttering, and delivering a bank draft without funds or credit to meet it upon presentation. The draft is in—

"words and figures as follows to wit: 'Wells Fargo Nevada National Bank, San Francisco, Cal., Jan. 25, 1919. 19—. For customer's use only. Pay to the order of Hal Warinack \$50.00, fifty dollars...dollars, value received, and charge the same to account of New Ellen Potash and Chemical Company, by Hugh H. Newell. Hugh H. Newell. To Security Savings Bank, Riverside, Riverside, California.'"

The second "Hugh H. Newell" was made with a rubber stamp; the rest of the signature being in handwriting.

It is alleged that neither the defendant nor the company had sufficient funds in or sufficient credit with the Riverside bank, or any credit at all, to meet the draft on presentation, which the company and defendant well knew. It is further alleged that after the draft was drawn by defendant he delivered it to the First National Bank of Oakland, with intent to defraud the said bank. Upon arraignment defendant pleaded not guilty to the charge and interposed two special pleas—former acquittal and once in jeopardy. The defendant was found guilty as charged in the information, and under the instructions of the court the jury found in favor of the prosecution on the said special pleas. In due course defendant interposed, respectively, a motion for a new trial "on all the statutory grounds," and a motion in arrest of judgment, both of which motions were denied, whereupon he gave an oral notice of appeal from the order denying the motion for a new trial, from the order denying the motion in arrest of judgment, and from the judgment of conviction.

Appellant's brief herein purports to have been prepared by himself, although he was represented on the oral argument in this court by one of the counsel who appeared at the trial. The brief concludes as follows:

"Defendant respectfully submits, therefore, that the order, judgment, and decree of the District Court of Appeal be affirmed, and that the judgment of the superior court in and for the county of Alameda county be reversed, and defendant discharged."

[1] 1. We will first consider appellant's contention that he is entitled to his discharge under his special pleas of former acquittal and once in jeopardy. Appellant relies on an asserted former trial of the action and a verdict of not guilty by reason of variance between the pleading and proof to sustain his pleas. It appears from the record that, when the first witness for the prosecution was about to testify at the last trial, counsel for appellant addressed the court as follows:

"At this time, if your honor please, I wish to make a motion to exclude any testimony in this case on the part of the prosecution on the ground of the plea of once in jeopardy, and I wish to call your honor's attention to the fact that the information which is now filed, under which this defendant is being tried, states in legal terms the same and identical crime for which the defendant was once before tried, and in which a jury found a verdict of 'Not guilty' upon the instruction or advice of the court in the previous trial, and that the question becomes a question of law in this case—while the question of former jeopardy is more a question of fact to be decided by the jury in the case where the evidence is the

same, still it becomes also a question purely of law, as held by the Supreme Court of this state. [Cites cases.] The question of former jeopardy becomes a question of law, and one in which the jury is not competent to decide a matter of law, as to whether the informations are the same or are identical, or whether the plea of former jeopardy in regard to the indictment in this case would be decided under the test of former jeopardy, the test of former jeopardy is, if what is set out in the second information has been proved under the first, it would have supported a conviction, and if it would the second cannot be maintained. Now, it becomes purely a question of law for the court itself to determine, if what is set out in the second information, under this present information, has been proved under the first, if it would have supported a conviction, and if it would the second cannot be maintained."

The court ruled as follows:

"The Court. I take it, gentlemen, that the entire argument is based upon the question as to whether or not the information upon which the defendant was tried formerly was a valid information. If it was invalid, a conviction would never have been sustained, and a person tried upon an invalid complaint is, according to the People v. Ammerman, just cited by counsel for the defendant, not once in jeopardy, and the court so rules, and the motion is denied."

When the prosecution rested, and before any evidence was offered on behalf of appellant, his counsel moved as follows:

"The next motion is that we ask the court, as a matter of law to direct a verdict or to advise a verdict of the jury to return a verdict of acquittal of this defendant, upon the ground that the evidence that has been introduced on this trial is the same evidence that was introduced on the former trial of this defendant in this same courtroom, before the same judge and the same court, and that the informations are the same—that the information on the first trial was sufficient in law to sustain a conviction—if this same evidence had been introduced under the first information filed, that that information would have been sufficient in law to sustain that evidence, in view of the fact there has been no demurrer interposed in that case against that information, and that the case was tried without a dismissal of the jury; that the jury heard the prosecution's case, and the case was closed by the prosecution, and after the prosecution's case was closed, the defendant then made a motion and asked the court for a verdict in favor of the defendant on the ground of the insufficiency of the evidence to sustain a conviction, and the court granted the motion on the ground there was a material variance between the information and the evidence, but that the jury, without being discharged, thereupon found a verdict in favor of the defendant of not guilty, which verdict was recorded in this court, and the jury was then and there discharged after the verdict had been rendered, and they had agreed that that was their verdict; and that at no time had the defendant asked for the jury to

be discharged, or the case be discharged, and that the verdict was a verdict in favor of the defendant, and he has been once in jeopardy, and the defendant moves on those grounds that the jury be advised to find a verdict of not guilty.

"The Court: Is the matter submitted?

"Mr. Higgins: Submitted.

"Mr. Ewell: Submitted.

"The Court: Motion denied."

The record does not show that any other action was taken on behalf of appellant during the trial in respect to the special pleas, nor does it contain any evidence in support thereof.

The petition of the Attorney General for a hearing herein presents two points on the special pleas—first, that the defendant, not having offered any evidence in support thereof, is deemed to have waived this defense, and, second, that, even if this be not true, the previous verdict of acquittal because of a material variance between the pleading and proof did not operate as a bar to a further prosecution. We will first consider the failure of appellant to present any evidence in support of the special pleas.

It was evidently under the misconception that the determination of the special pleas was confided to the court alone that no attempt was made to sustain these pleas by evidence. Appellant failed to offer in evidence the first information, the minutes of the plea, the minutes of the trial, the proposed instructions, the instructions given or refused, or the judgment. In fact, no part of the judgment roll of the asserted first trial was offered in support of the special pleas. There was no testimony identifying appellant as the defendant in the former action. The evidence purported to have been taken on the former trial was not offered in support of the pleas. Appellant claims the evidence was covered by a written stipulation, but this is denied by the prosecution, and the paper referred to shows it was signed alone by counsel for appellant. Nor is the statement of appellant's counsel that the evidence was the same on both trials the equivalent of proof that it was identical. It is shown by the transcript on appeal that, after certifying to the judgment roll of the second trial, the clerk of the court included in the succeeding pages what purports to be the first information and the verdict of the jury on the ground of variance, and certified to these papers as the judgment roll on that trial. None of these papers had any proper place in the transcript on appeal. If the information and verdict had been received in evidence, they should have appeared with the other proof in the reporter's transcript on appeal, as evidence under the special pleas.

For the purpose merely of illuminating appellant's contentions, we may have recourse to the first information. The only difference in the two informations is that the first al-

leged that "the said Hugh H. Newell * * * did not have sufficient funds in nor sufficient credit nor any credit at all with" the bank to meet the draft. The second information alleged that "neither the said Hugh H. Newell nor the said New Ellen Potash & Chemical Company * * * had sufficient funds in nor sufficient credit with or any credit at all with" the bank to meet the draft. Referring again to the purported first information, and the verdict on that trial for the same purpose, it may be assumed that the court on the first trial advised the jury, in conformity with sections 1151 and 1165 of the Penal Code, to acquit appellant on the ground of variance. We have already quoted appellant's counsel to the effect that, after the prosecution rested on the first trial, he made a motion for acquittal on the ground of the insufficiency of the evidence, and that the court then advised the jury to acquit on the ground of variance.

We shall next consider whether the court erred in instructing the jury to find for the prosecution on the special pleas.

"No person shall be twice put in jeopardy for the same offense." Const. art. 1, § 13.

"No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Section 687, Pen. Code.

Upon a review of the authorities it was said in *Ex parte Harron* (Cal. Sup.) 217 Pac. 728:

"It must be regarded as the law of this state that the constitutional and statutory pleas must be entered specially, and if this is not done they are waived. This is the general rule. *L. R. A. 1917A, 1233*, note, citing many authorities, including *People v. Bennett*, supra [114 Cal. 56], and *People v. Strickler*, 167 Cal. 627, 140 Pac. 270."

Appellant's special pleas were sufficient in form, but it has been held that such pleas present a question of fact which the jury alone has power to pass upon, unless the defendant fails to support such pleas with proof, when it becomes a question of law upon which the court must pass. *People v. Bennett*, 114 Cal. 56, 59, 45 Pac. 1013; *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654; *People v. McFarlane*, 138 Cal. 481, 484, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; *People v. Cummings*, 123 Cal. 269, 272, 55 Pac. 898; *People v. Wilkison*, 30 Cal. App. 473, 477, 158 Pac. 1067. See *Rebstock v. Superior Court*, 146 Cal. 308, 315, 80 Pac. 65.

"When the guilt of defendant is in question, he is protected by the presumption of innocence; but when a former conviction or acquittal is in question he has no such presumption to aid him. Therefore, to sustain such a plea, the burden is upon defendant, and he must prove not only the former conviction, acquittal, or jeopardy, but also the identity of the parties and of the offenses, and the jurisdiction of the court." 16 Corpus Juris, 425.

"And whatever be the true course in a case within our next subtitle, it is commonly understood that nothing short of a showing by record of a prior conviction or acquittal will sustain the plea here considered. The burden of proof—to establish this plea, being matter affirmatively alleged by the defendant—is on him." 2 Bishop's New Criminal Procedure, 632, 633.

To the same effect are *People v. McFarlane*, supra; *People v. Preciado*, 31 Cal. App. 519, 531, 160 Pac. 1090.

It is just as necessary to support special pleas by proof (*People v. Cummings*, 123 Cal. 269, 272, 55 Pac. 898) as it is to interpose the pleas, and the failure to do either is to be deemed a waiver of the defense (*People v. Strickler*, 167 Cal. 627, 140 Pac. 270; *People v. McFarlane*, supra). It was said, in *People v. Stoll*, 143 Cal. 689, 696, 77 Pac. 818, 821:

"The right to interpose a plea of once in jeopardy is a personal privilege, of which a defendant may, or may not, avail himself."

The principle was quoted in *People v. Bennett*, 114 Cal. 56, 59, 45 Pac. 1013, 1014, that:

"The law's methods must be pursued by him who seeks the protection of the law."

The special pleas of appellant presented an issue of fact, and, as no evidence was offered in support thereof, a question of law was presented to the trial court, which that court decided by instructing the jury to find for the prosecution on the special pleas. It was incumbent on the court to so instruct the jury. *People v. Cummings*, 123 Cal. 269, 272, 55 Pac. 898; *People v. Wilkison*, 30 Cal. App. 473, 477, 158 Pac. 1067.

[2] It is urged by appellant that because both informations were identical, except in the particular already mentioned, a question of law only was presented which the court should decide, thus ignoring the rule laid down in the authorities we have cited that special pleas must be supported by evidence and determined by the jury, even when both trials have been held in the same court. In such circumstances the court does not take judicial notice of what is contained in its files, the records, or the evidence but proof must be offered by the defendant to sustain the pleas. It is claimed in this connection that during the trial the court caused both informations to be produced, and that, after examining and comparing them, held the first information to be insufficient. We find no warrant for this statement of fact in the record, but, even if both informations were before the court for the purpose stated, this did not relieve appellant from the necessity of making full proof before the jury in support of the special pleas. It follows that the defenses of former acquittal and once in jeopardy were waived. This being so, it becomes unnecessary to determine under this head whether the first information stated facts suf-

ficient to constitute a public offense, or whether the court erred in instructing the jury to bring in a verdict of not guilty because of a variance between the pleading and proof, upon the motion of appellant under section 1118 of the Penal Code to advise the jury to acquit because of the asserted insufficiency of the evidence, even if it be assumed the points were properly presented in the court below.

[3] 2. Appellant next contends that he—

“was not tried within 60 days after the filing of the information, nor arraigned within 30 days after the filing of the information, and the information was filed more than thirty days after defendant was held to answer, and more than three years after offense was committed.”

First as to the trial: It is shown by the clerk's transcript on appeal that the information herein was filed on February 1, 1922, and that the trial opened on June 14, 1922—134 days after the filing of the information. But there is no showing anywhere that the relief afforded by subdivision 2, § 1382, of the Penal Code, was sought in the superior court. The application must be made, in the first place, in the court where the prosecution is pending (*Ex parte Fennessey*, 54 Cal. 101), and, if the application is not made therein before the trial is begun, the right is waived (*People v. Hawkins*, 127 Cal. 372, 374, 59 Pac. 697). It follows there is no merit in this claim.

[4, 5] As to the question of arraignment, it may be stated that there is no statutory or other requirement fixing the time within which the arraignment shall take place. Appellant was arraigned on April 13, 1922, and according to his assertion this was the second arraignment on the same charge. Moreover, it does not appear it was claimed in the court below that the appellant was not seasonably arraigned, and this alone is a sufficient answer to the contention.

[6] As to the next point, it is not shown that at any time prior to appeal the point was made that the information was not filed within 30 days after appellant was held to answer. Here again it is to be noted, appellant asserts two informations were filed. As has already been stated, the one herein was filed on February 1, 1922, but it nowhere appears when appellant was held to answer. The proper procedure, where relief is sought under the first subdivision of section 1382 of the Penal Code, is to first apply to the court below for an order of dismissal; and if this be not done the right will be deemed to have been waived. There is no merit in this contention.

[7] The next point is that the information was not filed within three years after the alleged commission of the offense, section 800, Pen. Code. It does not appear whether this was made a ground of demurrer or was otherwise brought to the attention of the lower court. However, the information alleges that

the offense was committed on January 22, 1919, some 3 years and 9 days before the filing of the information. But the information also alleges that on or about October 5, 1921, appellant fled from the state of California to the republic of Mexico, and that he remained outside of the jurisdiction of the court continuously until on or about November 28, 1921—a period of 1 month and 23 days. Evidence was received tending to support the allegations of absence from the state, and there is no foundation therefore, for appellant's claim that the statute of limitations had run against the charge.

We shall notice some additional points made in appellant's brief in the District Court of Appeal.

[8] One of these is the asserted misconduct of the district attorney in conversing with one of the jurors in the case. It appears from the testimony that the district attorney, in the corridor outside of the courtroom, during a recess, and while he was in plain view of the bystanders, engaged in casual conversation with one of the jurors, whom he had previously spoken to at an improvement club meeting. The district attorney denied that he had mentioned the case or the panel of jurors to the juror. The court afforded appellant the fullest opportunity to support his contention and admitted all the testimony offered by appellant bearing on the incident. Upon the showing made, it is manifest there was no foundation for the asserted misconduct, and the court properly declined to take any action.

Other assignments of error are:

“That the court erred in admitting and rejecting evidence, in striking out and refusing to strike out testimony, in instructions given and refused, and was prejudiced and expressed an opinion of a question of fact before the jury trying this cause.”

It is also urged that the evidence is insufficient to justify the verdict.

[9] We have examined the record with reference to the assigned rulings on the evidence, and find no substantial error in any of them. It is apparent that the court, in disposing of the numerous objections made by appellant's counsel during the trial, exercised an intelligent care to have its rulings conserve appellant's rights and to render the record free from error. There is no merit in the contention that it expressed an opinion as to a proposition of fact. What happened was that in the cross-examination of a witness his previous testimony was called to his attention, and the remark of the court that there was no difference in the testimony of the witness as to the point in question was apparently true. At any rate, after the objection, the court stated that the jury would determine whether there was any difference.

[10] Appellant complains that his proposed instructions on the subject of alibi were not

given. But the indorsements of the court thereon that they were substantially given elsewhere are fully justified by the instructions which the court gave of its own motion. We have carefully examined the charge and the proposed instructions; and perceive no error in the action of the court in respect to either.

[11] Appellant assigns error to the refusal of the court to give a proposed instruction covering the rule of burden of proof. The instruction in question correctly states the law on the presumption of innocence, the measure of proof in a criminal case, and that the burden of proof was on the prosecution. The indorsement is: "Given substantially elsewhere." We do not find in the charge of the court any specific statement as to the burden of proof, but it contains statements of the presumption of innocence; that if the evidence is not sufficient to overcome the presumption of innocence to a moral certainty and beyond a reasonable doubt appellant must be acquitted; that the evidence must be examined in the light of the presumption of innocence; that mere suspicion or even a strong suspicion would not justify appellant's conviction, not even if the evidence, in the opinion of the jury, preponderated in favor of the prosecution; that they must be satisfied that the facts presented in evidence are incompatible with any reasonable theory of innocence or upon any reasonable hypothesis than that of guilt or he must be acquitted; that if from an examination of the evidence in certain of its aspects they believe him guilty and from an examination of other aspects of the evidence they believe him not guilty, they should adopt the view of the evidence favoring acquittal; that mere probabilities or the greater weight or preponderance of evidence or the doctrine of chances are not sufficient—"he must be proved to be guilty so clearly and conclusively that there is no reasonable theory under the law and the evidence upon which he can be innocent;" that they have no right to disregard the testimony of appellant; and that, even if he stands charged with the commission of an offense, he is presumed to speak the truth. The failure to give the proposed instruction was evidently due to an inadvertence. The propositions embraced in the foregoing instructions were stated to the jury with marked repetition and in varying forms, and, while the proposed instruction should have been added to the numerous other instructions proposed by and given on behalf of appellant, it cannot be held his rights were in any way prejudiced by the omission. The instructions we have referred to inevitably had the effect of conveying to the jury the idea that the prosecution must establish appellant's guilt beyond a reasonable doubt, and that, if the presumption of innocence was not overcome by that degree of proof, the jury is in effect told that the burden of proof rests with the prosecution.

[12] Complaint is next made that the alleged offense properly comes under section 476a of the Penal Code as amended in 1919 (Stats. 1919, p. 238), and that, as the amended section did not go into effect until July 22, 1919, six months after the alleged criminal act was committed, appellant was condemned to punishment under an *ex post facto* law. The amendment consists of the addition of two clauses: The first between the words "who" and "willfully"—"for himself or as the agent or representative of another or as an officer of a corporation," and the second between the words "he" and "has"—"or his principal or the corporation of which he is an officer."

Appellant contends that the amendment was adopted for the purpose of adding a new crime to the Penal Code, and that therefore the information states no valid charge against appellant, and the judgment is void. The position of the Attorney General is that the amendment was definitive on the part of the Legislature and did not create another crime; that one who with intent to defraud issues a check against a bank, knowing there are insufficient funds to meet it, could not exculpate himself by showing that he signed his name as agent for some person, either real or fictitious. In this connection attention is called to the fact that appellant signed the draft in his individual capacity, as well as the agent of the company, and that in so doing he came clearly within the provisions of section 476a as it stood before the amendment. The evidence showed that the company was appellant himself, that he was treated as a principal by the bank; and not as agent of the company, which was merely a fictitious designation under which he was then doing business. The evidence further showed that the account carried by the Riverside bank was in the name of appellant and not the company, that on the date of the drawing of the draft his balance amounted to \$3.03, and that neither appellant nor the company had any arrangement for any credit whatsoever.

There is no merit in appellant's contention. He was proceeded against for having issued the draft on a bank in which he had neither funds nor credit. The evidence is clearly sufficient to support the allegations of the information as to him. There was evidence that the company was fictitious, that the company was appellant, and appellant the company. The case, therefore, would not come within the amended portion of the section. It is not charged in the information that appellant was an agent of the company, nor whether the company was a copartnership or a corporation. His individual signature rendered him a drawer of the draft and brought him within the terms of the section as it formerly stood. Therefore, under the allegations of the information and the evidence, the prosecution of appellant does not fall within the amended part of section 476a.

[13] With respect to appellant's final contention that the evidence is insufficient to justify the verdict, it appears that the evidence offered by the parties tended to establish the following among other facts: About 3 p. m. on January 22, 1919, appellant entered the First National Bank of Oakland and endeavored to have N. B. Campbell, assistant cashier of the bank O. K. by indorsement for cashing the draft set forth in the information. The request was denied. While this conversation was in progress, H. L. Anderson, paying teller of the bank, noticed appellant and Mr. Campbell talking together. Shortly after 3 o'clock appellant appeared before Mr. Anderson, apologized for being late, and requested the cashier to indorse for cashing two checks or drafts, including the draft in question. Appellant had been in the bank previously and had cashed checks indorsed by another party. In that way appellant became known to Mr. Campbell and Mr. Anderson, and his name had also been mentioned in connection with a projected business venture in Oakland. Mr. Anderson cashed the draft described in the information. It was sent to the Security Bank of Savings at Riverside for collection, and returned with the indorsement "no account."

Appellant had an inactive account with the Riverside bank, and on January 22, 1919, the account was ordered closed by the bank, and the amount of the credit balance, \$3.03, was forwarded to appellant, with a statement of the reasons for closing the account. The company never had an account with the Riverside bank.

Appellant was held in Dannemore State Prison of the state of New York and, in June, 1921, was returned to California by Inspector John S. Dufton of the Oakland police force. While on the train between Albany and Plattsburg a conversation occurred between the officer and appellant concerning the charge. We quote:

"Mr. Higgins. Q. Will you just relate what conversation you had with the defendant upon the occasion we have just mentioned? * * * A. He said to me, he said, 'What did you say I was arrested for?' So I pulled a warrant out of my pocket, and I said, 'For passing a bad check in Oakland, Cal.' He said: 'Well, if a man is acting as the agent for a corporation and passes a bad check, can they hold him for it?' I said: 'Well, I guess they can, if they can prove it on you.' He said, 'Well, I will prove I had nothing to do with that.' I said, 'All right, my boy, if you can prove that, that is all the better for you.'"

Appellant relied on an alibi. He claimed to be in Chicago on January 15 preceding the cashing of the draft, that he left there for Los Angeles on the 16th or 17th of the same month, arriving at his destination about the 20th. He testified he was at the Glenwood Mission Inn, Riverside, on the day the

draft was cashed in Oakland. Appellant also testified he gave instructions to Hal Wari-nack, the drawee, to send the draft for collection.

It is apparent from the foregoing that there was ample evidence to sustain the verdict. The appeal from the order denying appellant's motion in arrest of judgment is dismissed. The order denying the motion for a new trial and the judgment are affirmed.

We concur: WILBUR, C. J.; SEAWELL, J.; MYERS, J.; KERRIGAN, J.; WASTE, J.

192 Cal. 506

In re WELLINGS' ESTATE.

MICHIGAN TRUST CO. v. BRON-
SON et al.

(L. A. 7351.)

(Supreme Court of California. Dec. 11, 1923.
Rehearing Denied Jan. 10, 1924.)

1. Wills $\S$ 681(2)—Testamentary trustee entitled to distribution unless expressly disqualified.

A testamentary trustee is a devisee and takes, not under the decree of distribution, but as trustee under the will at testator's death, and, being bound, on accepting the trust, to obtain control of the trust property, should be allowed to act and receive distribution, as in the case of an executor appointed by the will, unless expressly disqualified by law, especially where testator's desire can be fully carried out only through trustees, whose appointment implies a wish by testator that it be so done.

2. Corporations $\S$ 642(1)—Foreign trust company entering state to carry out terms of testamentary trust is "doing business" therein; "to transact business;" "to do business;" "transacting business."

A foreign corporation entering a state to exercise some of the functions for which it was created, as in the case of a foreign trust company asserting ownership of land devised to it as testamentary trustee and assuming to administer the trust, is "transacting business" in the state, within Const. art. 12, § 15, and hence "doing business" therein within Bank Act, § 7, as amended by St. 1917, pp. 598-600, though it acts as trustee in only one case; the phrase "to transact business" being equivalent to "to do business."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business; Transacting Business.]

3. Corporations $\S$ 639—Act permitting foreign trust companies to act as testamentary trustees held not unconstitutional.

Bank Act, § 7, held not in contravention of Const. art. 12, § 15, as permitting foreign trust companies acting as testamentary trustees to transact business in the state under more favorable conditions than those prescribed for domestic trust companies.

4. Banks and banking — 311—Trusts — 159—
Legislature may classify trust companies as
banks.

The Legislature, in the exercise of its power under Const. 1849, art. 4, § 34, and Const. 1879, art. 12, § 5, as amended in 1910, to create banks under general laws and regulate the business of banking, may classify trust companies, which frequently do a general banking business, as banks for purposes of regulation, as was done by sections 1 and 2 of the Bank Act, section 7 of which was amended by St. 1917, pp. 598-600, providing that a foreign "trust company," as defined by section 6 (St. 1913, p. 137), may exercise such powers as are permitted to foreign corporations by section 90, and be appointed and act in California as executor or testamentary trustee.

5. Statutes — 109—Reasonably intelligent ref-
erence to subject in title sufficient.

Const. art. 4, § 24, requiring that every act embrace but one subject expressed in its title, must be liberally construed, and a reasonably intelligent reference to the subject is sufficient; the details provided for accomplishment of the general purpose declared being regarded as necessary incidents.

6. Statutes — 113(3)—Bank Act authorizing
appointment and qualification of foreign trust
companies as testamentary trustees held not
unconstitutional as embracing subject not ex-
pressed in title.

St. 1909, p. 87, entitled "An act to define and regulate the business of banking," section 7 of which was amended by St. 1917, pp. 598-600, authorizes the appointment and qualification of foreign trust companies as executors and testamentary trustees and prescribes the method of administration of trusts committed to them, held not in violation of Const. art. 4, § 24, as embracing a subject not expressed in its title; such provisions being logically germane to and included within the scope of the title.

7. Trusts — 159—Foreign trust company held
entitled to distribution of testatrix's realty in
state.

A foreign trust company complying with the laws governing the right of foreign corporations to do business in California held entitled, as testamentary trustee, to distribution of testatrix's realty in this state; its status not being that of a trustee appointed by the courts of another state merely to sell property in this state, the courts of which retain jurisdiction of the trust after distribution (Code Civ. Proc. § 1699).

8. Trusts — 160(3)—Higher rate of interest
on mortgages in California held insufficient to
warrant finding of detriment to mortgagee's
estate on appointment of foreign trust com-
pany as trustee.

That the rate of interest on mortgages is higher in California than in Michigan held insufficient to warrant a finding that it would be detrimental to mortgagee's estate to appoint a Michigan trust company as trustee; the courts of California retaining jurisdiction after distribution to settle accounts under the trust, and the presumption being, in the absence of any showing to the contrary, that the trustee

will so invest the funds as to produce the greatest revenue.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by the Michigan Trust Company, as testamentary trustee, for distribution of the estate of Myra Josephine Wellings, deceased, opposed by Marion Frances Bronson and another, legatees and devisees. From an order denying the petition, petitioner appeals. Reversed.

Flint & MacKay, William A. Bowen, and Flint, MacKay & Bowen, all of Los Angeles, U. S. Webb, of San Francisco, John W. Maltman, of Los Angeles, James M. Oliver, of San Francisco, and Phelps & Winston, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, for appellant.

Leland J. Allen and G. A. Gibbs, of Pasadena, for respondent.

Louis P. Boardman, of San Francisco, amicus curiæ.

WASTE, J. The sole question presented on this appeal is the right of the Michigan Trust Company, a foreign corporation, to act as trustee, and, as such, to have distributed to it the residue of the estate of Myra Josephine Wellings, deceased. The material facts are brought here in an agreed statement. The decedent died on September 6, 1920, in the county of Los Angeles. At the time of her death she was a resident of that county, and left, surviving her, granddaughters, nieces, and nephews residing in California and elsewhere. She left a last will and testament, executed in the state of Michigan on the 20th day of November, 1916, at which time the testatrix was a resident of that state, and by the terms of which she left her entire estate to her husband, James Henry Wellings, provided he survived her. If he should not survive her, she gave, devised, and bequeathed the rest, residue and remainder of her estate, after certain provisions were carried out, in trust to the Michigan Trust Company, this appellant, a corporation organized and existing under and by virtue of the laws of the state of Michigan.

The decedent appointed her husband, or, in the event of his death, the Michigan Trust Company, her executor, and appointed appellant trustee under the will, with certain enumerated powers. The husband of the decedent predeceased her, but when the will was filed for probate the appellant, not having the paid-up capital required by the laws of California to permit it to act, did not seek to be appointed executor. The will was admitted to probate, and letters of administration with the will annexed were granted to George C. Bronson. All of the property of

the decedent, valued at \$80,784.18, was located in California, and, according to the inventory, consisted of moneys on deposit, stocks, bonds, promissory notes secured by mortgage, household and personal effects, and certain real estate situated in Los Angeles county. Due administration was had, and when the time was ripe for closing the estate the administrator with the will annexed rendered his final account and report, together with his petition for distribution of the residue of the estate to the granddaughters, nieces, and nephews of the decedent. Appellant, having in the meantime increased its capital stock to an amount in excess of the capitalization required in order to entitle it to act as trustee in this state, filed its objection to the petition, and sought to have distribution made to it as trustee under the will. The matter was heard by the probate court on an agreed statement of facts. By stipulation, all objections of the parties were waived, with the single exception of the question of the right of appellant to act as trustee under the will of Myra Josephine Wellings, deceased. The court found that appellant is "not qualified to act as trustee in said estate," and that it would be "detrimental, unnecessary, and not to the best interests of the estate to appoint" appellant such trustee, or to distribute any part of the estate to it. Its petition being denied, appellant has perfected this appeal.

The appeal was first presented on briefs without argument. In a brief, filed by *amicus curiæ*, the constitutionality of the Bank Act of California (St. 1909, p. 87), was challenged. Because of the importance of the questions involved, the submission was set aside and the case was again placed on the calendar for oral argument as to certain points. On the suggestion of the court, the Attorney General and the attorney for the state superintendent of banks were permitted to join with appellant in the further presentation of the appeal.

[1] An executor appointed by will has the right to act unless there is some express provision of law disqualifying him. *Bauquier's Estate*, 88 Cal. 302, 309, 26 Pac. 178, 532. A trustee under a will has even a more substantial right to be recognized by the court. He does not become a trustee by virtue alone of the decree of distribution, although his fuller and more complete powers and duties are thus devolved upon him. A testamentary trustee is a devisee under the will and takes as trustee under the will at the death of the testator. *Civ. Code*, § 1341; *Estate of O'Connor*, 2 Cal. App. 470, 475, 84 Pac. 317; *Title Ins. & Trust Co. v. Duffill* (Cal. Sup.) 218 Pac. 14. He does not derive title from the decree of distribution, which merely declares the title that accrued under and by the will, but from the will itself. *Western Pac. Ry. Co. v. Godfrey*, 166,

Cal. 346, 349, 136 Pac. 284, Ann. Cas. 1915B, 825. When an estate is devised to trustees it becomes their duty, having accepted the trust, to obtain control of the trust property. 3 *Pomeroy's Eq. Jur.* (4th Ed.) § 1067. When the desire of a testator can be fully carried out only through trustees, their appointment as such implies a wish on the part of the testator that it be so done. *Estate of O'Connor*, supra. Therefore, unless some express statutory prohibition be found which will prevent the appellant from acting as trustee in this state under the will of Myra Josephine Wellings, the order of the probate court refusing distribution to it must be reversed.

Appellant claims the right to act as trustee under the will of Mrs. Wellings by virtue of authority conferred by section 7 of the act to define and regulate the business of banking, designated as the "Bank Act," as amended (Stats. 1917, pp. 593-600), which provides, in part:

"That a trust company incorporated in another state may have or exercise in this state such powers as are permitted to foreign corporations by the provisions of section ninety of this act and may be appointed and may accept appointment and may act in this state as executor of or trustee under the last will and testament of any deceased person, upon giving the bond required in such cases of individuals unless waived by the last will and testament making such appointment and by taking and subscribing an oath for faithful performance of such trust by the president, vice president, secretary, manager or trust officer of said corporation; provided, that such superintendent of banks, for the time being, shall be attorney of such foreign corporation qualifying or acting in this state as such executor or trustee, upon whom process against such foreign corporation may be served in any action or legal proceeding against such executor or trustee affecting or relating to the estate or property represented or held by such executor or trustee, or any act or default of such foreign corporation in reference to such estate or property, and it shall be the duty of any such foreign corporation so qualifying or acting to file in the office of said superintendent of banks a copy of its articles of incorporation, or of the statute chartering such corporation, certified by its secretary under its corporate seal, together with the postoffice address of its home office, and a duly executed appointment of said superintendent of banks as its attorney to accept service of process as above provided, and said superintendent of banks, when any such process is served upon him, shall at once mail the papers so served to the home office of such corporation." [Italics ours.]

Respondents challenge the constitutionality of the Bank Act, in so far as it applies to the right of foreign corporations to act as trustees in California, upon several grounds. Their first contention is that if section 7 of the act tends to permit foreign trust companies to do business in this state, it contravenes that portion of the state Constitution (art. 12, § 15) which provides that no foreign corporation shall be allowed to transact busi-

ness in this state under more favorable conditions than are prescribed by law for similar corporations organized under the laws of the state. The first question for consideration is whether appellant, in merely acting as trustee under the will of Mrs. Wellings, will be doing business within this state. The Michigan Trust Company is a corporation organized under the laws of the state of Michigan, and authorized to transact a trust business, and having capacity to act as executor and trustee. It filed a certified copy of its articles of incorporation in the office of the secretary of state of California on the 21st day of September, 1901, and a like copy in the office of the superintendent of banks on December 12, 1918. A certified copy of the certificate of increase of its capital stock from \$200,000 to \$1,000,000, was filed in the office of the secretary of state on February 7, 1921. On January 18, 1921, it made and appointed the superintendent of banks of the state of California, and his successor and successors in office, its attorney, as executor and trustee under the last will and testament of Myra Josephine Wellings, deceased, upon whom process against it may be served in any action or legal proceeding against it as such executor or trustee affecting or relating to the estate or property represented or held by it as such executor or trustee, or any act or default of the corporation in reference to such estate or property. Appellant offered to provide a bond in such amount as the court might require, as a condition for the distribution of the estate to it as such trustee.

[2] Appellant argues that acting as trustee in this one instance would be but a single and isolated act of a foreign trust company in receiving property in this state as a trustee under a will and testament, and would not amount to conducting or doing business within the state. The phrase "to transact business," as used in the Constitution, is equivalent to the words "to do business" found in the statutes of many states prohibiting foreign corporations from "doing business" in such states until they have complied with certain prescribed local requirements. In most jurisdictions it has been held to have reference to the continuance by the corporation, in some form, of business, and not to apply to a single act of business done in the state. But when a foreign corporation enters a state other than that of its creation, for the purpose of doing some substantial part of its ordinary business, or of exercising some of the functions for which it was created, it is transacting business within that state. When such foreign corporation does directly the primary business for which it was organized, it is "doing business" within the meaning of the statute. *Conference Free Baptists v. Berkey*, 156 Cal. 466, 470, 105 Pac. 411; *Bullfrog Goldfield R. R. Co. v. Jordan*, 174 Cal. 342, 344, 163 Pac. 40; 14A

Corpus Juris, p. 1270, § 3977; 7 Cal. Jurisp. p. 222, §§ 704-706. The Michigan Trust Company was created and organized to conduct and carry on a trust business. One of the main purposes for which it was formed is to act as executor and trustee under appointment made in last wills and testaments. This function is one of the ends for which the corporation was organized. Its exercise is not merely a means to enable it to accomplish those ends. Neither is it incidental to carrying on the main purposes of the corporation, nor only the exercise of some corporate power, as has been the case in many of the decisions which hold that one single and isolated transaction will not constitute doing business within the meaning of the statute. By the terms of the will of Mrs. Wellings devising her property to Michigan Trust Company, and appointing it trustee of her estate, appellant is given full power and authority to bargain, sell, transfer, and convey, and in any manner dispose of the estate, real or personal, at such times, in such manner, on such terms, and for such purposes as to it may seem proper, and for the best interests of the decedent's estate. It has full power to invest and reinvest any moneys that may come to it as such trustee. When a foreign trust corporation enters a state, under such powers, receives by devise, and asserts ownership of land devised to it, and assumes to carry out the terms of the trust, such foreign company is doing business in the state within the meaning of the statute. *Pennsylvania L. Ins. Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166, 170; 14A *Corpus Juris*, p. 1292, § 3999.

[3] It must therefore be determined whether or not, under the provisions of the Bank Act, a foreign trust corporation, permitted to act as trustee under the will of a decedent in this state, will be transacting business in California under more favorable conditions than those prescribed by law for trust corporations organized under the laws of this state. Section 7 of the Bank Act provides that no foreign corporation having authority to act as executor of or trustee under the last will and testament of any deceased person shall establish or maintain, directly or indirectly, any branch office or agency in this state, nor shall it in any way solicit, directly or indirectly, any business as executor or trustee. For any violation of this enactment the court having jurisdiction of such executor or trustee in any proceeding may, in its discretion, revoke the right of such foreign corporation to thereafter act in such capacity. Domestic trust companies which may act as executors or trustees are not so limited. They are permitted to solicit and to do a general trust business throughout the state, and to accept any and all private trusts without limitation. Unless the will of the decedent appointing a foreign

trust company waives the giving of an undertaking, the trustee must give the bond in large or small amount required in such cases of individuals. Domestic trust companies may act as trustees without giving any bond or security, other than the required deposit with the state treasurer. Respondents have attempted to show, by arranging in parallel statements the respective powers and limitations of foreign and domestic trust companies permitted to do business within this state, that the restrictions placed upon foreign trust companies are less rigorous than those imposed upon trust corporations organized under the laws of California. A detailed discussion of the points of comparison insisted on by respondents is unnecessary, for, viewing the whole situation in which the two kinds of trust companies are placed before being permitted to act as trustees, the advantage seems manifestly to rest with those organized under the laws of this state. The provisions of the Bank Act regulating the practice under which both domestic and foreign trust companies are permitted to do business are therefore free from the constitutional inhibition urged by respondents.

[4] When this matter was first considered on appeal, it was suggested in the brief of *amicus curiæ*, and it is now urged by respondents, that the provisions of the Bank Act relating to trust companies violate article 4, § 24, of the Constitution, which provides that "every [legislative] act shall embrace but one subject, which subject shall be expressed in its title." The title of the Bank Act is "An act to define and regulate the business of banking." Stats. 1909, p. 87. It is contended that trust companies are not to be considered in any way as banks, and that the regulation of the business of trust companies is not germane to the regulation of the business of banking. The point is also made that those sections of the Bank Act which relate to and prescribe the methods of appointment of foreign corporations as executors and trustees under the wills of decedents are unconstitutional in that they are not germane to the subject of the statute expressed in its title. Stated in another way, the contention is that the provisions of sections 7 and 90, and other sections of the act which relate to the appointment, qualification, and administration of executors and trustees, refer to probate matters which have no connection with the business of banking. The Bank Act, as variously amended to and including the legislative session of 1917, will be found in part 1 of Henning's General Laws, 1920, p. 143. Section 1 provides that the act shall be known as the "Bank Act," and shall be applicable to all corporations specified in the next section. It is provided in section 2 that the word "bank," as used in the act, "shall be construed to mean any incorporated banking institu-

tion which shall have been incorporated to conduct the business of receiving money on deposit, or transacting a trust business as" defined in the act. The section then provides that "banks are divided into the following classes: (a) Savings banks; (b) commercial banks; and (c) trust companies." The meaning of the term "savings bank" and "commercial bank" are explained in sections 4 and 5 of the act. Section 6, defining the term "trust company," provides:

"The term 'trust company,' when used in this act, means any corporation which is incorporated under the laws of this state for the purpose of conducting the business of acting as executor, administrator, guardian of estates, assignee, receiver, depository or trustee under appointment of any court or by authority of any law of this state, or as trustee for any purpose permitted by law." Stats. 1913, p. 137.

Section 7 of the act, which relates to foreign corporations and prescribes the conditions on which they may transact a banking business in this state, provides that a trust company incorporated in another state may have or exercise in this state such powers as are permitted to foreign corporations by the provisions of section 90 of the act, and may be appointed and act in this state as executor of or trustee under the last will and testament of any deceased person. Stats. 1917, pp. 598, 600, *supra*. Section 90 of the act provides that a foreign corporation may be authorized to act in this state as trustee for certain designated purposes, none of which is germane to this discussion, for they are powers granted in addition to the right of such foreign trust company to be appointed and act as executor or trustee in this state, which is directly conferred by section 7.

It cannot be disputed that, in the ordinary sense of the term, a "bank" is not a "trust company," nor is a "trust company" a "bank." The Legislature, by merely defining a certain kind of institution as a bank, does not in fact make it a bank in the ordinary commercial meaning of that word. The purpose of the Bank Act is not to change the nature of the business done by any of the corporations which are made subject to the act, but is purely one of regulation. For the purpose of regulation, and to specify what kinds of corporations come within the purview of its provisions, the Legislature has used the word "bank" to mean not only any incorporated banking institution which shall have been created to conduct the business of receiving money on deposit, but also such corporations as are permitted by the act to carry on business which has, by the trend of common understanding and opinion, come to be regarded as being appropriate and relevant to the banking business, functions which, in the judgment of the Legislature, make the business of the banks more successful. The power of the Legislature to do this is, we

think, beyond question. It has had the right, since California became a state, to provide for the formation of banks under general laws. Const. 1849, art. 4, § 34; Const. 1879, art. 12, § 5. The last-named provision was amended in 1910 to extend its power in the matter of regulating the business of banking. The right of the Legislature to exercise its judgment as to the necessity for creating banks includes the power to determine the scope and character of the functions which shall be given to them. This discretion vested in the Legislature should not be disregarded or set aside through the exercise of judicial discretion for the purpose of determining whether it was relevant or appropriate to give the banks the particular functions in question. *First Nat. Bank v. Union Trust Co.*, 244 U. S. 416, 424, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169. That the business of banking is a proper and legitimate subject of regulation by the state is well settled. *State Sav. & Comm. Bank v. Anderson*, 165 Cal. 437, 442, 132 Pac. 755, L. R. A. 1915E, 675. It was held in that case (165 Cal. 449, 132 Pac. 755, L. R. A. 1915E, 675) that the Bank Act, as originally passed in 1909, and which deals with banks and trust companies as does the present act, deals solely with a matter pertaining to the public welfare, and that the regulations provided by the act have a substantial relation to and are reasonably designed to protect and safeguard the state against insecure banking. The precise point we are now considering was not made in that case, but it was there said (165 Cal. 442, 132 Pac. 757, L. R. A. 1915E, 675):

"Under the rapid changes which have occurred in recent years in the industrial and economic world, enterprises and industries which were therefore considered mainly of a private character, have become essentially of a public nature and the changed conditions have called for regulations of a kind different from those that have theretofore sufficed. In that progress, banking, considered in early years as more or less of a private enterprise, has in the commercial development of the world become so incorporated into the business growth and prosperity of the country and so affects the commercial welfare and business interests of the people as to have become a proper and legitimate subject of legislative regulation by the state in the exercise of its police power."

The functions of a bank may be variously regarded. "Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead

of gold and silver. Modern bankers frequently exercise any two or even all three of those functions." *Oulton v. Savings Institution*, 84 U. S. (17 Wall.) 109, 118 (21 L. Ed. 618). Other functions have, with the still further progress of events, come to be regarded as so appropriate and relevant to the banking business as to be deemed almost essential attributes of it. An apt illustration is to be found in the case of the national banks. The act of Congress establishing the federal reserve board (38 U. S. Stats. 251, 262, chap. 6, § 11 [k]; U. S. Comp. St. § 9794) gives the board authority to grant national banks the right to act as trustee, executor, or administrator. The right of Congress to confer this power was called in question in a controversy between certain trust companies and a national bank. The Supreme Court of the United States held that although it might not be within the implied power of Congress to establish as a function of the banks a particular character of business, when such business was isolatedly considered, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful. *First Nat. Bank v. Union Trust Co.*, supra, 244 U. S. at page 420, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169. What may or may not be done by banks, and what may or may not be considered as carrying on a banking business, depends upon the changing circumstances of society. The California pioneers, by the section of the Constitution of 1849, supra, prohibited banking associations from issuing paper "to circulate as money." Construing the effect of this prohibition at a much later date, this court said:

"The provisions of the Constitution of 1849 must be viewed in the light of 1849." *Bank of Martinez v. Hemme Orchard & Land Co.*, 105 Cal. 376, 378, 38 Pac. 963, 964.

As corollary to that statement, the provision of the present Bank Act should be construed in the light of to-day.

Corporations and associations formed for other purposes may take on the essential functions of a banking business. In such event the power of the state to regulate the business is unquestioned. For instance, trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally. For very obvious reasons they are subject to regulation to the same extent as banks are. In classifying trust companies as banks, for the purpose of regulation, the Legislature has acted on common knowledge that trust companies frequently do a general banking business in addition to their trust business, and that many banks are doing a

more or less extensive trust business. We therefore entertain no doubt that it was competent for the Legislature, considering the business which trust companies are doing in this state, to define such business as banking, if it were not such in fact, and to throw around it the general safeguards provided for the banking business proper. *MacLaren v. State*, 141 Wis. 577, 580-584, 124 N. W. 667, 135 Am. St. Rep. 55, 18 Ann. Cas. 826.

[5, 6] We are also satisfied that the Bank Act embraces but one subject, and that subject is sufficiently expressed in its title. It is now well settled that the constitutional provision requiring the subjects of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation is to be addressed. When the purpose of the Bank Act as expressed in its title is borne in mind, it must appear, from what we have already said, that the provisions of the act relating to trust companies, and to the appointment of such trust companies as executors and trustees, are logically germane to the title of the act, and are included within its scope. *Estate of McPhee*, 154 Cal. 385, 389, 97 Pac. 878; *Abeel v. Clark*, 84 Cal. 226, 229, 24 Pac. 383. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. *Ex parte Liddell*, 93 Cal. 603, 637, 29 Pac. 251. The procedure outlined by the Legislature for the appointment and qualification of foreign trust companies acting as executors and trustees, and providing the method by which they shall carry on the administration of the trusts committed to them, are part of the comprehensive scheme contemplated, and afford an appropriate means of effecting one of the main purposes of the law. *Robinson v. Kerrigan*, 151 Cal. 40, 50, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *Buelke v. Levenstadt* (Cal. Sup.) 214 Pac. 42.

[7] For the foregoing reasons we see no need to question the capacity of the Michigan Trust Company, as trustee, to conduct, manage and dispose of the property comprising the residue of the estate of Myra Josephine Wellings, deceased. The will has been probated here. It operates upon the real estate by the force of our law, and the property will be distributed to the Michigan Trust Company by the superior court of this

state. Appellant will not have the status of a trustee appointed by the courts of another state merely to sell property in this state, and therefore no complication or doubt as to its powers can arise on that ground. After distribution the trust will still be subject to the jurisdiction of the courts of this state. (Code Civ. Proc. sec. 1699.) Appellant, having complied with the laws of this jurisdiction governing the right of foreign corporations to do business in this state, and being a devisee under the will, it was entitled to have distribution of the estate made to it pursuant to the terms of the will of the deceased testatrix. *Estate of Rawitzer*, 175 Cal. 585, 593, 166 Pac. 581.

[8] The trial court went beyond the stipulation of the parties as to the sole question to be decided in the lower court, and found that it would be detrimental, unnecessary, and not to the best interests of the estate to appoint appellant trustee. In support of this finding respondents rely upon the stipulation in the agreed statement of facts to the effect that the decedent, before her death, received payment of a mortgage on Michigan property drawing six per cent. interest, and invested the amount as seven per cent interest in Los Angeles county, and that the going rate of interest in California is from one to three per cent. higher than in Michigan. Assuming it was proper to rely on this point on the appeal, there is nothing in the agreed statement to justify the court in saying in advance of any act of the appellant in connection with the administration of the estate that it would be detrimental or not to the best interests of the estate that it be appointed trustee. It is not even intimated that the Michigan Trust Company intends to remove any part of the estate from the state of California pending the termination of the trust, and, as already pointed out, after distribution the superior court will not lose jurisdiction of the estate but will retain such jurisdiction for the purpose of the settlement of accounts under the trust. In the absence of any showing to the contrary, it will be presumed that the trustee will so invest the funds of the estate distributed to it as to bring in the greatest amount of revenue.

The order of the lower court is reversed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

192 Cal. 781

In re EDDY'S ESTATE.

NORTHERN TRUST CO. v. EDDY.

(L. A. 7396.)

(Supreme Court of California. Dec. 11, 1923.)

Trusts §159—Foreign trust company held entitled to distribution as testamentary trustee.

A foreign trust company complying with the laws of California for doing business therein held entitled to distribution of a nonresident's estate as trustee under a will probated in the state of his residence.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by Jerome O. Eddy for distribution of the estate of Arthur J. Eddy, deceased, to petitioner and the Northern Trust Company, as testamentary trustees. From a decree denying distribution to the trust company, it appeals. Reversed.

Phelps & Winston and Frederick J. Winston, all of Los Angeles (Jerome H. Kann, of Los Angeles, of counsel), for appellant.

G. A. Gibbs, of Pasadena, and Leland J. Allen (Louis P. Boardman, of San Francisco, of counsel), for respondent.

WASTE, J. This appeal is prosecuted by the Northern Trust Company, a corporation of Illinois, one of the trustees named in the last will and testament of Arthur J. Eddy, deceased, from the decree of distribution rendered in the matter of said estate, particularly from that part wherein appellant was denied the right to act as trustee under said last will and testament. The questions involved are very similar to those considered in the Estate of Myra Josephine Wellings, Deceased (L. A. 7351) 221 Pac. 628, this day decided.

Arthur J. Eddy was, at the time of his death, a resident of the state of Illinois, and left real property in the county of Los Angeles in this state. His will was admitted to probate in the state of Illinois, and letters testamentary were issued thereon to the Northern Trust Company and to Jerome O. Eddy, son of the decedent, who were named in the will as executors and trustees. Thereafter, a copy of the will and of the probate thereof, duly authenticated, was filed in the superior court of Los Angeles county, and letters testamentary were issued to said Jerome O. Eddy. In due course of administration Jerome O. Eddy, as executor, filed his final account and petition for distribution, praying, among other things, that the residue of the estate be distributed to appellant herein and to said Jerome O. Eddy, as trustees, pursuant to the terms of the last will and testament of Arthur J. Eddy, de-

ceased. On hearing of said petition, the lower court ordered distribution of the estate in accordance with the will of the deceased, except that the petition of the Northern Trust Company to be cotrustee with Jerome O. Eddy was denied. It is from that portion of the decree that it has appealed.

The appeal is on the judgment roll alone. It is not disputed here that the last will and testament of Arthur J. Eddy, deceased, properly gives, devises, and bequeaths unto the said Northern Trust Company and Jerome O. Eddy, as trustees, all of the residue of the estate of the decedent in trust and upon the trusts, purposes, and conditions set out in the will. Neither is it disputed that the appellant has complied with the laws of the state of California for the purpose of enabling it to do business in this state.

On the authority of the Estate of Myra J. Wellings, Deceased, supra, that portion of the decree of the lower court which denies distribution to appellant Northern Trust Company, as cotrustee with Jerome O. Eddy, is reversed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

192 Cal. 528

GRINBAUM v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10708.)

(Supreme Court of California. Dec. 17, 1923.
Rehearing Denied Jan. 16, 1924.)

1. Constitutional law §309(1)—Insane persons §33(1)—Notice to incompetent prerequisite to appointment of guardian.

Under Code Civ. Proc. §§ 1763, 1793, or even in the absence of statutory provisions, a guardian of an insane person or his estate may not be appointed without some form of notice to him sufficient to satisfy the constitutional requirement of due process.

2. Insane persons §33(2)—Presumption of service of notice of guardianship proceedings held unwarranted.

In a proceeding under Code Civ. Proc. § 1793, for the appointment of a guardian for an insane person residing out of the state, where the order for service of notice and the notice itself and the affidavit of service all affirmatively showed upon whom service was to be made or had been made, and did not include the alleged insane person, the court will not presume in aid of the record that such person was actually served.

3. Insane persons §33(1)—Service of notice of guardianship proceedings, in absence of order directing, futile.

Under Code Civ. Proc. § 1793, providing that the court in guardianship proceedings "must cause notice to be given to all persons interested, in such manner as such court deems

reasonable," any attempted service of notice, in the absence of an order directing it, would be futile.

4. Insane persons —33(1)—Recitals in order appointing guardian held not to show giving of notice of proceeding.

Recitals in an order appointing a guardian for an insane person that "the petition * * * coming on regularly to be heard," and "that all notices had been given as required by law and as directed by this court," held not to show that notice had been given to the alleged insane person, in view of other recitals.

5. Insane persons —36—May not during incapacity lose by estoppel or waive rights.

One subject to the disqualification of adjudged insanity cannot, by permitting a lapse of time or by acts or conduct, waive or lose by estoppel the right to have the order adjudging her insane or undertaking to establish guardianship vacated for defects of jurisdiction apparent on its face, particularly in view of Civ. Code, § 40, declaring one judicially determined insane can waive no right until restoration to capacity.

6. Insane persons —33(2)—Denial of certiorari to review appointment of guardian held unwarranted.

The Supreme Court, in the exercise of its discretion, would not be warranted in denying writ of certiorari to annul an order, declaring petitioner insane and appointing a guardian, which is void on its face for lack of jurisdiction, merely because petitioner may have been actually insane or the guardianship of benefit to her, or because of possible confusion and litigation growing out of the right of third persons, who have contracted with the de facto guardian.

7. Certiorari —9—Granting writ of review discretionary.

The granting or refusal of a writ of review is within the discretion of the court to which application is made.

8. Trusts —170—Good faith acts of de facto trustee upheld.

Equity will protect and uphold good faith acts and transactions of a de facto trustee, which inure to the benefit of the cestui que trust.

9. Insane persons —33(2)—Certiorari to annul void adjudication of insanity not denied for failure to proceed by motion.

A petition for the writ of certiorari to review and annul a void adjudication of insanity should not be denied merely because petitioner might have proceeded by motion to set aside in the court making same.

10. Certiorari —3—Relief in court making void judgment need not be sought first.

One having a clear right to directly attack by certiorari a judgment or order void for want of jurisdiction is not required first to seek relief in the court making or entering same.

11. Insane persons —33(2)—Denial of certiorari to review void adjudication of insanity held unwarranted by different remedy.

A proceeding under Civ. Code, § 1766, for restoration to capacity, affords no proper remedy against a void adjudication of insanity, and denial of certiorari to review and annul such an adjudication is unwarranted merely because no application for restoration has been made.

12. Insane persons —33(2)—Denial of certiorari to review void adjudication of insanity unwarranted by remedy in equity.

Denial of certiorari to review an adjudication of insanity, void for want for jurisdiction, held unwarranted merely because petitioner might have proceeded in equity to have such adjudication set aside, in view of circumstances indicating such mode of relief would have been prolonged and inadequate, due to petitioner's age and health.

13. Insane persons —38—Guardian's duty is to ward, and it cannot oppose proper termination of guardianship.

The highest duty of an insane person's guardian is to its ward, and it can have no adverse interest, and cannot oppose proper removal of the ward from guardianship.

Wilbur, C. J., dissenting.

In Bank.

Application by Julie Grinbaum, by John Francis Neylan, her guardian ad litem, for a writ of certiorari to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, and Honorable Frank H. Dunne, Judge thereof, to review an order of J. V. Coffey, Judge. Order annulled.

See, also, 209 Pac. 1005; 221 Pac. 651, 653.

John Francis Neylan and Philip S. Ehrlich, both of San Francisco (Edmond E. Herrscher, of San Francisco, of counsel), for petitioner.

John J. Barrett and Morrison, Dunne & Brobeck, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. The original application for a writ of review herein was presented by Julie Grinbaum acting on her own behalf and praying for the relief sought therein. A motion to dismiss said application was presented by the respondents named therein upon the ground that the petitioner had not the legal capacity to sue. In support of said motion there was presented a certified copy of an order of the superior court of the state of California, in and for the city and county of San Francisco, adjudging the said petitioner to be at the date thereof, and for some time prior thereto, an insane person, which said order and adjudication at the time of the filing of said application was, and thereafter continued to be, in full force and effect. Thereupon a petition for the appointment of a guardian ad litem for said Julie Grinbaum in this and also in

certain other proceedings pending before this court was presented by one Erna A. Herrscher, alleging herself to be the nearest blood relative of said Julie Grinbaum, and asking for the appointment of John Francis Neylan as such guardian ad litem for said petitioner. Thereafter this court made an order granting said application for the appointment of a guardian ad litem and making the appointment as prayed for in said petition; which order had the effect of disposing of said motion for a dismissal, and placing said applicant in a position through her said guardian ad litem to further maintain and prosecute her said application.

The proceedings herein sought to be reviewed are those proceedings in the matter of the guardianship of the estate of Julie Grinbaum, which were initiated in the superior court of the state of California, in and for the city and county of San Francisco, on January 9, 1913, by a petition on behalf of the Mercantile Trust Company, a corporation, alleging that said Julie Grinbaum was an insane person, having estate and properties in the state of California requiring attention and praying for the appointment of said Mercantile Trust Company as guardian of the estate of said insane person; whereupon such proceedings were had, that an order was made by said court on January 27, 1913, appointing said Mercantile Trust Company to be such guardian of the estate of said Julie Grinbaum, an insane person; which proceedings and order are sought to be reviewed in the instant proceeding. The respondents herein are nominally the said superior court and the judge thereof, but the real party in interest and actual respondent herein is the Mercantile Trust Company in its capacity as such guardian of the estate of said Julie Grinbaum, under and by virtue of the aforesaid order for its appointment as such guardian, and under which it has, ever since the making thereof and its qualification thereunder, been and still is the acting guardian of said estate.

The petitioner herein alleges, as the basis for her application for the issuance of a writ of review herein, that the order of said superior court made and entered upon January 27, 1913, wherein and whereby the said Mercantile Trust Company was appointed guardian of the estate of Julie Grinbaum, was and is void upon the face of said proceedings forming the basis for said order, since it affirmatively appears therefrom that the said superior court did not acquire and did not have jurisdiction to make said order for the reason that no notice of such proceedings or of the application for said order or of the hearing thereon was ever ordered, issued, or served upon said Julie Grinbaum as required by law. The respondents herein, both by their demurrer and answer herein, present and urge certain objections involving the present right of this petitioner to insti-

tute or maintain this proceeding, and also urge certain reasons why this court should not exercise its discretion to the extent of granting the relief sought therein. These objections might appear to stand upon the threshold of this proceeding and to require determination in advance of any consideration of the merits of the petitioner's said application; but, since the parties to this proceeding, both nominal and real, have by appropriate stipulations agreed that the entire record of the proceedings of the superior court in the matter of the guardianship of the estate of Julie Grinbaum are correctly set forth in the pleadings and exhibits of the respective parties, and are as fully before this court as if they had been brought before it in response to a writ of review, and that the same may be considered by this court as fully as though the record of such proceedings had been embodied in a return to such writ, and since the preliminary objections urged by the respondents herein to the consideration of said application and to the issuance of said writ can only be properly resolved upon and after a full understanding of the whole case and of the merits of the petitioner's said application, the court will first address itself to the main question at issue in this proceeding. This will require a review at some length of the history and record of said proceedings sought to be reviewed herein, together with the history and record of the present proceeding.

In the year 1873, Moritz S. Grinbaum and his wife, Julie Grinbaum, the former a native of Baden and the latter of Dusseldorf, Germany, came to the United States, and settled in San Francisco, which city became and was at all times thereafter the place of their residence and home. They became, in due course, naturalized citizens of the United States. Mr. Grinbaum prospered in his business ventures, which included the acquisition of considerable interests in the Hawaiian Islands, and accumulated a fortune estimated in 1913 at \$800,000, a portion of which was invested in San Francisco real estate, but the larger and more productive portion of which consisted of sugar plantations in the islands. In the year 1909 the Grinbaums, who had no children, left San Francisco for an extended European trip. They passed the winter of that year in Berlin, and during the year 1910 visited several places, apparently in search of health. On December 14, 1910, while at Meran, in the Austrian Tyrol, Mr. Grinbaum died, after an operation following a brief illness. By his will, dated August 4, 1904, he left his entire estate to his wife. By an olographic codicil thereto, dated March 2, 1909, he again devised his said estate to his wife if she survived him, but provided that if she predeceased him, one-half of his said estate was to go in equal shares to certain of his blood relations in Germany and the remaining one-half to a blood relative of

Mrs. Grinbaum, one Erna Goldschmidt, then living in Germany, and being the daughter of her only sister, then deceased. By the terms of her deceased husband's said will Mrs. Grinbaum was named as the executrix thereof, but she renounced her right to act as such in favor of Albert Meyer, a member of a banking institution known as the Bank of Daniel Meyer, long established in San Francisco, and being at the time of his death her husband's banker and agent. This will was admitted to probate in the superior court of the city and county of San Francisco, and said Albert Meyer was appointed as administrator with the will annexed of the decedent's said estate. Mrs. Grinbaum, after her husband's death, went to several places, both in France and Germany, seeking relief from a heart affliction, which was complicated by an increasing melancholy due to her husband's death and her own lonely condition, and which showed signs of affecting her mind. In 1911 she went, upon the advice of her physicians, to a sanitarium in Baden-Baden devoted to the care of those mentally afflicted. Her condition grew steadily worse during the following year, and until in the latter part of 1912 her physicians considered the appointment of a guardian over her and her affairs imperative, and instructed their attorney to institute necessary proceedings for such guardianship in the German courts. After an apparently careful investigation of her case, a petition for the appointment of a guardian was on November 20, 1912, filed by the Attorney General in the judicial tribunal of the Grand Duchy of Baden, Germany, having jurisdiction of such matters. On December 4, 1912, an order was made therein appointing one Emil Meyer, described as a banker in Baden, "interim guardian" of the property and person of Mrs. Julie Grinbaum. This order does not upon its face purport to be more than temporary, and does not attempt to determine whether or not Mrs. Grinbaum was at the time insane. It expressly refers to the appointment of the guardian as an "interim" appointment, and to the fact that a proceeding to determine whether Julie Grinbaum was insane had been instituted and was then pending. The court, in point of fact, proceeded with its investigation of the question as to whether Julie Grinbaum was or was not insane during the succeeding months, and it was not until May 3, 1913, that its final adjudication of the fact of Mrs. Grinbaum's insanity was formally made by the German court. In the meantime and at an early date in January, 1913, the Bank of Daniel Meyer in San Francisco received advices from Emil Meyer, the interim guardian of Julie Grinbaum in Baden-Baden, informing the San Francisco banking house as to her physical and mental condition, and advising the appointment of a local guardian of her estate. The Bank of Daniel Meyer was at that time engaged in wind-

ing up its affairs, but Henry Meyer, one of the members of said institution took the matter up with the Mercantile Trust Company, requesting this latter corporation to act as guardian of the estate of Julie Grinbaum. The Mercantile Trust Company consented to so act, whereupon and on January 9, 1913, a petition on behalf of the Mercantile Trust Company for such guardianship was filed in the superior court of the city and county of San Francisco. In view of the fact that this petition marks the initiation of the proceedings for the appointment of the Mercantile Trust Company as guardian of the estate of Julie Grinbaum, which are assailed in this proceeding, some particular reference to its contents should be made. The petition, after alleging the corporate character and qualifications of the petitioner, proceeds to allege:

"That the above-named Julie Grinbaum is a widow over the age of 21 years, and at present resides at Baden-Baden, empire of Germany. * * * and has estate within the city and county of San Francisco, said state, and that your petitioner petitions as a friend of said insane person that the said Julie Grinbaum for more than one month last past has been of unsound mind, and wholly incompetent to transact her own business or to properly, or at all care for her own property or estate; that the said Julie Grinbaum was on or about the 10th day of December, 1912, adjudged of unsound mind by the Grossherzoglich Badisches Ministerium des Grossh. Hauses, der Justiz und des Auswartigen, of the Grand Duchy of Baden, Empire of Germany, and has not since said time been restored by any decree of court to capacity, and ever since said last-mentioned date has been and now is an insane person; that as petitioner is informed and believes, and therefore so alleges, there are no persons within the state of California who are interested in the estate of said Julie Grinbaum, and that the heirs and relatives and next of kin who are interested in said estate are:

Names:	Who Reside at:
Toni Horn (a cousin),	50 Rue Juste-lipse, Brussels, Belgium;
Max Goldsmith (a brother-in-law),	
Jane Doe Goldsmith (a daughter of said Max Goldsmith True name unknown),	Hamburg, Germany;
	Hamburg, Germany.

"That it is necessary and for the best interests of the estate that a guardian be appointed by the Court to collect and preserve the estate of said Julie Grinbaum, and to manage said estate."

On the date of filing said petition, the said superior court made an order directing notice of said application to be given. This order follows in the main the language of the petition reciting that the said Julie Grinbaum, an insane person, resides at Baden-Baden, Germany, and is without the state of California:

"That there are no relatives of said Julie Grinbaum within said state of California, but that the relatives of said insane person reside in the empire of Germany and are as follows, to wit: (Repeating former names and addresses) and that there are no persons within the state of California who are interested in the estate of said Julie Grinbaum; It is therefore ordered that notice of said application be issued by the clerk of this court directed to said Toni Horn, Max Goldsmith, and Jane Doe Goldsmith, relatives of said insane person, residing in said empire of Germany, and that true copies of said notice be mailed forthwith to said relatives by depositing in the United States post office at said San Francisco, Cal., true copies of said notice, inclosed in envelopes properly addressed, with the postage prepaid thereon; it is further ordered that true copies of the said notice of the time and place of the hearing of said application be forthwith served personally at least 5 days prior to the time fixed herein for the hearing of said petition upon any and all persons, firms, and corporations, which have in their possession, or under their control, any of the property or estate of the said insane person within the said city and county of San Francisco, or the state of California; The hearing of said petition is hereby set for the 27th day of January, 1913, at the hour of 10 o'clock a. m. of said day at the courtroom of department No. 9 of the above-entitled court."

Thereafter and on January 13, 1913, the clerk of said court made, issued, and filed the notice of the time and place of the hearing of said application in conformity with the terms of said order, which notice, after stating the title of the court and cause, reads as follows:

"Notice of Time and Place of Hearing of Application.

"To Bank of Daniel Meyer, Henry Meyer, A. I. Esberg, Toni Horn, Max Goldsmith, Jane Doe Goldsmith:

"Take notice that Mercantile Trust Company of San Francisco, a corporation, has heretofore filed in the above-entitled court its petition to be appointed guardian of the estate of Julie Grinbaum, an insane person; that said petition has been set for hearing by said court on the 27th day of January, 1913, at the hour of 10 o'clock a. m. of said day, at the courtroom of department No. 9 of the above-entitled court, at which time and place you may appear and show cause, if any you can, why said Mercantile Trust Company of San Francisco should not be appointed such guardian."

Thereafter and on January 25, 1913, there were filed with the clerk of said court two affidavits relating to the service of said notice. In one of these affidavits one Henry Melander deposed that he personally served said notice on Henry Meyer and the Bank of Daniel Meyer, and that he left a copy of said notice at the place of business of A. I. Esberg, in the city and county of San Francisco, he being then absent from the state, the persons thus served being named in said notice as comprising presumably "the persons, firms

and corporations" generally referred to in said order as having "in their possession or under their control any of the property or estate of said insane person within the said city and county of San Francisco or the state of California." The other affidavit was by one G. Selner, who, after reciting generally the terms of said notice and of said order directing that copies of said notice be mailed to the specified relatives of said insane person residing in Germany, deposed "that on the 13th day of January, 1913, the affiant deposited in the United States post office in San Francisco, Cal., true copies of said notice of the time and place of hearing said application securely inclosed in envelopes, respectively addressed as follows:

One thereof addressed to Toni Horn (a cousin), 50 Rue Juste-lipse, Brussels, Belgium; one thereof addressed to Max Goldsmith (a brother-in-law), Hamburg, Germany; and one thereof addressed to Jane Doe Goldsmith, (a daughter of said Max Goldsmith, true name unknown), % Max Goldsmith, Hamburg, Germany."

Thereafter and on January 27, 1913, the matter of the application of the Mercantile Trust Company to be appointed guardian of the estate of Julie Grinbaum came on for hearing in said superior court in department 9 thereof, and was then and there heard; whereupon the judge of said department of said court made and entered an order appointing said Mercantile Trust Company to be the guardian of the estate of Julie Grinbaum, an insane person. The said order contains the following recitals:

"The petition of Mercantile Trust Company of San Francisco praying to be appointed the guardian of the estate of said Julie Grinbaum, an insane person, coming on regularly to be heard, upon due proof to the satisfaction of said court that notice has been given to the relatives of the said Julie Grinbaum, residing in the empire of Germany, and that none reside in this city and county or in the state of California, and that said insane person resides in and is now in said empire of Germany, and that all notices have been given as required by law and as directed by this court, and it duly appearing to the court that said Julie Grinbaum is an insane person and has estate within the state of California, which needs the care and attention of some fit and proper person, which estate is of the value of \$200,000 or thereabouts."

Letters of guardianship were issued to said Mercantile Trust Company pursuant to said order, under the authority of which it has ever since been and still is acting as guardian of the estate of said Julie Grinbaum, and has been and still is in the possession and administration of practically the whole of her property and estate, together with the rents, issues, profits, increments, and accumulations thereof.

Before attempting to set forth and pass upon the respective contentions of the peti-

tioner and respondents herein based upon the foregoing record, it may be well to have in mind the provisions of the Code of Civil Procedure relating to proceedings for the appointment of guardians of insane or incompetent persons who do or who do not reside within the state of California. Section 1763 of the Code of Civil Procedure provides for the appointment of guardians for the person and estate of insane or incompetent persons who reside within the state of California having property within it. It reads as follows:

"When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing, provided that when such person is a patient at a state hospital in this state, the certificate of the medical superintendent or acting medical superintendent of such state hospital, to the effect that such patient is unable to attend on the hearing, shall be prima facie evidence of such fact."

Section 1793 of the Code of Civil Procedure provides for the appointment of guardians of insane or incompetent persons who reside or are without the state of California. It reads as follows:

"The superior court may appoint a guardian of the person and estate, or either, of a minor, insane or incompetent person, who has no guardian within the state, legally appointed by will, deed or otherwise, and who resides without the state, and has estate within the county or, who, though not having such estate, is within the county, upon petition of any friend of such person or any one interested in his estate, in expectancy or otherwise. Before making such appointment, the court must cause notice to be given to all persons interested, in such manner as such court deems reasonable."

These two sections of the Code of Civil Procedure comprise the law of this state, by compliance with which its courts acquire jurisdiction to appoint guardians of the persons or estates of alleged insane or incompetent persons who do or who do not reside within the state of California, and who have property rights or interests therein.

[1] It is to be observed that each of these two sections of the Code provides for some form of notice to be given to the individual whose personal liberty or whose property rights or interests are to be affected by such guardianship. Section 1793 of said Code provides that "before making such appointment, the court must cause notice to be given to all persons interested, in such manner as such court deems reasonable." Section 1763 of said Code provides that the "court or judge must cause a notice to be given to the supposed insane or incompetent person of

the time and place of hearing the case," and further provides that "such person, if able to attend, must be produced on the hearing." The requirement of these sections of the Code of Civil Procedure that notice in some form and of some manner of service must be given to the individual alleged to be an insane or incompetent person before the courts can acquire jurisdiction to appoint guardians over their persons or estates does not depend for its sanction upon the express provisions of either section of the Code. It rests upon the fundamental doctrine, as old as Magna Charta, that no person can be deprived of life, liberty, or property without due process of law; and it has accordingly been held in several of the states that, even in the absence of express provisions in their laws relating to guardianship, requiring notice to be given to insane or incompetent persons of impending guardianships over their persons or estates, such notice must be given, or such proceedings shall be void. In the case of *McKinstry v. Dewey*, 192 Iowa, 753, 185 N. W. 565, 23 A. L. R. 587, the decisions of these several jurisdictions are extensively reviewed, and are shown to uniformly support the conclusion that even without express statutory requirements as to notice the personal liberty or property rights of a person alleged to be insane or incompetent cannot be invaded or impaired by the appointment of a guardianship over his person or estate without the giving to him of some form of notice sufficient to satisfy the constitutional requirement as to due process of law. It is not seriously contended by the respondents herein that either in the presence or absence of the provisions of the foregoing sections of the Code of Civil Procedure respecting notice, any appointment of a guardian of either the person or property of the petitioner herein could have been validly made without some sufficient form of notice to her of such proceedings. The primary question before this court, therefore, is as to whether, upon the face of the foregoing proceedings, this court, as the petitioner insists, is compelled to the conclusion that no notice whatever was given to the petitioner herein of the application of the Mercantile Trust Company to have her adjudged to be insane or incompetent; and to have itself appointed guardian of her estate or of the proceedings taken thereunder, resulting in such adjudication and such guardianship; and hence that such proceedings and the orders therein made were and are wholly void as beyond the jurisdiction of said court; or whether, as the respondents herein contend, this court will presume upon the face of said proceedings, read as a whole, that some sufficient form of notice of such proceedings and of the order or orders sought to be made therein was given to said petitioner, and hence that such proceedings

and the order or orders adjudging said petitioner to have been incompetent or insane and appointing the said Mercantile Trust Company guardian of her estate were and are valid as within the proper exercise of the jurisdiction of said court. To this primary inquiry we therefore address ourselves. In so doing we do not deem it necessary to determine whether proceedings for the appointment of guardians of the estates of insane or incompetent persons are proceedings in personam or in rem; for while it is true that, if such proceedings are in the nature of proceedings in personam, personal service of notice of such proceedings and of the relief sought therein would be required, while if in rem notice by substituted service, as by mail or posting or publication, might suffice, the question here is not as to the form or sufficiency of the notice, but is as to whether or not any notice whatsoever was given, or is to be presumed to have been given; for, if the presumption is to be indulged in at all, it must be held to go the full length in establishing the sufficiency of the notice thus presumed to have been given. It would seem to be conceded by the respective parties hereto that the proceedings which are assailed herein were taken under the provisions of section 1793 of the Code of Civil Procedure relating to the appointment of guardians of the person and estate of nonresident persons. The petition of the Mercantile Trust Company alleged that Julie Grinbaum "at present resides at Baden-Baden, Germany"; and further alleged "that as petitioner is informed and believes and therefore so alleges there are no persons within the state of California who are interested in the estate of said Julie Grinbaum." The order of the court, fixing the time and place for the hearing upon said petition, and directing to whom and in what manner the notice of said hearing should be given, repeats in its recitals the foregoing recitals of the petition. Without attempting to precisely define the meaning of the phrase in said section 1793 of the Code of Civil Procedure reading "who resides without the state," it will be assumed, in view of the admission of the parties hereto and of the form and phrasing of the aforesaid petition and order that said proceeding for the appointment of a guardian of the estate of Julie Grinbaum comes properly within the scope of the provisions of said last-named section of the Code; and that the provision therein that "before making such appointment the court must cause notice to be given to all persons interested in such manner as the court deems reasonable," applies to said proceeding. This assumption is in harmony with the authorities of both this and other states having similar statutes, and is in keeping with the constitutional requirement that no person shall be deprived of life, liberty, or property without such notice and opportunity to be heard as

shall be held to constitute due process of law. Estate of Eikerenkotter, 126 Cal. 55, 58 Pac. 370; Estate of Schulmeyer, 171 Cal. 344, 153 Pac. 233; McGee v. Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57; Matter of Lambert, 134 Cal. 632, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121; McKinstry v. Dewey, 192 Iowa, 753, 185 N. W. 565, 23 A. L. R. 587; Paine v. Folsom, 107 Me. 337, 78 Atl. 378; Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 A. L. R. 737, 45 Am. St. Rep. 912; Hathaway v. Clark, 5 Pick. (22 Mass.) 490.

At the threshold of our consideration of the record before us in the matter of the application of the Mercantile Trust Company for the appointment of itself as guardian of the estate of Julie Grinbaum, it is to be noted that, under the express provision of section 1793 of the Code of Civil Procedure last above quoted, whatever notice is to be given of the time and place of the hearing upon said application "to all persons interested" must be such notice as is ordered by the court as distinguished from such notices in certain similar proceedings as are expressly provided for by statute, and as may be given without any special order of the court but by the clerk or other officer thereof pursuant to statutory direction. In the proceeding under present review there must be a court order directing the giving of notice to all persons interested, and specifying in what reasonable manner such notice shall be given. It is therefore essential to a proper consideration of the sufficiency of the proceedings under review to scrutinize the contents of the order of the court touching the notice to be given of the hearing upon said application. An inspection of said order discloses that there are two specified sets of persons to whom notice of the hearing upon said application is directed to be given. These are (1) Toni Horn, a cousin of the alleged insane person, who resides at 50 Rue Juste-lipse, Brussels, Belgium; Max Goldsmith, a brother-in-law, who resides at Hamburg, Germany, and Jane Doe Goldsmith, a daughter of said Max Goldsmith, who also resides at Hamburg, Germany. (2) "Any and all persons, firms and corporations which have in their possession, or under their control, any of the property or estate of the said insane person within the city and county of San Francisco or the state of California." It thus affirmatively appears upon the face of said order that no notice whatever is directed to be given the alleged insane person, either under the particular name of Julie Grinbaum or under the general designation of a person interested in her estate.

We next come to consider the notice which, as appears from the record before us, was issued by the clerk of said court pursuant to the foregoing order. It gives the title of the court and cause, and then proceeds

to designate somewhat more particularly than was done in said order the persons to whom said notice is directed. They are "Bank of Daniel Meyer, Henry Meyer, A. I. Esberg, Toni Horn, Max Goldsmith, Jane Doe Goldsmith." It then proceeds to state:

"Take notice that Mercantile Trust Company of San Francisco, a corporation, has heretofore filed in the above-entitled court its petition to be appointed guardian of the estate of Julie Grinbaum, an insane person."

It then proceeds to state the time and place of hearing in said court upon said petition in conformity with the terms of said order, and notifies said designated persons to "appear and show cause, if any you can, why said Mercantile Trust Company should not be appointed such guardian." It thus appears upon the face of said notice what particular persons are cited to appear at the hearing upon said application for guardianship, and it thus affirmatively appears that Julie Grinbaum, neither by name nor by any general inclusion, is to be notified to thus appear.

We come next in order to the service of said notice, to the manner thereof, and to the persons upon whom the service of the same was made pursuant to the directions of said order and the terms of said notice. There are two affidavits of service, and no more, embraced in the record before us. One of these relates to the service of said notice upon the first three persons named in said notice, viz. Bank of Daniel Meyer, Henry Meyer, and A. I. Esberg. As to the first two of these, the affiant deposes that the notice was personal, by delivering to Henry Meyer, in his personal capacity, a copy of said notice, and by delivering to Henry Meyer, as vice president of the Bank of Daniel Meyer, a corporation, a copy of said notice. As to the service upon A. I. Esberg, the affiant states that service of said notice was made by leaving a copy thereof at his place of business, he being absent therefrom and from said city and state. The second affidavit of service relates to the fact and manner of service upon the other three persons specifically designated in both said order and said notice, viz. Toni Horn, Max Goldsmith, and Jane Doe Goldsmith, and shows the service of said notice by mailing copies of said notice to each of said persons at their respective places of residence in Europe. Neither of said affidavits of service refers directly or indirectly to any service of said notice upon any person or persons other than those whose names are specifically enumerated therein.

On January 27, 1913, the said matter of the application of Mercantile Trust Company to be appointed guardian of the estate of Julie Grinbaum came on for hearing pursuant to the aforesaid order and notice with the affidavits of service thereof, and was

heard by said superior court upon said day. Upon such hearing the said court made its order appointing said Mercantile Trust Company guardian of said estate, which order reads as follows:

"It is hereby ordered that said Mercantile Trust Company be and it is hereby appointed guardian of the estate of said Julie Grinbaum, an insane person, and that letters of guardianship of the estate of said Julie Grinbaum, an insane person, be issued to said Mercantile Trust Company, no bond being required by law, said Mercantile Trust Company is appointed without bonds."

Thereupon and on said 27th day of January, 1913, pursuant to said order, the clerk of said court issued letters of guardianship of said estate to Mercantile Trust Company, which thereafter duly qualified as such guardian, and took possession of the said properties and estate of Julie Grinbaum which were within the state of California, and has ever since been and still is in the possession and administration of the same as such guardian of said estate under and by virtue of its appointment as such by and through the foregoing proceedings and not otherwise.

It is the contention of the petitioner herein that the foregoing proceedings as produced before this court in the manner above set forth show upon the face thereof that the said superior court in which the same were instituted and pending never acquired and did not have jurisdiction to make the aforesaid order appointing said Mercantile Trust Company guardian of the said estate of Julie Grinbaum, for the reason that no notice of such proceedings or of the hearing thereon was ever served upon said Julie Grinbaum as required by law or at all; that a writ of review is the petitioner's proper and only adequate remedy and that for the reason stated this court should declare void and should vacate and annul the said order of said superior court appointing said Mercantile Trust Company guardian of her said estate.

[2] The respondents herein, while apparently conceding that some sort of notice to an alleged insane or incompetent person residing or being outside of the state of California is required to be given under the express provisions of section 1793 of the Code of Civil Procedure before the court can acquire jurisdiction to appoint a guardian of the estate of such person, still contend that the presumption as to the regularity of the proceedings of courts of record having jurisdiction over such proceedings can be invoked and applied in the instant case to eke out the insufficiency of the record herein due to its silence as to whether or not the alleged insane person was duly served with such notice; and the respondents further and more particularly contend

that this presumption is not only aided but is fully sustained and established by the recitals in the order making such appointment, referring to the said petition as "coming on regularly to be heard," and reciting "that all notices have been given as required by law and as directed by this court." In support of the respondents' contention that they are entitled to the benefit of the presumption as to the regularity of the proceedings for the appointment of said guardian as shown by the record under review, they cite and copiously quote from the leading case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and from certain other cases from this and other jurisdictions which have followed and applied its doctrine as fully upholding their aforesaid contention. The petitioner on the other hand insists, and we think correctly, that the case of *Hahn v. Kelly*, supra, far from upholding the respondents' contention, expressly repudiates it, and sustains the petitioner's contention, that the presumption relied on by the respondents herein cannot be invoked or relied upon under the state of the record before us. The case of *Hahn v. Kelly*, supra, arose out of the case of *Hawes v. Jones*, which was an action in equity for the foreclosure of a mortgage upon property in this state of a nonresident and absent mortgagor, upon whom personal service could not be had. The case was concedely one wherein a judgment in rem affecting only the property involved could be obtained upon substituted service by publication of the summons therein. An order for such publication in a designated newspaper was duly made; an affidavit of publication was in due time presented, which showed the publication of the process for the requisite period but which affidavit failed to state whether the person making it was the printer, foreman, or principal clerk of said newspaper. The record was silent as to the qualification of the affiant, or as to whether or not upon the hearing other proof was presented as to the regularity of the publication, or as to the qualifications of the maker of the affidavit. The judgment recited that service had been made "according to law and the order of said court." In the later case of *Hahn v. Kelly*, involving the same property, and wherein the said judgment of foreclosure was assailed as void by reason of said defective affidavit of service of the process upon which jurisdiction to render the judgment depended, this court held in an exhaustive opinion that, upon the state of the record in that case and of the recitals of the judgment, "if the record is silent as to what was done in respect to some material matter, we will presume that what ought to have been done was done." The court supports this brief statement of the principle governing the application of the rule as to presump-

tions in support of a judgment with an amplitude both of reasoning and of illustration, which abundantly serves to differentiate the case of *Hahn v. Kelly* from the case at bar. For example, it follows immediately the foregoing statement of the principle with these words:

"But, where the record states what was done, it will not be presumed that something different was done. A want of jurisdiction affirmatively appears on the face of the record whenever what was done is stated, and which having been done was not sufficient in law to give the court jurisdiction."

Again, the court, by way of illustration, says:

"Suppose in a case of attempted personal service the officer should return that he had served the summons upon A. B., the son of the defendant, by delivering to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the subject of service, could we presume, in the face of such a record, that he served it upon the defendant also? Undoubtedly not. There would be a want of jurisdiction upon the face of the record within the rule in hand, and the judgment would be declared a nullity whenever and wherever presented in support of a legal claim or right. We consider the true rule to be that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three."

[3] A very good illustration applying the foregoing principles and showing the difference between the facts of the case of *Hahn v. Kelly* and those of the case at bar would be the following: Suppose that in that early case the record had affirmatively shown that no order directing the service by publication of the summons upon the defendant had ever been made. Would the court have presumed from the recitals of the judgment that such order had been entered, and that such service had been made? In the case at bar the record affirmatively shows that the order for service of notice specified those persons upon whom such service was to be made, and that the alleged insane person was not among the list of those thus directed to be served. This amounts to an affirmative showing that there existed no order for service of notice upon such insane person. Could the court presume in the face of this state of the record that an order for service of notice upon Julie Grinbaum was made?

If not, then whatever service was attempted to be made would be futile in the absence of an order directing such service to be made. But the record in this case goes further in differentiating it, not only from the state of facts shown in *Hahn v. Kelly*, but also in distinguishing it from every other case upon which the respondents rely in support of their contention upon the point at present under review. The notice issued pursuant to the order entered in the instant case specifies with even greater particularity than the order itself the persons upon whom service thereof is to be made. The alleged insane person, though the person most interested in said proceeding, is not included in that specification. Could it be presumed that the service of said notice was to be made upon one whose name was thus excluded from the list of those upon whom such service was to be made? Again, the affidavits of service of said notice contained in this record show affirmatively the persons upon whom the service of such notice was made, and the alleged insane person is not among their number. Does not the foregoing illustration in *Hahn v. Kelly* have exact application to this state of the record? When the return of service thus shows affirmatively the names of those persons upon whom such service has been made, can the court presume that service has also been made upon one whose name is: neither included in the order, the notice, or the affidavits of service thereof? Undoubtedly not. The case of *Alderson v. Bell*, 9 Cal. 315, also cited and relied upon by the respondents, resembles the case of *Hahn v. Kelly* as to its facts, and is subject to the same differentiation from the facts of the case at bar and the principles to be applied thereto. On the other hand, this court has had occasion in numerous later cases to apply and to distinguish the doctrine announced in *Hahn v. Kelly*, supra, among which are the cases of *Belcher v. Chambers*, 53 Cal. 639; *Smith v. Los Angeles Co.*, 98 Cal. 210, 33 Pac. 53; *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30; and *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 89 Pac. 348, 11 Ann. Cas. 841. In the case last cited the court gives a more direct application to the rule announced in these earlier cases when it says:

"There is, however, a well-defined limit to an appellate tribunal's power in indulging in such presumptions. It can indulge in no presumption which does violence to the facts as presented by the record of the inferior court, and, while it is true that an order of a court of general jurisdiction will be treated as void only in the event that its invalidity appears upon the face of the record, * * * the rule in this court has been well settled that this does not mean that the record must contain a direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done, but means that want

of jurisdiction appears whenever what was actually done is stated, and this which was done is not sufficient in law to confer jurisdiction. Therefore, whenever the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact or that the fact was otherwise than is averred"—citing *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, and other cases.

[4] The respondents, however, insist that the recitals contained in the order of the court appointing the Mercantile Trust Company guardian of the estate of Julie Grinbaum are sufficient to establish due service of process upon her so as to sustain the jurisdiction of the court to make said order. These recitals, as we have seen, are: (1) "The petition of the Mercantile Trust Company of San Francisco to be appointed the guardian of the estate of said Julie Grinbaum, an insane person, coming on regularly to be heard"; and (2) "and that all notices have been given as required by law and as directed by this court." It is to be noted that these two recitals in said order are connected and joined together by the declaration therein immediately following the first of said recitals and immediately preceding the second of them, reading as follows:

"Upon due proof to the satisfaction of said court that notice has been given to the relatives of said Julie Grinbaum residing in the empire of Germany and that none reside in this city and county or in the state of California and that said insane person resides and is now in said empire of Germany."

As to said first recital, it thus appears upon the face of the order what notice and proof of service formed the basis of said recital, and upon the foregoing authorities it will not be presumed that any other notice than that thus affirmatively stated is covered by said recital; while as to said second recital, not only does the same reasoning apply, but the recital itself grammatically construed means no more than that whatever notices were given were given in the manner required by law and as directed by the court. That the foregoing is the utmost force and effect to be given to either of said recitals is further made plain by the authorities which deal with the weight to be accorded to recitals in orders, judgments, and decrees, and which uniformly hold that it is only in the absence of anything to the contrary in the record that the recital that the matter "came on regularly to be heard" must be presumed to be true. *Estate of Schulmeyer*, 171 Cal. 341, 153 Pac. 233; *Estate of Espinosa*, 179 Cal. 189, 175 Pac. 896; *Settlemyer v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110; *Latta v. Tutton*, supra; *Hahn v. Kelly*, supra. We are satisfied from the fore-

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going considerations that the order of the said superior court dated January 27, 1913, appointing the Mercantile Trust Company guardian of the estate of said Julie Grinbaum, was void for want of jurisdiction appearing upon the face of the proceedings in said court leading up to and including said order sought to be reviewed herein.

[5] The respondents herein, however, contend that, conceding said order to have been void at the date thereof for want of jurisdiction, the petitioner herein should not at this time be granted the relief prayed for in her petition herein, for the following reasons: First, that the petitioner herein has waived her right to make this application for a writ of review (a) by laches and lapse of time; (b) by her acts and conduct since the making of said order, amounting to a consent thereto, and particularly by her acts and conduct since her return to San Francisco in August, 1921, including her application for a restoration to capacity presented to the court, in which the aforesaid proceedings were pending on or about June 26, 1923, and which said proceedings for restoration are still pending therein, and by which acts and conduct the respondents also contend the petitioner herein is now estopped to maintain the present proceeding. As to the petitioner's waiver of her right to a writ of certiorari, for the purpose of having said proceedings reviewed and said order annulled for want of jurisdiction, a sufficient answer to the respondents' foregoing contention in that regard is to be found in the provisions of section 40 of the Civil Code, which reads as follows:

"Sec. 40. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract nor delegate any power or waive any right, until his restoration to capacity.

During all of the years which have elapsed since the date of the making of said order and even down to the present moment, Julie Grinbaum has been the subject of judicial determination that she was an insane or incompetent person. Not only was she so adjudged by the terms and effect of said order, but also by the judicial determination of the German tribunal, which, in May, 1913, adjudged her insane; which adjudication has never been set aside or revoked so far as the record in the present proceeding discloses. The instant proceeding is being conducted through and by means of a guardian ad litem appointed by this court upon the presentation of the aforesaid proceedings of both the American and German courts adjudging her to be insane. It is impossible to conceive how any act of failure to act, or any conduct on the part of a person thus subject to the disqualification of adjudged insanity could be held to operate as either a waiver or estoppel against the

assertion of the right to have an order of a court adjudging her insane or undertaking to establish a guardianship over either her person or estate, vacated for defects of jurisdiction appearing upon the face of the proceedings which form the basis of such order. We are cited by the respondents to no decision of any court which goes so far, or which applies the doctrine of either waiver or estoppel to persons who are laboring under an unrevoked judicial determination of their disability.

[6] Second, the respondents contend that inasmuch as a writ of certiorari is not a writ of right, but is an extraordinary remedy, the granting of or refusal to grant which lies in the sound discretion of the court to which application therefor is made, this court ought not to issue such writ or set aside said order creating such guardianship, conceding said order to have been void for want of notice to the petitioner herein, if the said petitioner was in fact insane at the time of the making of said order, and if the condition of her properties and estate was such that an imperative necessity existed for the appointment of a guardian over her estate at said time, and if the guardian was otherwise a suitable, acceptable, and properly qualified person, and if the administration of the petitioner's said estate under said guardianship had during the several years of its continuance been beneficial to the said insane person and to her said estate; and if no substantial injustice has been done to her or her estate through the existence or exercise of said guardianship; and if confusion, litigation, and prejudice to third persons would result from the annulment of the initial order upon which such guardianship and all subsequent proceedings thereunder rests.

[7] In entering upon a discussion of this phase of the issue before us, it is to be taken as true that the granting or refusal of a writ of review is a matter which rests in the sound discretion of the court to which application for such writ is made. The authorities fully sustain this view. 4 Cal. Jurisprudence, 1061, and cases cited. But, conceding this to be true, it is not to be denied that the making and execution of a judicial order or decree, declaring an individual to be insane, and placing the entire property and estate of such individual within the custody and control of others, are matters of the gravest concern, affecting, as they do, intimately and immediately, those rights of the individual often and not improperly termed "sacred" to the full exercise and enjoyment of life, liberty, and property. It is for this reason chiefly that the express provisions of our statutes relating to guardianship require that notice of proceedings for the creation of such guardianship shall be given to the person having property within the jurisdiction of the

court, and who in such proceedings is alleged to be incompetent or insane. The strictitude of our statutory requirements in that regard is best illustrated by the provisions of section 1763 of the Code of Civil Procedure relating to the guardianship over the person or property of alleged insane or incompetent persons who are within this state. Said section requires, not only personal service of notice of the pendency of such proceedings and of the time and place of the hearing thereon to be given to the alleged insane or incompetent person, but further requires that such person must be produced at such hearing, unless he is at the time a patient at a state hospital, and is shown by the certificate of the superintendent thereof to be unable to attend. The reason for this strictitude lies in the fact that the issue of primary importance to be determined before any order can be made in the premises is as to whether or not the persons, whose personal and property rights are to be thus affected, are or are not incompetent or insane. That a similar strictitude cannot be practically enforced in the case of alleged insane or incompetent persons, who reside without or are absent from the state, lies in the nature of things, but does not in any degree diminish the importance of giving the notice required by section 1793 of the Code of Civil Procedure. In the case of *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912, this proposition is aptly and forcibly stated:

"It lies at the fountain of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said in answer to this that he is insane, and that notice to an insane man will do him no good? The reply is that his insanity is the very question to be tried, and he the only party interested in the issue. In many cases, if notice be given him, he will be prompt to attend and in person be the unanswerable witness of his sanity. In some cases, if notice be not given him, those interested in using his property or robbing him of it will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice."

In the entire absence of any notice to the person of all others, the most interested in the proceedings in which these vital issues are to be determined, and in the consequent want of jurisdiction in the court entertaining such proceedings to make any order whatever in the premises, it would seem clear that this court ought not to prejudge, under the procedure of a writ of review, that the order thus assailed was imperatively or at all necessary to the welfare of the person most

affected by it, or that the subsequent proceedings under the guise of the guardianship created thereby were beneficial to such person or to his property; since as to all such matters such person has never had his or her day in court. In the instant proceeding it is not to be forgotten that Julie Grinbaum was at the time of the making of the order complained of herein detained in a hospital for the mentally afflicted in a distant foreign land, and that she continued to be so detained for the seven years or more which followed the making of said order; that the record herein discloses that during that entire period she had not a single relative in the state of California who might have been interested in the welfare of her property interests therein, or who might have been notified of proceedings from time to time taken, and of orders from time to time made in the course of said guardianship; that, so far as the record herein discloses, no such legal notice as the law requires was ever given either to Julie Grinbaum or to any relative of hers, interested in her welfare, of any of the subsequent proceedings had or orders made in the course of said guardianship during all these years; that it was not until within a brief year before the institution of the instant proceeding that Julie Grinbaum came or was brought within the boundaries of this state or the jurisdiction of its courts; and that ever since her return to this state in 1921 she has been and still is subject to the legal disability created by said order judicially determining her to have been insane at the date thereof, and to have continued so to be while said order remains in force and effect. Can it be said with propriety under these circumstances that this court would be exercising a proper discretion in denying to this petitioner, for the reasons urged by the respondents, the right by writ of certiorari to have annulled an order void upon its face for absolute lack of jurisdiction in the court to make it, if the petitioner is otherwise entitled to such writ? We think not.

[8] As to the contention of the respondents that confusion, litigation, and prejudice to third persons might result from the annulment of said order, it may be said that so far as the record herein discloses no rights of third persons are involved in said proceedings or would be injuriously affected by the annulment of said order. As to possible litigation, it may be noted that it is to such very litigation that this court is asked by respondents to relegate this petitioner through their insistence that she should seek her relief in a court of equity rather than by means of this writ; while as to any confusion in respect to the petitioner's properties or affairs or in respect to the administration thereof during the past years of said guardianship it would seem that the mere fact that the guardian might be required to render an accounting of its stewardship, while

acting as such under a void order of appointment, should not of itself be sufficient to justify this court in refusing to annul said order, since equity will always intervene to protect and uphold the acts and transactions of trustees de facto, when done in good faith, and when the same inure to the benefit of the person or estate of the ward. *Perry on Trusts* (6th Ed.) § 910; *Jessup v. Jessup*, 17 Ind. App. 177, 46 N. E. 553; *Curran v. Abbott*, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337; *Jones v. Dawson*, 19 Ala. 672; *Lowe v. Morris*, 13 Ga. 165; *Railroad Co. v. Miller*, 47 Vt. 146; *McElhenny's Appeal*, 46 Pa. 347; *Worrall v. Harford*, 8 Ves. 8.

[9, 10] We will next proceed to a discussion of the further contention of the respondents herein to the effect that said petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, and hence is not entitled to the relief sought herein. Under this head, the respondents insist that the petitioner has had four separate, distinct, and adequate remedies against the making, operation, and effect of said order, viz.: (1) By appeal; (2) by motion in the court making said order to set the same aside; (3) by an action in equity to declare said order void; and (4) by a petition for restoration to capacity. As to the first of these remedies, it is conceded that the time has long gone by for its exercise, and it is obvious from the state of this record that the petitioner neither had nor was in any condition to receive notice of the making of such order or of the defects in the same during the statutory time when such appeal might have been taken. As to the petitioner's second suggested remedy, viz., that of a motion to set aside such void order in the court making the same; in response to this suggestion it may be stated that it has never been the practice to require a party injuriously affected by a judgment or order of a court, which court had never acquired jurisdiction over either his person or property to make the same, to first apply to the court making said order to have the same vacated; nor should it be so in reason, since to apply such a rule would be to require such a party to submit himself to the jurisdiction of the court making such void order, and thus commit himself thenceforward to the tender mercy of the court making the same. We are cited to no authority which goes so far as to hold that a person having a clear right to make a direct attack by certiorari upon a judgment or order of a judicial tribunal upon the ground of lack of jurisdiction must first seek relief from such judgment or order in the court which was without jurisdiction to make or enter the same. The cases of *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, *People v. Davis*, 143 Cal. 673, 77 Pac. 651; and *Benning v. Superior Court*, 34 Cal. App. 296, 167 Pac. 291, go no further than to hold that a party affected by an order of a court, void upon its face,

may apply to the court making the same to have it vacated, but do not hold that such party is obliged to do so before applying for a writ of review. On the other hand, in the case of *Havemeyer v. Superior Court*, 84 Cal. 327, 405, 24 Pac. 121, 141 (10 L. R. A. 627, 18 Am. St. Rep. 192), which arose on application for a writ of prohibition, this court, after an exhaustive consideration of the subject, said:

"If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition."

This we think to be the true and reasonable rule applicable to cases of this character.

[11] The respondents' next contention is that the petitioner has a plain, speedy, and adequate remedy by application for restoration to capacity under the provisions of section 1766 of the Code of Civil Procedure; but a moment's reflection will serve to show that this is no remedy at all for the matter complained of in this proceeding, since proceedings under that section of the Code do not assail the validity of the original proceedings and order declaring the petitioner to be insane, but, on the contrary, admit, in so far as the party applying for restoration to capacity can admit, the validity of such proceedings. Nor does such an application in any way involve an inquiry into the validity of the order creating a guardianship over the property or estate of the petitioner, and hence could not determine the main issue presented in the instant proceeding.

[12] The respondents finally contend that the petitioner has a plain, speedy, and adequate remedy in a court of equity, in an action to declare said order void. In the case of *Consolidated Adjustment Co., etc., v. Superior Court*, 189 Cal. 92, 207 Pac. 552, Mr. Chief Justice Shaw, referring to the issuance of extraordinary writs in cases where inferior tribunals have attempted to proceed in causes over which they have no jurisdiction, aptly says:

"The question whether or not there is a plain, speedy, and adequate remedy in such cases is a question of fact depending upon the circumstances of the particular case." See, also, *Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390.

[13] The circumstances of this particular case, as shown by the record before us, disclose that Julie Grinbaum, the petitioner herein, is now of the advanced age of 75 years; that she is in delicate health physically, and in a more or less enfeebled mental state; that during most of her life she has been a citizen and resident of San Francisco; that about 13 years ago she was deprived of her husband's companionship and support by his sudden death while they were traveling in foreign lands; that under the shock of

that loss she became morbid and melancholy to a degree which deprived her of all interest in the ordinary affairs of life, and which presently rendered her the proper subject of internment in hospitals devoted to the care of those mentally afflicted or enfeebled, if not actually incompetent or insane; that for 7 years she was thus interned under the immediate custody and care of guardians and of physicians who were not only not related to her by ties of blood, but who had been strangers to her prior to her said affliction. During that entire period the administration of her properties and estate in California proceeded under the guardianship of the Mercantile Trust Company, with which institution she had never theretofore had any business connection or relation, and without any actual participation by her therein, and without any form of legal notice or actual or comprehending knowledge on her part, so far as this record discloses, of the various proceedings, reports, hearings, and orders had and made therein. In the year 1921, through the persistent efforts of her nearest relatives, she was enabled to be freed from such detention to return to the city of San Francisco, which had always been the place of her legal residence and home, and where she has since continued to be. What may be the actual state of her bodily health or mental powers at present is beyond the scope of the instant inquiry, but it is reasonably certain that at most she has left but few remaining years of her already prolonged and too much troubled life. To relegate her to a suit in equity against this guardian of her estate to obtain the relief which she seeks by this direct proceeding would but mean to relegate her to a litigation which would in all reasonable probability outlast her life, and during the continuance of which she would not only be under the ban of the judicial determination of her incapacity which said order creates, but would also have her property and affairs administered by a guardian whose appointment, as such, she was assailing as void for want of original jurisdiction in the court creating the same. In such suit in equity, the primary question to be determined would be the question of law as to the validity upon its face of the proceedings for the appointment of such guardian; but this question would necessarily in such action be involved in the other equitable considerations presentable in such case under the well-known rule that when equity lays hold of any matter of equitable cognizance it will do so to the full extent of affording complete equitable relief to the parties before it. This would of necessity involve a complete accounting between the parties before the entry of a final decree, and it is fairly to be apprehended from the attitude and briefs of respective counsel herein that such accounting would involve an extended inquiry and a prolonged, if not acrimonious, litigation. It is to be noted in

this connection that the parties interested in said guardianship proceeding are not adversary parties in the ordinary sense of that term. The Mercantile Trust Company as guardian of the estate of Julie Grinbaum has no interest in her properties or estate in any other capacity than as her trustee, and has no right to be perpetuated in the possession and control of her said properties or estate, except upon the assumption that she has been judicially determined to be incompetent or insane by a valid order of the court, which, after such determination, appointed it to be and act as guardian of her said estate. Its highest duty as such guardian is to its ward, and in relation to both her personal welfare and her property rights it can have no adverse or selfish purpose or interest to subserve; nor should it be heard to urge either that removal of its said ward from the shadow of an alleged adjudication of insanity, if such removal is otherwise proper, shall be delayed, nor that its possession and control of her property shall be perpetuated through its insistence upon slower or more involved legal processes to gain relief than those which the ward herself, or her immediate relatives and advisors, have seen fit to select. Under the foregoing circumstances the language of this court in the case of *Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390, while applied to a different state of facts, would seem to have application here:

"In view of the fact that the superior court was then, and ever since has been, without power or jurisdiction to proceed further in the action, * * * and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense * * * to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

The order is annulled.

We concur: LENNON, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.

WILBUR, C. J. I dissent. As to the question of notice and the effect of the failure to make substituted service upon Mrs. Grinbaum of the application for letters of guardianship, I am in doubt, and as the majority of my associates have arrived at a conclusion, I do not desire to further delay the filing of an opinion in order to make the necessary research to definitely determine that question, nor do I think that necessary, in view of my conclusion as to the duty of this court in the premises in the exercise of a sound discretion in the granting or withholding of writs of review. The original petition filed in this matter was presented by Mrs. Grinbaum, and upon that petition an order to show cause

was issued. Upon the return day the respondent called attention to the fact that the petition showed on its face that Mrs. Grinbaum was under legal disability, owing to the adjudication of the German court, and that, although she might have presented a petition in this matter in her own right, upon the theory that the adjudication of the California court was void for lack of jurisdiction, she was, notwithstanding that proposition, under legal disability owing to the German decree, which was still in full force and effect. Thereupon, upon the suggestion of the attorney who had presented her petition, he was appointed guardian ad litem to present the matters alleged in her petition. At the time of the issuance of the order to show cause upon the petition of Mrs. Grinbaum, we had before us two original proceedings instituted by her relating to her proceeding for restoration to capacity then pending before the department of the superior court in which the guardianship proceedings were pending. One of these proceedings was an application for writ of prohibition to prohibit the judge of that department from proceeding with the trial of the issues upon the application for restoration to capacity, and the other was a mandamus proceeding to compel him to issue certain commissions for the taking of depositions. It was urged upon us as a reason for entertaining these original proceedings to view the record upon the appointment of a guardianship that a decision favorable to the applicant might render unnecessary a long and expensive trial of the proceedings for restoration to capacity, and render unnecessary our own decision in the two original proceedings then pending. It was upon this basis that the order to show cause was issued. It now appears that a favorable judgment in this matter will not at all relieve Mrs. Grinbaum of the necessity of proceedings for restoration to capacity because of the fact that her incapacity is established by the German decree. We are called upon in this matter to exercise our discretion in three different particulars: first, in the question of whether or not the proceedings will be entertained at all in the court of last resort without requiring the parties to first present the matter to the superior court; second, we are called upon to determine whether or not in this proceeding we will exercise our discretion by annulling the order of the trial court appointing the Mercantile Trust Company as guardian, in the event that we conclude that the trial court had no jurisdiction to make the appointment; third, we are called upon to determine whether or not for the purpose of prosecuting these proceedings we will appoint and continue in power the guardian ad litem.

In view of the fact that we have already expended the time and labor involved in a consideration of this matter, both by briefs

and argument, it may be that, if there is no consideration involved other than the inconvenience resulting to the pressing business of this court by taking up such proceedings in the first instance, we might waive that question, and proceed to judgment. Second, with reference to the discretion as to the issuance of the writ of review upon the application of Mrs. Grinbaum, it might be that, if we were fully satisfied that she was capable of conducting her own affairs, and was only deprived of that authority because of a decree entered without jurisdiction and without notice to her, we might be justified in entertaining jurisdiction on the theories advanced in the main opinion. But as to the exercise of our discretion and power in appointing and continuing in power the guardian ad litem for the purpose of attacking this order declaring Mrs. Grinbaum incompetent and appointing a guardian to take possession of her property, it is clear to my mind that under the circumstances disclosed by the record this ought not to be done.

I will state my reasons briefly for the conclusion. It appears that the Mercantile Trust Company was appointed guardian at a time when Mrs. Grinbaum was insane and under guardianship for that reason, and that the guardianship in Germany was continued after a full inquiry into her mental capacity. It further appears that the guardianship proceedings here were instituted at the request of the friends and relatives of Mrs. Grinbaum, and in all probability with the knowledge and upon the request of the German guardian. This German guardian and the guardian subsequently appointed in Switzerland not only had knowledge of the fact that the Mercantile Trust Company was acting as guardian for Mrs. Grinbaum, but they applied to the guardian for money for the maintenance of the ward, and during almost the entire period of guardianship were in receipt of regular remittances from the Mercantile Trust Company to pay the expenses of caring for Mrs. Grinbaum. It further appears that the Swiss guardian was appointed at the instance of the Mercantile Trust Company, and eventually surrendered the custody of the ward to an agent acting jointly for the Mercantile Trust Company, the guardian of her estate in California, and the guardian of the person appointed by the California court. It thus appears that the only persons capable of acting for and on behalf of Mrs. Grinbaum had full knowledge of and fully acquiesced in the appointment of the Mercantile Trust Company as guardian. It is no doubt true that Mrs. Grinbaum would not be bound by the extraterritorial acts of her German and Swiss guardians, and that so far as the conduct of the guardian of her person appointed in California is concerned, that appointment is also under attack. This contention, however, does

not dispose of the question involved, namely, as to whether or not we should appoint a guardian ad litem to directly interfere with that which has been acquiesced in by her general guardian, inasmuch as it is necessarily conceded that Mrs. Grinbaum is incapable of acting for herself because of the legal adjudication of incompetency which is still in full force and effect. It seems to me that, if the proceedings for the appointment of her guardian here are to be attacked in certiorari proceedings, that attack should be made by a general guardian properly appointed, who would have the right in the event of a successful termination of the proceedings to immediately take over the estate now in the custody of the Mercantile Trust Company. The difficulty I see in the matter is that the guardian ad litem is acting under the authority of the appointment by this court, and solely upon that authority. It is true that the appointment is predicated upon the petition of the ward herself and of her relatives in this jurisdiction, but, inasmuch as her own consent is clouded by the incompetency resulting from the German decree, it seems to me that we ought not to proceed further in the matter. There are other considerations leading to the same conclusion and bearing upon our general discretionary powers. It clearly appears that, at the time of the appointment of the Mercantile Trust Company, Mrs. Grinbaum was in fact insane, and that she continued to be so for many years thereafter. It further appears that her insanity is of such type that actual notice to her of the pendency of the proceeding for the appointment of a guardian in California would have no effect whatever upon her; that is to say, she was incapable mentally of receiving notice, and whatever form the notice may have taken her mentality was so clouded that she would not have understood or appreciated the nature or effect of the notice.

It is clear, then, that, if the almost universal form of notice given by the probate court under the statutes of this state, namely, a notice posted for 10 days in three public places in the county, had been given, such notice would have been utterly unavailing to actually bring home to the insane person, then in Germany, knowledge of the proposed proceeding in California. It is true that of necessity we indulge in the conclusive presumption that notices of that type do in fact notify nonresidents of the pendency of proceedings affecting their rights in California. Assuming, as the majority opinion holds, that in default of such notice the proceedings are utterly void, I do not think that we should indulge in the legal fiction that only by such notice or a similar notice could the ward be subject to the jurisdiction of the court when the result of our action will be to declare that the acts of the guardian for more than 10 years had been without legal authority.

The Mercantile Trust Company, in their answer to these proceedings, allege that the transactions of the estate have involved the transfer of nearly \$2,000,000 worth of property, and that during its administration the estate has increased from a value of \$800,000 to nearly \$2,000,000. We are asked to declare these proceedings all void at the instance, not of the ward, but of a guardian ad litem appointed by ourselves. I think this ought not to be done.

It is true that in considering this matter we must recognize that Mrs. Grinbaum, being under a formal adjudication of incapacity, could not herself take any action which would be binding upon her. Nevertheless, it is true that during all this period she has been supported by moneys provided by the Mercantile Trust Company from the funds belonging to her in their hands. If she is not estopped by her conduct in thus acquiescing in the appointment of the Mercantile Trust Company as guardian, it is only because of her adjudicated incapacity, and it seems to me that we ought not to appoint another guardian ad litem to attack this guardian, and thus have at the instance of the guardian ad litem a declaration that an order to which she and her general guardian have consented, as far as they were capable of consenting, declared null and void.

It may be said that we have already exercised our discretion by the appointment of the guardian ad litem. This is true, but when, after a complete hearing of the matter, it is manifest that the result of his appointment is merely to give this guardian so appointed by us an opportunity to attack a guardian appointed by the superior court, where such appointment has been acquiesced in, not only by the ward herself, but also by duly appointed general guardians of her person and estate in Germany and Switzerland, I think we should not continue the guardian ad litem in office.

The fact is that we are baffled at every turn in this case by the fact that Mrs. Grinbaum is under adjudication of complete and total incapacity to transact business, and that at the same time she claims to be sane and is prosecuting a proceeding for restoration to capacity.

It has been held by the Supreme Court of the state of Missouri in the case of Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572, that, where an alleged insane person petitions for restoration to capacity in a guardianship proceeding, he could not subsequently attack the validity of those proceedings upon the ground that he had had no notice of the original appointment of the guardian, and that he was thereby estopped from pursuing property which had been sold by the general guardian so appointed in the hands of an innocent purchaser from the guardian. Under the principles established by this Missouri case, Mrs.

Grinbaum, after having applied for an order restoring her to capacity, cannot now be heard to claim that the guardian was not originally appointed upon proper notice. But here we again encounter the baffling difficulty that while Mrs. Grinbaum in her own proper person could apply for restoration to capacity in the probate court in California, and after such restoration might be bound by the original order appointing a guardian, she was in this case under the additional disability of the German and Swiss decrees of incompetency, and it is doubtful if her application for restoration to capacity in the California court would have any effect as a waiver or estoppel because of her disability under the German and Swiss decrees. It seems to me that an order vacating the appointment of the Mercantile Trust Company before the appointment of a guardian entitled to receive the property of the ward and without any adjudication as to her restoration to capacity would result in confusion and delay. And confusion and delay in an estate involving \$2,000,000 means great expense. The guardian ad litem in this matter, it should also be stated, adheres consistently to his contention that the real purpose of these proceedings is to obviate the delay and difficulty incident to a trial of the proceedings for restoration to capacity, and, when we have determined that such proceedings in some form or other are essential, it is clear that we ought not to proceed further in the matter.

In my judgment we should discharge the guardian ad litem, and dismiss the proceedings without prejudice to any further actions that may be undertaken by the parties interested.

192 Cal. 566

GRINBAUM v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10723.)

(Supreme Court of California. Dec. 17, 1923.)

1. Insane persons — 33(1)—Personal service of notice necessary in proceedings to appoint guardian of person.

Proceedings to appoint a guardian being in personam, it is essential to jurisdiction that the incompetent, or insane person, be within the court's jurisdiction, and that personal service of notice be made, notwithstanding Code Civ. Proc. § 1793, providing "the superior court may appoint a guardian of the person and estate, or either, of a minor, insane or incompetent person * * * who resides without the state."

2. Insane persons — 32—Order appointing guardian of person held void.

Where it affirmatively appears that at the time of proceedings to appoint a guardian of the person of an insane person she was without the state, beyond the jurisdiction of the court to give personal service, and that no

personal service was ordered or attempted, the order appointing a guardian of such person was void for want of jurisdiction.

In Bank.

Application by Julie Grinbaum, by John Francis Neylan, her guardian ad litem, for a writ of certiorari to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. Frank H. Dunne, Judge thereof, to review an order of J. V. Coffey, Judge. Order annulled.

See, also, 209 Pac. 1005; 221 Pac. 635, 653.

John Francis Neylan and Philip S. Ehrlich, both of San Francisco (Edmond E. Herrscher, of San Francisco, of counsel), for petitioner.

John J. Barrett and Morrison, Dunne & Brobeck, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. This is an application for a writ of review, wherein it is sought to have a certain order of the superior court of the state of California, in and for the city and county of San Francisco, made and entered on the 7th day of April, 1921, appointing Erna Herrscher guardian of the person of Julie Grinbaum, reviewed and annulled.

The main facts respecting the physical and mental condition of Julie Grinbaum which led up to the institution of the proceeding for the appointment of a guardian of the person of Julie Grinbaum which is herein sought to be reviewed are substantially the same as those fully set forth and considered in the decision of this court in the Matter of Julie Grinbaum, an insane person, etc., v. Superior Court, etc. (S. F. 10708), 221 Pac. 635, this day filed.

The petition of Erna A. Herrscher for appointment as guardian of the person of Julie Grinbaum was filed in said superior court on March 9, 1921. It averred that the petitioner was the next and only relative in California and nearest blood relation of Julie Grinbaum; that on the date of the filing of said petition Julie Grinbaum was and for more than 40 years prior thereto had been domiciled in and a resident of the city and county of San Francisco, state of California; that Julie Grinbaum was and is, at present, temporarily without the state of California, and is incarcerated in the Bellevue Sanitarium at Kreuzlingen, Switzerland, as and that she has been and is an insane person, and that it is necessary that a guardian be appointed of the person of Julie Grinbaum, an insane person. Wherefore the petitioner prays that she be appointed such guardian. Upon the filing of said petition the court made an order setting the hearing thereon

for April 5, 1921, and directing notice to be given to the Mercantile Trust Company, guardian of the estate of said insane person, by personal citation, and also directing the posting of notices of the time and place of hearing for two weeks prior thereto. The court further set forth in its said order that "it further appearing from said petition and the facts aforesaid that the said petitioner is the only person in the state of California related to said Julie Grinbaum by consanguinity or otherwise, and that said petitioner is the nearest blood relative of Julie Grinbaum, said insane person, that no necessity exists for any other or further notice of the time and place of said hearing, no further notice thereof is hereby directed." The matter in said application came on for hearing upon the date appointed, whereupon proof was made of the giving of the notices as required by said order and of the facts set forth in said petition, and thereupon said court made its order appointing Erna A. Herrscher guardian of the person of Julie Grinbaum, an insane person, which is assailed in this proceeding.

[1] It is apparent upon the face of the foregoing proceedings that the court had no jurisdiction to entertain said petition for the appointment of a guardian of the person of said insane person, and had no jurisdiction to appoint such guardian. Proceedings for the appointment of a guardian of the person of another are essentially proceedings in personam. *De La Montanya v. De La Montanya*, 112 Cal. 101, 131, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; 28 Corpus Juris, 1068, 1069; *Schouler on Domestic Relations* (6th Ed.) vol. 1, p. 930. This being so, it is a prime essential to the jurisdiction of the court to entertain a proceeding or make an order for the appointment of one person as a guardian of the person of another alleged to be either a minor or an incompetent or an insane person that such person shall be within the jurisdiction of the court seeking to make such appointment, and that personal service of notice of such proceeding and of the time and place of the hearing thereon shall be given to such person before the court can acquire jurisdiction to make an order for the appointment of a guardian of either such minor or incompetent or insane person. With regard to the appointment of guardians of minors, it was held by this court in the case of *De La Montanya v. De La Montanya*, 112 Cal. 101, 131, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, that the superior court had no jurisdiction to appoint a guardian for minors who were absent from the state, and that the fact of their domicile within the state did not suffice to give the court jurisdiction to appoint a guardian over them while they were so absent from the state and thus be-

yond the jurisdiction of said court to give personal notice of such application and appointment. The same principle applies to proceedings for the appointment of a guardian of the person of another who is at the time absent from the state. It is true that section 1793 of the Code of Civil Procedure provides that "the superior court may appoint a guardian of the person and estate, or either, of a minor, insane, or incompetent person, * * * who resides without the state, and has estate within the county or, who, though not having such estate, is within the county" wherein such application is made. This provision of the Code, however, cannot be held to give jurisdiction to the superior court to entertain a proceeding or make an order for the appointment of the guardian of a person of an alleged minor, insane, or incompetent person, who is absent from the state, and hence beyond the jurisdiction and power of the court to give to such person personal notice of the pendency of said proceedings under the authorities above cited. The only other section of said Code giving statutory authority for the appointment of guardians of insane and incompetent persons is section 1763 thereof, which expressly provides that personal service of notice of such proceedings shall be given to the alleged insane or incompetent person before the court can acquire jurisdiction to make an order appointing the guardian of his person.

[2] In the proceedings sought to be reviewed herein and upon the face of the order sought herein to be annulled, it affirmatively appears that at the time said proceedings were instituted, and, at the time said order was made, Julie Grinbaum was absent from the state of California, and was therefore beyond the jurisdiction of said court to give personal notice to her of the pendency of said proceedings. And it further affirmatively appears upon the face of the order sought to be annulled herein that no such personal notice was either ordered or attempted to be given. It follows necessarily that the entire proceeding for the appointment of a guardian of the person of Julie Grinbaum, while she was so absent from the state of California, and beyond the jurisdiction of said court, is void. It follows that the order appointing Erna A. Herrscher guardian of the person of the said Julie Grinbaum must be annulled, and it is so ordered.

We concur: LENNON, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

WILBUR, C. J. I concur in the opinion of Mr. Justice RICHARDS, for the reasons stated by him, and, in view of my dissenting opinion in the companion case affecting the guardianship of the estate of Julie Grin-

baum, I would add to what is stated by Mr. Justice Richards that the guardian ad litem in this matter was appointed at the instance of Erna A. Herrscher, who, in effect, consents to the reversal of the order appointing her guardian.

192 Cal. 570

GRINBAUM v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10634.)

(Supreme Court of California. Dec. 17, 1923.)

Mandamus ☞ 16(1)—Moot question only held presented.

Application for writ of mandate, questioning the qualifications of a judge to hear proceedings under Code Civ. Proc. § 1766, for the restoration to capacity of one adjudged insane, presents only a moot question after the adjudication of insanity has been declared void, and will be dismissed.

In Bank.

Application by Julie Grinbaum for a writ of mandate to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. Frank H. Dunne, Judge thereof. Dismissed.

See, also, 209 Pac. 1005; 221 Pac. 635, 651, 653.

John Francis Neylan, of San Francisco, for petitioner.

Morrison, Dunne & Brobeck, and John J. Barrett, all of San Francisco, for respondents.

WILBUR, C. J. This is a petition for a peremptory writ of mandate requiring the respondent Frank H. Dunne, judge of the superior court, to perform the acts required by him under section 170 of the Code of Civil Procedure for the selection of another judge for the trial of the proceedings in the matter of the guardianship of Julie Grinbaum, the petitioner, now pending before him for her restoration to capacity after the denial by respondent of her motion for such transfer, based upon affidavits alleging that the respondent is disqualified by reason of bias and prejudice to hear such proceeding.

The only points presented by the parties in connection with this application are with relation to the disqualification of the judge. We have, however, this day rendered decisions holding that the appointments of a guardian of the person and a guardian of the estate of Julie Grinbaum were made without jurisdiction and void. The proceedings herein were inaugurated under and by virtue of the provisions of section 1766 of the Code of Civil Procedure. This section is only applicable to persons adjudged insane or incompetent, for whom guardians have been appointed under section 1764,

Code of Civil Procedure, or section 1793, Code of Civil Procedure. Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; Aldrich v. Superior Court, 120 Cal. 140, 52 Pac. 148.

Having reached the conclusion that such guardian has not been appointed, it is unnecessary to determine the application for a writ of mandate to compel the respondent judge, Frank H. Dunne, to transfer the proceedings to another judge or department, for the reason that the proceedings for restoration to capacity are based upon a false premise, namely, that a guardian of the person and a guardian of the estate have been appointed. Inasmuch as the only question before us relates to the qualifications of the respondent judge to try the proceedings now pending before him, it is unnecessary to pass upon the jurisdiction of the superior court of the city and county of San Francisco to entertain proceedings based upon section 2189 of the Political Code, or other appropriate proceedings to determine the present mental capacity of Julie Grinbaum. The question involved in the application having thus become a moot question, the petition for writ of mandate is dismissed.

We concur: **LAWLOR, J.; LENNON, J.; KERRIGAN, J.; MYERS, J.; WASTE, J.**

192 Cal. 783

GRINBAUM v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10685.)

(Supreme Court of California. Dec. 17, 1923.)

Mandamus ☞ 16(1)—Moot question only held presented.

Proceedings for mandamus to compel the issuance of an order for the taking of depositions in a proceeding under Code Civ. Proc. § 1766, for the restoration to capacity of one adjudged insane, present only a moot question after the adjudication of insanity has been declared void, and will be dismissed.

In Bank.

Application by Julie Grinbaum for a writ of mandate to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. Frank H. Dunne, Judge thereof. Dismissed.

See also, 209 Pac. 1005; 221 Pac. 635, 651, 653.

John Francis Neylan, of San Francisco, for petitioner.

Morrison, Dunne & Brobeck and John J. Barrett, all of San Francisco, for respondents.

WILBUR, C. J. We have this day rendered decisions holding that the guardian of the

person and the guardian of the estate of Julie Grinbaum were appointed by void orders. We have also held that by reason of these decisions it is unnecessary to pass upon the qualifications of the judge to try the proceedings for restoration to capacity, because the respective proceedings for the appointment of the respective guardians of the person and estate were void, and that the proceedings for restoration to capacity based upon the validity of such orders of appointment must fall with the orders appointing the respective guardians. For the same reason it is unnecessary to issue a mandamus to compel the respondent judge to make an order for the taking of the depositions of certain individuals to be used upon the trial of the pending application of Julie Grinbaum for restoration to capacity.

We concur: LAWLOR, J.; LENNON, J.; KERRIGAN, J.; WASTE, J.; MYERS, J.

64 Cal. App. 386

PEOPLE v. BAKER. (Cr. 996.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1923.)

1. Criminal law §1144(13)—Appeal disposed of on assumption of truth of state's evidence.

Where state's evidence was contradicted by that of defendant and jury resolved contradictions in favor of the state, an appeal must be disposed of on the assumption that the facts were as testified to by state's witnesses.

2. Embezzlement §16—Act as to fraudulent removal of leased property inapplicable to embezzlement as bailee.

Information in embezzlement of an automobile being under Pen. Code, § 507, as embezzlement by a bailee, section 504a, making fraudulent removal of leased property embezzlement, is not applicable.

3. Embezzlement §16—One in possession of automobile under agreement to paint held a bailee; "bailment."

Where defendant received possession of an automobile to paint it on an agreement to redeliver after the painting was completed, he was a bailee and the transaction a "bailment" during his possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bailment.]

4. Embezzlement §16—Test to determine whether contract creates "bailment" or a "sale" on credit stated.

The principal test by which to determine whether a contract creates a bailment, or is a sale on credit, is whether there was a binding promise by the person to whom the possession was given to pay for the article, and, if there was such promise, then it is one of sale, and, if there was no such promise, then it was not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

5. Embezzlement §16—Bailment with option of bailee to buy remains a "bailment."

A bailment with an option to bailee to buy is a "bailment" and nothing more.

6. Embezzlement §16—Bailee with optional right to purchase guilty of embezzlement in fraudulently appropriating.

A bailee with an optional right to purchase is guilty of embezzlement, if he fraudulently appropriates property with which he was intrusted.

7. Embezzlement §16—Automobile painter guilty of embezzlement, on conversion to own use.

Defendant receiving an automobile under contract to paint and return it, with option to buy on becoming financially able to make an initial payment, held it as bailee only, and when, instead of painting or purchasing it by making agreed payment, he fraudulently and feloniously converted it to his own use, he was guilty of embezzlement.

8. Embezzlement §11(1)—Owner's demand for return of automobile held unnecessary.

Where automobile was turned over to a painter with option to purchase it when able to make an initial payment and the only right which he had to drive it anywhere was to go to a town within the state for only one day to raise money to make the initial payment, his action in taking the car into Mexico and there borrowing money on it was inference of fraudulent appropriation with felonious intent, rendering demand for return unnecessary.

9. Criminal law §564(1)—Evidence warranted finding of intent to embezzle within venue.

In prosecution for embezzlement of an automobile, evidence held to warrant a finding that intent to embezzle was conceived in county of venue.

10. Embezzlement §23—Restoration of property embezzled received only to mitigate punishment.

Under Pen. Code, § 513, actual restoration of property embezzled is ground for mitigation of punishment only; and hence, in prosecution for embezzlement of an automobile, defendant's guilt was not affected by the fact that evidence failed to show that the automobile was not recovered and returned to its owner prior to time when complaint was lodged.

11. Criminal law §547(2)—Witnesses §255(2)—Stenographer competent to testify to admissions in court, referring to notes to refresh recollection.

In prosecution for embezzlement of an automobile, admissions of defendant at preliminary examination were properly proved by a stenographer who heard his statements in presence of the magistrate, and she was therefore competent to testify as to admissions and properly referred to her notes to refresh her recollection. Code Civ. Proc. § 2047.

12. Criminal law §1086(14)—Court not put in error for refusing unrequested instructions.

Where record fails to show that requests for instructions were proffered by defendant,

errors assigned on refusal so to give them are not available.

13. Criminal law —958(3)—Denial of new trial held not abuse of discretion.

Where, on motion for new trial for newly discovered evidence, affidavits set forth only matters to which affiants could testify, but did not show that their evidence could not have been produced at trial by the exercise of reasonable diligence as required by Pen. Code, § 1181, subd. 7, no abuse of discretion in denying the motion was shown.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

E. W. Baker was convicted of embezzlement of an automobile, and he appeals. Affirmed.

Fred A. Shaeffer, of Santa Maria, and W. E. Learned, of Santa Barbara, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. By an information filed in the superior court for Santa Barbara county, defendant was charged with the embezzlement of an automobile, the property of one O. P. Hazard. He was found guilty, and now appeals from the judgment of conviction and from the order denying his motion for a new trial.

The information charges that defendant, as a bailee, was intrusted by Hazard with a Nash automobile of the value of \$700, and that on or about June 13, 1922, at Santa Maria, in the county of Santa Barbara, he feloniously and fraudulently appropriated it to his own use.

Appellant's main contention is that the evidence is insufficient to justify the verdict. The evidence adduced by the people tended to prove the following: Defendant was the proprietor of a paint shop at Santa Maria. Hazard, the owner of the automobile, took his car to defendant's place of business on June 12, 1922, to have it painted. Defendant agreed to paint the car and to finish the job not later than June 21st. He signed and delivered to Hazard a receipt for the property reading as follows:

"Rec'd. of O. P. Hazard June 12, '22 Nash, a chummy roadster, 249341. To be painted dark blue black fenders promised June 21st, '22.
[Signed] E. W. Baker."

Hazard testified unequivocally that he delivered the automobile to defendant and left it with him under the latter's agreement to paint it, as evidenced by this written receipt. It seems that Hazard desired to sell the car to any one who would purchase it on terms satisfactory to him; and such desire to sell seems to have furnished the reason why he wanted the automobile painted, he thinking, doubtless, that if it were painted it would sell more advantageously. Prior to deliver-

ing the automobile to defendant, i. e., a day or so prior to June 12th, defendant and Hazard had a conversation respecting the possible purchase of the car by the former. Hazard expressed a willingness to sell the automobile to defendant for \$600, payable one-half at the date of sale and the balance on time. Defendant was seemingly willing to buy the car for that sum, but instead of agreeing to make an immediate cash payment of one-half of the purchase price he offered to give for the initial payment his personal check, postdated two weeks. Hazard declined to consider any such arrangement, but told defendant that the latter could buy the car for \$600 if he would pay one-half down and the balance in monthly installments. On his cross-examination Hazard testified, in part, as follows:

"Q. Did you agree upon a sale? A. No, sir; I wouldn't receive his check dated two weeks ahead. * * * I agreed that I would sell it for that [\$600] if he had the money. * * * Q. Mr. Baker did not have the purchase price at that time? A. No. Q. It was settled at that time that Mr. Baker should use the car in order to secure the money to pay you for the car? A. I took the car to be painted. He asked me for the use of it to go out to Sisquoc [a small town in Santa Barbara county], as I understood him, to raise the money. Q. And you consented to have him use the car so he could go out and get the money? A. On that day [June 12th]; yes, sir. * * * If I did not find another purchaser before he bought it, he had the privilege to buy it. Q. He had the privilege of buying that car at any time while it was in the shop to be painted? A. Yes, sir. * * * Q. If he did not buy it, he would have the right to go ahead and paint it? A. Yes. * * * Q. Then, Mr. Hazard, the truth of the situation is this, is it not: That you delivered the car to Mr. Baker expressly with the understanding that he should buy it? A. No, sir. Q. What was the understanding? A. Not expressly. The understanding was that he could buy it, and the price was open to anyone who wished to purchase. * * * Q. And you did not object to his taking the car out to see if he could raise money? A. Only on the day I gave him permission to use the car [June 12th]. * * *

"Question by the Court: Did you ever authorize the defendant to take that car out of this county? A. No, sir. Q. Or anywhere else except to go to Sisquoc on this errand to see if he could raise the money? A. That was all."

On his redirect examination Hazard testified as follows:

"Q. Mr. Hazard, on June 12th, at the time this contract was executed referring [to the painting contract evidenced by the receipt which defendant gave when the car was left with him], was there any other agreement whatsoever of any kind or nature between you and E. W. Baker in regard to that car? A. Only he had the privilege to buy it if he could raise the money. * * * Q. But the car was left there under this contract [the contract to paint

it]? A. Yes, sir. * * * Q. You mean that it was open for purchase by him or anybody else for that price, if they would come and give you the money? A. Yes, sir."

At no time subsequent to June 12, 1922, when he left his car to be painted, did Hazard again see defendant until after the latter's arrest. Shortly after the car was delivered to him to be painted, defendant drove it to Mexico, where he left it with a man from whom he says he borrowed a sum of money. Some time about the middle of August Hazard recovered possession of the automobile. He testified that the "insurance people" told him that they had recovered the car. It was redelivered to him at Los Angeles by an agent of the insurance company.

[1] Needless to say, the evidence given by the people's witnesses was flatly contradicted, on many points, by that given by the defendant and his witnesses. For example, defendant testified that Hazard gave him express permission to drive the automobile to Mexico. By their verdict of guilty the jury resolved these contradictions in favor of the testimony of the people's witnesses, and this appeal must be disposed of upon the assumption that the facts are as testified to by them.

To support his claim that the evidence is insufficient to justify the verdict appellant claims: (1) That the automobile was delivered to him not only to be painted, but with the right to purchase it at any time while it was in his possession; and (2) that the owner gave him the right to use it.

[2, 3] The information was drawn under section 507 of the Penal Code. Hence, section 504a, added to the Code in 1917, is inapplicable. Appellant's contention, therefore, necessarily presents the question of whether or not he held possession under a contract of bailment or under an unfulfilled contract of purchase. We think it clear that appellant was a bailee and that the transaction was one of bailment during all the time the automobile was in his possession. There never was a contract of sale, and appellant never acquired any interest in the car as a purchaser. According to the testimony of the complaining witness, which on this appeal must be accepted as true, appellant received possession of the car for a particular purpose, namely, to paint it, on an agreement to redeliver it after that purpose had been fulfilled. Such a transaction constituted a bailment. C. J., vol. 6, p. 1088. If the bailment had been coupled with an agreement whereby appellant had obligated himself to purchase on terms mutually agreed upon, the transaction doubtless would have constituted a sale. But appellant never obligated himself to purchase. He never exercised the optional right which was given him—the right to purchase the car, at his option, for \$600 by paying one-half of that amount in cash and agreeing to pay the balance in monthly

installments. Under the terms of the offer made to him by the owner, appellant could exercise his optional right to purchase only upon the payment by him of one-half of the stated purchase price. That he never did. Until such time as he should make a cash payment of one-half of the amount for which the owner was willing to sell, or at least until such time as he should communicate to the owner his acceptance of the latter's offer and express a willingness to comply therewith by the immediate payment of one-half of the stated purchase price, appellant was a bailee, and the transaction was one of bailment only.

[4] One of the principal tests by which to determine whether any particular contract creates a mere bailment or is a sale on credit is this: Was there a binding promise on the part of the person to whom the possession was given to pay for the article? If there was such promise, then the contract is ordinarily held to be one of sale and not of bailment; and, conversely, if there was no such binding promise to purchase on terms agreed upon, then the transaction is ordinarily held not to be a sale. See *Bentley v. Snyder*, 101 Iowa, 1, 69 N. W. 1023; and *Norwegian Plow Co. v. Clark*, 102 Iowa, 31, 70 N. W. 808.

[5, 6] A bailment with an option on the part of the bailee to buy—and that is this case—is a "bailment," and nothing more. 35 Cyc. p. 655. There is a class of sales known to the law as "sale or return." They are cases where the purchaser is given the option to return the article if he does not like it. 6 C. J. pp. 1095, 1096. Such cases differ radically from those wherein the person to whom the property is delivered is given the option to purchase if he likes the goods or if he finds himself financially able to make the purchase. In the former class of cases the title passes at once, subject to the right to rescind and return; in the latter class, no title passes until the option to purchase is exercised. One who falls within the latter class, that is, one who, like the defendant here, is a bailee with an optional right to purchase, is guilty of embezzlement if he fraudulently appropriates the property with which he was intrusted. *State v. Betz*, 207 Mo. 589, 106 S. W. 64; See, also, *People v. Goodrich*, 142 Cal. 216, 75 Pac. 796.

[7] Our conclusion is that, having received the automobile under a contract to paint it and return it, with the optional right to buy it if he should desire to do so upon becoming financially able to make the initial payment, appellant held the car as a bailee only, and that he was guilty of embezzlement when, instead of painting the car or purchasing it by making the agreed payment, he fraudulently and feloniously converted it to his own use.

[8] There is no merit in the claim that appellant was given the right to take the car into the Republic of Mexico. According to

the testimony of the complaining witness, the only right which appellant had to drive the car anywhere for his own use was the right to drive it to the town of Sisquoc, in Santa Barbara county, and then only on the one day mentioned by the parties, namely, June 12, 1922. This right to drive the car to Sisquoc was given to appellant solely for the purpose of enabling him, if possible, to raise the money wherewith he might make a payment on the car if he elected to purchase it. His action in taking the car out of the state in the manner he did, with all the attendant circumstances, was sufficient to warrant the jury in drawing the inference that he fraudulently appropriated it. That is, it was sufficient to warrant the inference that appellant converted the car to his own use in a manner and for a purpose inconsistent with the owner's rights and inconsistent with the nature and purposes of the bailment, and that he did so with a fraudulent and felonious intent. See *People v. Fisher*, 16 Cal. App. 275, 116 Pac. 688. There was therefore, no necessity for a demand that the property be returned. *People v. Fisher*, supra; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Goodrich*, supra; *People v. Hatch*, 163 Cal. 368, 373, 125 Pac. 907.

[9] The evidence was sufficient to warrant the jury in finding that the intent to embezzle the property was conceived in Santa Barbara county. This answers appellant's objection that the venue was not properly laid. *People v. Goodrich*, supra.

[10] Appellant's guilt is not affected by the fact that the evidence fails to show that the automobile was not recovered and returned to its owner prior to the time when the complaint was lodged with the committing magistrate. Had appellant voluntarily restored or tendered restoration of the car before the complaint was laid before the committing magistrate, that fact might have justified the trial court in mitigating the punishment, but it would not be a ground of defense. Pen. Code, § 513; *People v. Royce*, 106 Cal. 188, 189, 37 Pac. 630, 39 Pac. 524.

[11] While testifying in his own behalf at the preliminary examination in the justice's court, appellant made certain admissions which the district attorney proved at the trial in the superior court by producing the person who took the shorthand notes of the testimony which appellant gave before the committing magistrate. That person was permitted to refresh her memory by referring to her notes. It is claimed that they should not have been used until it first was shown that the witness had been sworn honestly and faithfully to take the testimony in

shorthand. The witness heard the statements which appellant made in the presence of the committing magistrate. She therefore, regardless of whether she was or was not a duly appointed official reporter, was competent to testify to the admissions or statements which she had heard appellant make in her presence, and it was proper to permit her to refer to her notes for the purpose of refreshing her recollection. Code Civ. Proc. § 2047. See *People v. Carty*, 77 Cal. 216, 19 Pac. 490.

[12] The contention that the court erred in refusing to give certain instructions is not available here. The record before us fails to show that the requests for the instructions were proffered by appellant. See *People v. Hettick*, 126 Cal. 425, 429, 58 Pac. 918, and *People v. Vukojevich*, 25 Cal. App. 459, 464, 143 Pac. 1058.

[13] Newly discovered evidence was one of the grounds of appellant's motion for a new trial. The motion upon this ground was supported by the affidavits of the persons whose testimony appellant claimed he could adduce if granted a new trial. Those affidavits simply set forth the matters to which the affiants could testify. No attempt was made to show that their evidence could not have been produced at the trial by the exercise of reasonable diligence. The exercise of reasonable diligence is an express requirement of the statute. The Code expressly states that a defendant is entitled to a new trial upon this ground when new evidence is discovered "which he could not, with reasonable diligence, have discovered and produced at the trial." Pen. Code, § 1181, subd. 7. An affirmative showing that the newly discovered evidence could not have been discovered and produced at the trial by the exercise of reasonable diligence has always been insisted upon in the decisions. *Haynes on New Trial and Appeal*, vol. 1, § 92. "A motion for a new trial upon the ground of newly discovered evidence," says the court in *People v. Warren*, 130 Cal. 685, 63 Pac. 86, "is looked upon with suspicion and disfavor, and a party who relies upon such ground must make a strong case both in respect to diligence on his part and as to the truth and materiality of the evidence, and if he fails in either respect his motion must be denied." We cannot perceive that the trial court abused its discretion in denying appellant's motion for a new trial.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 307

GLOBE COTTON OIL MILLS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 4310.)

(District Court of Appeal, Second District, Division 1, California. Oct. 31, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

1. Master and servant ☞369—Situe of accident in Mexico not conclusive of jurisdiction under Compensation Act.

That an accident, out of which injuries arose, occurred in Mexico, is not in itself conclusive of jurisdiction, since Workmen's Compensation, Insurance Safety Act, as amended by St. 1917, p. 870, confers jurisdiction in controversies arising from injuries outside the state, where contract of hire was made within the state.

2. Master and servant ☞368—Contract of employment of compensation claimant made at place where offer was accepted.

Where claimant for award under Workmen's Compensation Act as amended by St. 1917, p. 831, applied in this state to superintendent of construction work in Mexico for work, and superintendent stated he would see foreman when he went down to the Mexican camp, and the foreman told him to send plaintiff down, and the superintendent saw plaintiff in this state and asked him when he was ready to go, and plaintiff went down the following day, the contract was made at the place where plaintiff accepted the offer, notwithstanding superintendent's evidence that only the foreman employed workmen.

3. Contracts ☞2—"Place of contract" is where meeting of minds occurred.

The "place of the contract" is the place at which the last act was done by either of the parties essential to a meeting of the minds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Place of Contract.]

4. Master and servant ☞417(7)—Decision of Commission on conflicting evidence conclusive.

The decision of the Industrial Accident Commission on conflicting evidence is conclusive.

5. Master and servant ☞385(11¼)—Compensation for permanent disability for injury to eye held not excessive.

Where injury to a workman necessitated removal of lens of an eye, in which condition he had but $\frac{1}{100}$ vision, having previously lost sight in his remaining eye, determination of the Industrial Accident Commission that percentage of permanent disability was $19\frac{1}{4}$ per cent. and awarding a named sum for 77 weeks, based on his earning capacity, was not abuse of discretion, though with aid of glasses his vision was restored to practically normal.

6. Evidence ☞19—Common knowledge that experts differ as to loss from impairment of human body.

It is common knowledge that one experienced person may differ greatly from another equally experienced in conclusion as to the degree of loss sustained by impairment of any part of the human body.

Certiorari by the Globe Cotton Oil Mills and another against the Industrial Accident Commission and another, to review an order awarding compensation for injuries to Frank Kowall. Award affirmed.

Hickcox, Crenshaw & Trude, of El Centro, for petitioners.

A. E. Graupner, of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondents.

HOUSER, J. Certiorari to review proceedings of the Industrial Accident Commission in connection with a claim presented by Frank Kowall as applicant against Globe Cotton Oil Mills and others as defendants for damages caused by an injury received by said Kowall while in the employ of said defendants.

The questions which this court is called upon to decide are, first, whether or not the Industrial Accident Commission had jurisdiction of the matter, and, secondly, whether the percentage of permanent disability of the claimant was correctly determined by the Commission.

[1-4] The accident out of which the injuries to the claimant arose occurred in Mexico. That fact in itself, however, is not conclusive of jurisdiction, for the reason that section 58 of the Workmen's Compensation, Insurance and Safety Act, as amended in 1917 (Stats. 1917, p. 870), confers jurisdiction in all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the contract of hire is made within this state. The primary question which the Commission had to determine was simply as to where the contract of hire was entered into between the claimant and his employer. The evidence showed: That the Globe Cotton Oil Mills was engaged in some construction work in Mexico, just below the border line of the state of California. That C. N. Perry was superintendent of the work and Charles Lichtenberger was the foreman. That a few days before January 25, 1922, at the border town of Calexico, in the state of California, Kowall asked Perry for employment, to which Perry replied that when he went down to the Mexican camp he would ask Lichtenberger "how he was fixed." That Perry testified that he made it a rule never to hire a man. He further testified: "In other words, if I put a man in charge of the work it is up to him to deliver the work, and it is not up to me to say who he shall carry on the pay roll." That thereafter Perry did talk to Lichtenberger regarding the proposed employment of Kowall, with the result that Lichtenberger told Perry to send Kowall down, following which Perry saw Kowall at Calexico and asked him if he was ready to go. That on the day there-

after Kowall did go down to the camp, and on his arrival there no conversation occurred between him and Lichtenberger, other than a greeting by Kowall of "How do you do. Where is my bunk?" and a response by Lichtenberger of "Make yourself at home; there is your bunk; throw in and get ready to work," followed a few days later by a fixing of the compensation to be paid to Kowall for his services. The substance of the negotiations was that at Calexico, within the state of California, Kowall asked the superintendent for a job; the superintendent said he would see about it and later told Kowall that he could go to work. Whatever the superintendent may have had in his mind regarding the propriety of letting his foreman hire his own men, or whatever arrangement the superintendent may have had with his foreman concerning the matter, is of no consequence here. So far as the workman was concerned, he applied for his employment directly to the superintendent at Calexico, and it was the superintendent who indicated to him that he could have the job. A contract is made at the place where the offer is accepted. *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; *Michelin Tire Co. v. Coleman & Bentel Co.*, 179 Cal. 598, 178 Pac. 507. The place of the contract is the place at which the last act was done by either of the parties essential to a meeting of the minds. *Clark v. Belt*, 223 Fed. 573, 138 C. C. A. 1. That the contract was complete at the time the superintendent asked Kowall when he would be ready to go is shown by the fact that on the arrival of the workman at the construction camp in Mexico no conversation took place other than an inquiry by the workman as to the location of his "bunk," its designation by the foreman, and a direction to "throw in and get ready to work." Perry may have had it in mind not to interfere with Lichtenberger in his right to employ the men who were to work under his direction, but legal principles affecting the contract rights of individuals cannot be prejudicially affected by what one party may have concealed within the recesses of his mind, and which he fails to divulge to the individual with whom he is negotiating, and with whom contractual relations are later consummated. Perry, as the superintendent of construction, had the power to disregard any rule or custom which he had theretofore followed regarding the hiring of men. There is nothing in the evidence to show that Kowall knew that Perry had abdicated any of his authority in the matter. Kowall had the right to assume that he was dealing with the supreme head of the construction department of the defendant company in the matter of employment. If any different rule prevailed, Kowall was entitled to complete knowledge thereof before entering into a

final contract. If the place of contract was a part of the contract within the intention of both parties to the agreement, certainly each of the contracting parties should have been placed in possession of all the details going to a determination of that factor. It must be presumed that Kowall knew the law of this state affecting the status of an employee injured while engaged within the scope of his employment; also that, if the contract of hire were made in Mexico, he would waive such rights. In such circumstances he might and probably would have declined the employment in Mexico, on the ground that he could not afford to take the risk which such employment would necessarily involve, especially in view of the testimony herein that if he were not successful in obtaining the Mexican job he was assured of occupation in the Imperial Valley and on American soil. Kowall's testimony at least supports the conclusion by the commission that the contract of hire was made in this state, and the rule that, where substantial conflict in the evidence exists, the decision so reached by the Commission is conclusive, is so well settled that a citation of authorities in support thereof is unnecessary.

[5] The remaining question has to do with the amount awarded by the Commission to the applicant on account of his injuries. Kowall's injury was of such a nature and to so great an extent as necessitated the removal of the lens of one eye. In its then condition he had but $\frac{1}{100}$ vision in that eye, and owing to the fact that previously he had entirely lost the sight in his remaining eye, his situation was apparently that of a blind man. However, with the aid of properly prepared and adjusted glasses, his sight was restored to practically normal vision for most purposes. It is admitted that under the provisions of the act here in question the respondent Commission is vested with a reasonable discretion in making disability ratings and in fixing the percentage under different claims. The Commission, in accordance with the terms of the statute and of its schedule theretofore adopted, determined that the percentage of applicant's permanent disability was $19\frac{1}{4}$ per cent., for which he was awarded the sum of \$20.83 per week for 77 weeks, or a total of \$1,603.91, and which award was based upon an earning capacity of \$7.50 per day.

[6] Complaint is made that because the schedule of the Commission fixes $35\frac{1}{2}$ per cent. as a maximum allowance for complete loss of sight without removal of the eyeball, the allowance by the Commission of $19\frac{1}{4}$ per cent. to the applicant, considering that he has $\frac{1}{100}$ vision without glasses and normal vision with glasses, is excessive. The argument is that, considering applicant's age as being 48 years, even without the accident occurring, he would in all probability be

compelled to wear glasses within a very short time, that because wearing glasses was somewhat inconvenient to the applicant constitutes no valid reason for awarding him anything, but, on the contrary, that the wearing of glasses would constitute a protection to his eyes, and that if he been wearing goggles at the time the accident occurred, the probabilities are that he would have suffered no injury whatsoever. In support of such reasoning the case of *McNamara v. McHarg-Barton Co.*, 200 App. Div. 188, 192 N. Y. Supp. 743, is cited. That case holds in effect that where the loss of vision may be corrected by the use of glasses no award can be made therefor; which conclusion is supported by several cases from the same court. In the case of *Butch v. Shaver* (1921) 150 Minn. 94, 184 N. W. 572, the applicant had suffered an injury to one of her eyes, with practically the same results as had the applicant here—that is, without glasses, no vision, and with glasses, normal vision—and the court held that because the disability might in a measure be overcome by artificial means was no good reason why compensation should not be awarded to her. Another case with similar facts is that of *Johannsen v. Union Iron Works* (N. J. Err. & App. 1922), 117 Atl. 639, in which it is held that where an employee sustained an injury to his eye, causing permanent impairment of vision, he was entitled to compensation, although the vision could be rendered normal by the use of glasses. It would seem apparent, without the use of argument or illustration, that the loss of the use of any organ or member of the body would constitute a permanent disability. Because such a loss may be regained by artificial means, while perhaps in a measure compensatory, is not a complete or satisfactory substitute for nature's art. From an injury one might lose the use of either leg or both legs. Surely it should not follow that because thereafter such person might succeed in transporting himself, by means of crutches, or by a wheeled chair, to and from his place of employment, he had suffered no permanent disability. And so here, while by the aid of glasses the applicant has had his sight restored as long as those means are employed, the very instant

that the glasses are removed from their proper position, whether such removal be caused intentionally or through an accident, the applicant is rendered absolutely helpless because of the total blindness in one eye and only $\frac{1}{100}$ vision in the eye which was injured in the accident herein involved. Laying aside the probability of an accident, and considering the ability on the part of the applicant to be always in possession of his glasses, they will be very useful only at certain distances from given objects because of their failure to perform other than purely mechanical functions. The natural lens of the eye is controlled by the muscles so as to accommodate the sight to near objects as well as to those located at a distance. Spectacles cannot be so arranged; neither do they afford the same field of vision as does the eye when naturally used. It is certainly a most difficult matter, if one that is possible, to determine with accuracy, or even with satisfaction, the degree of loss sustained by the impairment of any part of the human body. Perhaps the most that can be truthfully said of such determinations is that they are approximate, and that they actually amount to nothing more than a rough estimate. It is common knowledge that one experienced person may differ greatly from another equally experienced in a conclusion regarding such matters. As is said in *Frankfort General Insurance Co. v. Pillsbury*, 173 Cal. 59, 159 Pac. 152:

"The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the Commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence."

The Commission in the instant case has made an allowance based upon the evidence and its adopted schedules. So far as this court is able to determine, there was no abuse of discretion in its findings. In such circumstances its award should be affirmed.

It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 362

WESTERVELT v. McCULLOUGH.
(Civ. 4403.)

(District Court of Appeal, Second District, Division 2, California. Nov. 9, 1923.)

Appeal and error ⇨82(3)—**Order denying motion to set aside judgment appealable; "special order made after final judgment."**

An order, denying a motion made under Code Civ. Proc. § 663, to set aside a judgment and enter a different judgment, is a "special order," made after final judgment, and as such is appealable under section 963.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by Emma J. Westervelt against Nora McCullough. From an order denying defendant's motion to set aside judgment, she appeals. On motion to dismiss appeal. Motion denied.

Walter M. Campbell and Peyton H. Moore, both of Los Angeles, for appellant.

William Hazlett and Merton A. Albee, both of Los Angeles, for respondent.

FINLAYSON, P. J. Respondent moves to dismiss the appeal, which was taken from an order denying a motion made by defendant in the trial court under section 663 of the Code of Civil Procedure, namely, a motion in that court to set aside its judgment, amend its conclusions of law, and enter another and different judgment. No appeal has been taken from the judgment. Respondent claims that an order denying a motion to set aside the judgment and to enter another and different judgment is not an appealable order. Hence her motion to dismiss this appeal.

An order denying a motion made under section 663 is unquestionably a special order made after final judgment, and as such is appealable under section 963—unless there be some good reason for holding otherwise. Because in section 663a the Legislature expressly provided that an order granting such a motion may be reviewed on appeal in the same manner as a special order made after final judgment, respondent argues that, under the familiar rule of construction, "expressio unius est exclusio alterius," it should be held that the lawmakers did not intend that there should be a right of appeal from an order denying the motion. To support this view respondent cites *Modoc Co-operative Ass'n v. Porter*, 11 Cal. App. 270, 104 Pac. 710. It is true that certain dicta may be found in the opinion in that case which seem to give color to respondent's contention; but since that case was decided our Supreme Court has stated unequivocally that an order denying a motion made under section 663 is appealable

(221 P.)

under section 963, as a special order made after final judgment. *Bond v. United Railroads*, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113. The rule thus announced is binding here.

The motion to dismiss the appeal is denied.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 384

STOCKTON et al. v. SANTA PAULA OIL CO.
(Civ. 4354.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1923. Hearing Denied by Supreme Court Jan. 10, 1924.)

1. Mines and minerals ⇨27(1)—**Location according to law has priority over subsequent location.**

A location of mineral land in accordance with law, based on a discovery and followed by compliance with the law as to assessment work, has priority over any subsequent location.

2. Mines and minerals ⇨39—**Basis of right to possession and ownership of public mineral lands stated.**

The right to possession of public mineral land and ultimately to ownership thereof, under a patent from the federal government, rests on discovery of a mineral deposit of such value as would justify a man of ordinary prudence in expending sufficient money for its development, and on performance of the development work required by statute.

3. Mines and minerals ⇨14(1)—**Claim to mineral land not sustained in absence of findings as to discovery and performance of assessment work by claimant.**

In the absence of findings by the trial court, or abuse of discretion in not finding, that mineral deposits of such value as to justify development were discovered, and the required assessment work done by claimant of mineral land, such claim cannot be sustained.

4. Appeal and error ⇨1011(1)—**Findings supported by substantial evidence not disturbed.**

The trial court's findings on conflicting evidence cannot be disturbed on appeal, when supported by substantial evidence, whether or not the appellate court would reach the same conclusion.

Appeal from Superior Court, Ventura County; T. A. Norton, Judge.

Action by J. T. Stockton and another against the Santa Paula Oil Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Frank Hall and Ferard Leicester, both of San Francisco, for appellants.

Charles W. Slack, of San Francisco, Robert M. Clarke, of Los Angeles, and Thomas H. Breeze, of San Francisco, for respondent.

HOUSER, J. [1] In form this action is a quiet-title suit between adverse claimants to mineral land, and, as is admitted by counsel representing the respective parties hereto, the ultimate question for determination by the trial court was simply which of them was entitled to priority. Plaintiffs claim under an original location made in 1910, while the defendant claims under locations made in 1916. Assuming that plaintiffs' location was made in accordance with the law, based upon a "discovery" and followed by a compliance with the law regulating the performance of the required assessment work after such location, it would result that any subsequent location made by the defendant would necessarily yield to plaintiffs' prior rights.

[2] The right of any claimant, first to the possession of public mineral land, and ultimately to ownership thereof through the medium of a patent therefor issued by the United States government, rests primarily on the discovery of a mineral deposit of such value as would justify a man of ordinary prudence in expending sufficient money for its development, and, secondarily, upon the performance by the claimant of the development work required by the statute. *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, and cases there cited; *Lindley on Mines* (1st Ed.) vol. 2, p. 773.

[3] The only alleged errors committed by the trial court of which complaint is here made consist in findings by the court which it is contended are not supported by the evidence. The first of these has to do with the question of whether or not a discovery was made within the meaning of the statute, and the second relates to the question of the performance of the assessment work required thereunder. It is manifest that the decision of both these questions must be based upon findings of fact made by the court. In the absence of either of such findings in favor of a claimant, assuming no abuse of discretion on the part of the trial court, no legal foundation exists to support his claim. In the instant case, so far as those particular issues were concerned, the trial court found:

"That neither the plaintiff, J. T. Stockton, nor any of the other said locators of the said claim 'Flow 4' (the claim in question), ever made any discovery of any gas, petroleum, or other mineral oils on or in the said south half (S. ½) of the south half (S. ½) of the said

section eighteen (18), embraced within the exterior boundaries of the said claim 'Flow 4,' or ever made discovery of any mineral, of any kind, of any value, thereon or therein, or ever prosecuted any work of discovery, diligently, or otherwise, thereon or therein; that the alleged discovery by the plaintiff, J. T. Stockton, of valuable deposits of ochre and minerals other than natural gas, petroleum, and other mineral oils, on and in the said last-mentioned land is sham and a subterfuge; that the plaintiff, J. T. Stockton, as the owner of the said claim 'Flow 4,' performed work and made improvements on the said claim 'Flow 4,' as and for purported annual assessment work thereon, during each of the years subsequent to the said location of the said claim 'Flow 4,' and prior to the respective said locations of the said (claims of defendant), but the said purported assessment work and improvements for each of the said last-mentioned years were not of the reasonable value of the sum of \$100, and were flimsy in character, were not in good faith, and did not tend to develop the said claim 'Flow 4,' or to facilitate the extraction of any minerals therefrom."

The said findings also contain the following:

"That none of the said last-mentioned land (referring to the claim of plaintiffs) is valuable for, or contains valuable deposits of, ochre, or any minerals other than natural gas, petroleum, and other mineral oils."

[4] The record discloses a substantial conflict in the evidence with reference to each of the said several findings of fact, and under the rule which has been many times announced by the courts of this state, and to which we must adhere, whether from the evidence we would reach the same conclusion or not, the findings of the trial court when supported by substantial evidence cannot be disturbed on appeal.

Some other contentions are made by appellants, especially one to the effect that another finding of the court as to a relocation by plaintiffs of the same claim was invalid by reason of the fact that a homestead entry embracing a part of such claim was filed thereon prior to such relocation, but each of such objections falls within the ruling heretofore announced. There are other findings made by the trial court which support the judgment in favor of the defendant.

It is therefore ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 274

(221 P.)

WEBER v. WILEY B. ALLEN CO. et al.
(Civ. 4631.)

(District Court of Appeal, First District, Division 2, California. Oct. 30, 1923.)

1. Master and servant §332(4)—Refusal of instruction as to employer's defense of abandonment of business by agent held error.

In action for injuries from an automobile collision while plaintiff was riding with defendant's agent on alleged business of defendant, where it was defendant's theory that after the alleged business trip was abandoned plaintiff and the employee went on a pleasure trip of their own, during which the collision occurred, it was reversible error to refuse instruction thereon; such theory not having been submitted in any other instruction.

2. Trial §194(16)—Instruction in action by third person against employer for injuries, held to take from jury question of fact.

In action for personal injury from an automobile collision while plaintiff was riding with defendant's agent on alleged business of defendant, an instruction that, if the agent went on a business trip to a named place, then the return trip at the time of the accident was a part of the business trip, took from jury question of whether agent and plaintiff were on a business trip, or whether having started on such a trip, they abandoned it for their own pleasure.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Adolph C. Weber against the Wiley B. Allen Company and others. Judgment for plaintiff, and defendant named appeals. Reversed.

Rea, Cassin & Caldwell, of San Jose, for appellant.

W. E. Foley and D. T. Jenkins, both of San Jose, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover damages for injuries sustained in an automobile accident, judgment went for the plaintiff, and Wiley B. Allen Company, a corporation, defendant, has appealed.

During the period of time involved in this litigation, the plaintiff was engaged in soliciting life insurance for the New York Life Insurance Company. The Wiley B. Allen Company had a place of business at San Jose, where it was engaged in selling musical instruments, and the defendant W. Austin was the resident manager at San Jose in charge of the business of the defendant corporation. The defendant J. P. Bertlow was the owner of and operating an automobile on the highway leading from Gilroy to San Jose, and, as contended by the plaintiff, he was guilty of such negligence in the operation of his machine that he was partly responsible for the accident.

On June 25, 1921, the plaintiff stated to Mr. Austin that he knew of a man residing in the neighborhood of Morgan Hill, a small town in Santa Clara county 20 miles south of San Jose, who would be interested in purchasing a piano. Thereupon the plaintiff and Mr. Austin arranged for a call on the prospective purchaser. Some time during that evening, variously recited as being between 7:30 and 9 p. m., the plaintiff and Mr. Austin took the automobile belonging to the defendant corporation and started on their trip. Miss Koenig, a friend of the plaintiff, accompanied them. The party drove down the highway to Morgan Hill, and there they turned off on a mountain road and traveled that road a distance of 5 miles or thereabouts, and made three separate calls for the purpose of locating the prospective purchaser. That purchaser, the plaintiff said, was a Portuguese; but he did not recall the name. Neither did he recall the names of the persons on whom he called. At the last place at which the party called, they were informed that the prospective purchaser lived about 4 miles to the south. Thereupon the party stopped their attempt that night to locate the purchaser. Later the party returned up the highway to a place where soft drinks and sandwiches were on sale, and which is referred to in the record as Kinkade's. At that place Austin separated from the plaintiff and his companion, and all of them remained at Kinkade's some time; the exact length of time being differently stated by the witnesses at from 30 minutes, or 45 minutes, or even a longer period. The defendant Austin testified that he had two drinks of wine, and the plaintiff testified that he had no drinks but did have some sandwiches. The defendant Austin testified that a part of his purpose in stopping at Kinkade's was to interview Kinkade on the subject of purchasing a musical instrument. While the party was still at Kinkade's, the automobile of J. P. Bertlow came up. As it came to a stop, Miss Koenig ran out and asked Mr. Bertlow if he was going to San Jose and if he would take her, as she was in a hurry to get there. He asked her in reply how she got out there, and when he learned that she had gone out in another automobile he declined to interfere, but at once drove on up the highway. As he proceeded up the highway, he was traveling at 35 miles, or perhaps 36 or 37 miles per hour, and his machine was traversing the middle line of the highway. When he was so traveling, the automobile driven by the defendant Austin approached from the rear and attempted to pass on the left, and as it did so it was partly off of the highway and in the attempt to right itself it swerved and turned over. In that accident the plaintiff Weber suffered the injuries which are the subject-matter of this suit.

It is conceded by both parties that the de

fendant Austin had the right to drive the automobile of the defendant corporation for his own pleasure, or for the business of the corporation, and that the defendant Austin was accustomed at times, with the knowledge of the defendant corporation, to solicit business, after ordinary business hours, and for that purpose to use the automobile belonging to the corporation. However, it was the theory of the defendant corporation that the trip on the evening of June 25th was not for the purpose of interviewing any prospective purchaser of a musical instrument, but was solely for the purpose of the entertainment of the occupants of the machine, and, moreover, that if that contention be not wholly true, nevertheless that when the last call was made on the mountain road near Morgan Hill that the party then abandoned the business of the defendant corporation and started on a frolic of their own.

Many points are made by the appellant, but in view of the conclusion which we have reached concerning two of those points, it will not be necessary to discuss all of the points made by the appellant.

[1] 1. The appellant requested the trial court to give its instruction numbered XV, which is as follows:

"If you believe from the evidence in this case that the plaintiff and the defendant Austin went on the trip on June 25th, and left San Jose for the purpose of attending to business of the Wiley B. Allen Company, a corporation, and for any reason afterwards abandoned that business and went on a pleasure trip or entertainment of their own, and that subsequently the defendant Austin undertook to drive said plaintiff and said lady guest to their respective homes in San Jose, and that he was so engaged at the time of the accident, then I instruct you that he was not, at the time of the accident, engaged within the scope of his employment, and under such circumstances the Wiley B. Allen Company, a corporation, would not be liable for any negligence of his, or for any tort that he might commit."

The trial court refused to give the instruction, and the appellant assigns the refusal as error. We think the appellant is correct in this contention. It will be observed that the instruction is directly in point as to one theory of the defense of the appellant. The same instruction, differently worded, or the same instruction in substance, was not given in any other part of the proceedings. The appellant was therefore deprived of a substantial right which was vital to its defense.

[2] 2. The defendant corporation asked the trial court to give an instruction which it numbered XIV. The trial court added a clause to the end of the instruction (which we have printed in italics), and then gave the instruction as follows:

"If a servant abandons or departs from the business of his master and engages in some manner suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be a servant's individual and exclusive business, and while so negligently commits a tort, the master is not answerable although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to the master.

"If the said plaintiff and the said defendant Austin, on the evening of June 25th, were on a trip for their own pleasure, or on the business of the plaintiff, and not on the business of the defendant Wiley B. Allen Company, a corporation, and at the time of the accident they were thus engaged, the plaintiff is not entitled to recovery against Wiley B. Allen Company, even though the injuries received by him were due entirely to the negligence and carelessness of the defendant Austin, and the defendant Austin at the time was driving and operating an automobile belonging to the Wiley B. Allen Company, *but if you should find that Austin went on the trip to Morgan Hill or vicinity on business of the Wiley B. Allen Company, then I charge you that the return trip at the time of the accident was a part of the business trip of the Company named.*"

The appellant claims that the language added to the instruction by the trial court had the effect of charging the jury on a question of fact and taking from the jury its power to determine that question of fact. One needs only read the language to see that it did have that effect. The question as to whether the party departed from the master's business at any time during the evening of June 25th was the vital issue in the case as viewed by the appellant. If it did so depart, did it later return to the transaction of the master's business, and, if so, when and where were also vital questions touching the rights of the appellant. When, therefore, the trial court stated to the jury that if the outward trip was on the business of the appellant that, then the return trip was a part of the appellant's business, the trial court clearly took from the jury all power to answer that question. The appellant claims that the question was a question of fact which had been placed in issue by the pleadings and was solely for the determination of the jury. 26 Cyc. 1576; Mechem on Agency, § 1916. The respondent does not cite to us any authorities to the contrary. We know of none. In view of the refusal to give instruction XV, the error in modifying instruction XIV was patently enhanced, and the whole charge, as given to the jury, took from the appellant the one substantial defense which the appellant was attempting to present.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

PEOPLE v. MOORE. (Cr. 1016.)

(District Court of Appeal, Second District,
Division 1, California. Nov. 1, 1923.)

1. Criminal law §1166½(6)—Excusing juror without challenge not prejudicial.

In prosecution for rape, where, in answer to questions on voir dire, juror showed she was subject to challenge for actual bias, and had not the court excused her on its own motion, state would have challenged, and the court would have sustained, excusing her without challenge was without prejudice to defendant.

2. Criminal law §1166½(6)—Where peremptory challenges not exhausted, excusing juror without challenge not prejudicial.

Where the record does not disclose that state exercised its full number or any peremptory challenges, no prejudice is shown by the court's excusing a juror, without challenge, who was subject to challenge for actual bias.

3. Criminal law §1186(4)—Excusing juror without challenge did not deprive defendant of fair trial.

Where evidence showed defendant was guilty of crime charged, and that no other verdict than that of guilty could have been returned, excusing a juror for actual bias, if error, was not, under Const. art. 6, § 4½, ground for reversal.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Arthur Moore was convicted of rape, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. [1] The only error assigned by appellant for a reversal of the judgment herein is the ruling of the court in excusing a juror without any challenge to said juror having been interposed by either party. It is not questioned but what the juror excused possessed all the general qualifications of a juror. Upon her examination, after answering in an equivocal manner a number of the questions propounded to her both by the court and by counsel, she was asked by the court, if the guilt of the defendant was established beyond a reasonable doubt by the evidence and instruction of the court, would she find him guilty, to which question she replied, "I don't know." Whereupon the court, without any challenge being interposed by either side, stated as follows: "I think we better excuse Mrs. Wheaton. You are ex-

cused." To which ruling the defendant then and there excepted.

While the practice of the court in excusing the juror is not that which is usually followed by our trial courts and probably not such as our criminal procedure contemplates, we cannot say that the defendant was prejudiced thereby. The answers of the juror to the questions propounded to her clearly showed that she was subject to challenge for actual bias. Undoubtedly had not the court excused her on its own motion, the district attorney would have challenged her, and the court, under the testimony, would have been bound to have sustained the challenge. It is inconceivable that a prosecuting officer would have permitted a juror in the state of mind of this juror to remain on the jury without interposing every challenge at his command. A person who does not know whether he would find the defendant guilty when from the evidence and instruction of the court he has been proven guilty beyond a reasonable doubt is not qualified to sit as a juror in any case.

[2] It is further contended that the record does not show whether the court excused the juror peremptorily or for cause, and that, if it was done peremptorily, such action on the part of the court would virtually give to the prosecution an additional challenge above those provided by law. An answer to this contention may be made by calling attention to the fact that the record does not disclose that the prosecution exercised at the trial of defendant its full number or any peremptory challenges.

[3] Aside from the above considerations in favor of sustaining the judgment herein, we are of the opinion that, under section 4½ of article 6 of the Constitution of the state, the judgment should be affirmed, even conceding that the court erred in excusing the juror, Mrs. Wheaton. The defendant was not thereby deprived of a fair trial. There is nothing in the record to indicate that the jury impaneled to try him was not a fair and impartial jury. The evidence shows beyond all question that the defendant was guilty of the crime charged, and that no other verdict than that of guilty could have been returned by the jury under the facts presented to it. After examining the entire record herein, including the evidence, we are of the opinion that, if any error was committed by the court in excusing the juror, such error has not resulted in any miscarriage of justice.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 203

QUATMAN et al. v. SUPERIOR COURT OF GLENN COUNTY et al. (Civ. 2714.)

(District Court of Appeal, Third District, California. Oct. 24, 1923. Hearing Denied by Supreme Court Dec. 20, 1923.)

1. Judges ⚡42—Interest must be pecuniary to disqualify.

To disqualify a judge under Code Civ. Proc. § 170, subd. 1, his interest must be a pecuniary one, either direct or indirect.

2. Judges ⚡42—Ownership of note and account against litigant held to disqualify.

Ownership by a judge of a note given by, and a small account against, defendant in receivership proceedings disqualifies him to act therein.

3. Judges ⚡51(1)—Evidence of collateral oral understanding inadmissible to affect liability upon transfer of note to remove disqualification.

Evidence that a judge, at the time of selling a note and account which he held against a litigant for the purpose of removing a disqualification, stated to the purchaser, "This is your funeral and not mine," held inadmissible in proceeding to prohibit him from acting for the purpose of modifying, qualifying, or limiting the obligation of the parties concerned.

4. Evidence ⚡44(11)—Oral testimony inadmissible as affecting liability on blank indorsement.

Oral testimony is inadmissible to show an agreement between the indorser in blank and the indorsee of a promissory note that the note was to pass without recourse.

5. Judges ⚡55—Transfer without recourse of note of party owned by judge will not remove disqualification.

The indorsement, without recourse, and transfer by a judge of a note due from a corporation for whom a receivership is sought does not remove the disqualification arising from the note, since such transfer divests him of none of the liabilities of vendor of the paper.

6. Bills and notes ⚡280, 296—Liability of indorser without recourse stated.

An indorser without recourse is liable as a vendor, and warrants that the instrument is genuine and in all respects what it purports to be; that he has good title; that all prior parties had capacity to contract; and that he had no knowledge of any fact impairing its validity or rendering it useless.

7. Prohibition ⚡3(5)—Denial of writ unwarranted merely because of remedy by appeal.

Denial of a writ of prohibition, restraining a judge from further proceeding in an action for receivership and other relief, wherein he is disqualified, is unwarranted merely because relief might be had by appeal, as such remedy is neither speedy nor adequate.

Petition by A. H. Quatman and another, for a writ of prohibition to be directed to the Superior Court of Glenn County, Claude F. Purkitt, Judge thereof. Writ granted.

Joseph E. Blen, of San Francisco, for petitioners.

Arthur C. Huston, of Woodland, for respondents.

Ware & Ware, of Chico, amici curiæ.

PLUMMER, J. By this proceeding petitioners seek a writ of prohibition restraining respondent Hon. Claude F. Purkitt from further proceeding in a certain action heretofore begun and now pending in Glenn county, entitled H. J. Barceloux, plaintiff, v. Sacramento Valley Realty Company, a corporation, respondent (action No. 3454), on the alleged grounds that the respondent was at the time of the beginning of the said action and ever since has been and now is disqualified to act therein.

It appears from the petition that on or about the 11th day of April, 1923, an action was begun by the said Barceloux against the Sacramento Valley Realty Company, a corporation, praying for the appointment of a receiver and for other appropriate relief; that, at the time of the filing of the complaint by the said Barceloux, the respondent made an order to show cause returnable on the 21st day of April, 1923, directed to defendant Sacramento Valley Realty Company, commanding it to be and appear on said 21st day of April, 1923, to show cause why receiver should not be appointed, and at the same time issued a temporary restraining order prohibiting the Sacramento Valley Realty Company from mortgaging or otherwise disposing of any of its personal property. On the 21st day of April, 1923, the hearing of the order to show cause was continued until the 28th day of April, when a hearing was had and a receiver thereafter appointed.

At the time of the beginning of the action by Barceloux against the Sacramento Valley Realty Company, the respondent Purkitt was the owner and holder of a promissory note dated June 6, 1920, for the sum of \$301.60 made, executed and delivered to him by the Sacramento Valley Realty Company, payable, 60 days after date, and also was the owner and holder of an account against said Sacramento Valley Realty Company in the sum of \$27.35.

On the 26th day of April, 1923, as admitted by the proceedings, for the sole purpose of removing any disqualification of the judge, owing to his being a creditor of the corporation, if in fact such disqualification existed, the plaintiff Barceloux caused one Leo A. Mitchell to purchase the said promissory note and account from the respondent Purkitt; the plaintiff Barceloux furnishing the money with which to make such purchase. Thereupon the respondent indorsed said promissory note in the following words: "Pay to Leo A. Mitchell or order. [Signed] Claude F. Purkitt"—and at the same time assigned and

transferred to the said Mitchell all his interest in the account hereinbefore referred to. Thereafter and on or about the 4th day of September, 1923, and three days before the hearing of the petition for the writ of prohibition herein in this court, there were added to the indorsement on the promissory note the additional words "without recourse."

Upon this state of the facts it is insisted by the petitioners that the respondent is disqualified under the provisions of subdivision 1 of section 170, Code of Civil Procedure, for the reason that the respondent at all times during the proceedings had and taken in the case of *Barceloux v. Sacramento Valley Realty Co.* was a party interested, in that at the time of the filing of the complaint and issuance of the temporary restraining order and order to show cause he was a creditor of the defendant in the action begun by the plaintiff *Barceloux*, and that he was an indorser on the note issued by the *Sacramento Valley Realty Company*, and liable as such until on or about the 4th day of September, when the words "without resource" were added to the indorsement of the promissory note theretofore indorsed by the said respondent, and that under the law his liability on said note is still such as to constitute him a party in interest.

[1] The law is well settled that in order to disqualify a judge under the first subdivision of section 170, Code of Civil Procedure, the interest must be a pecuniary one, either direct or indirect, or, as said in the case of *Lassen Irrigation Co. v. Superior Court*, 151 Cal. 357, 90 Pac. 709, the interest which will disqualify a judge under the provisions of this section "is a property or personal interest, an interest in the event of the suit, in the judgment which may be rendered," and not a mere sentimental interest.

It is insisted by counsel for respondent that no disqualification ever existed, and that if any disqualification ever did exist the indorsement of the note and assignment of the account held by the learned judge against the *Sacramento Valley Realty Company* removed the same.

[2] That such disqualification, save and except as to the formal matters of procedure specified in section 170, Code of Civil Procedure, existed on the part of respondent at the time of the beginning of the action by *Barceloux v. Sacramento Valley Realty Co.*, of which company the respondent was then and there a creditor, scarcely appears to be a debatable question. In the case of *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815, an action was pending involving the value of certain bonds issued by the irrigation district. Some of these bonds were held by a bank in which the Hon. Wm. O. Minor, judge of the superior court of Stanislaus county, was a stockholder. The court held the judge was dis-

qualified irrespective of the pecuniary value of the stock held by him, and also further held that a disposal of the stock after he had heard the evidence did not remove the disqualification so as to qualify him to render judgment therein. In the case of *Regents of University of California v. Turner*, 159 Cal. 541, 114 Pac. 842, Ann. Cas. 1912C, 1162, it is pointed out that section 170, Code of Civil Procedure, disqualifies a judge from acting in all cases where he is a creditor of one of the parties to the action save and except as that disqualification is limited and held not to apply to certain probate proceedings under section 1495, Code of Civil Procedure. Thus in all other cases except those specially provided for, the existence of the relation of debtor or creditor to one of the parties in the action necessarily disqualified any judge occupying such relation. To the same effect is the case of *Johnson v. German American Insurance Co.*, 150 Cal. 336, 88 Pac. 985.

Several cases have been called to the attention of the court where the disqualification has been removed after the beginning of the action, and thereafter the disqualification was held to no longer exist. It does not appear, however, in the cases cited, that the courts are governed and controlled by the same statutory provisions as exist in this state. It does appear, however, in some of the cases, that the claim, account, or note held by the presiding judge against one of the parties and for which it was said to disqualify him from acting therein, had been actually paid and thus put out of existence and not merely transferred or assigned to other persons. In the case at bar the note and account are still in existence, the receiver appointed to take charge of the property is authorized to collect the assets of the company and discharge its indebtedness. Upon the conclusion of the receiver's duties it would be necessary for him to render an account to the court appointing him of all and singular the acts done and performed by him under such authorization which would necessarily include passing upon by the court of the two items hereinbefore referred to, to wit, the note indorsed to Mitchell under the circumstances set out and also the account assigned to him. Whatever language may be used in describing the transaction, it nevertheless is true that it is the duty of the court to pass upon and determine the validity of every note, claim, or account paid by the receiver, and in this manner the respondent would be called upon to pass upon the genuineness of the note and account formerly assigned and transferred by him.

[3, 4] Upon the hearing of this petition there was some evidence to the effect that at the time of the assignment of the account and indorsement of the note by the respondent to Mitchell, the respondent stated to

Mitchell in substance to the effect "that this is your funeral and not mine." Though admitted without objection, such oral testimony is clearly inadmissible and cannot be given any weight as to modifying, qualifying, or limiting the obligation of the parties concerned. The authorities are all to the effect that in the case of a blank indorsement or an indorsement without limitation, qualification, or restriction, oral testimony is inadmissible to show any agreement between the indorser and the indorsee of a promissory note, that the note was to pass without recourse; the effect of such evidence would be to controvert the unambiguous terms of the contract as evidenced by the written indorsement. *Aronson v. Nurenberg*, 218 Mass. 376, 105 N. E. 1056; *Security National Bank v. Pulver*, 131 Minn. 454, 155 N. W. 641. Also cases cited in notes 25 and 26 of section 3119, Civ. Code, *Kerr's Cyc. Codes*.

[5, 6] Irrespective of whether such testimony is admissible, did the adding of the words "without recourse" in the indorsement on the promissory note referred to on the 4th day of September, 1923, remove the disqualification of the Honorable Claude F. Purkitt to further proceed in the case of *Barceloux v. Sacramento Valley Realty Company*? We think not. The authorities are practically unanimous to the effect that it does not follow that one who exempts himself from liability as an indorser by using the expression "without recourse" or its equivalent stands free from all obligation in respect to the indorsement. His undertaking, notwithstanding the restricted indorsement, may be a substantial one, for it seems clear that he divests himself of none of the liabilities of the vendor of the paper. In other words—

"An indorsement 'without recourse' still leaves the indorser liable as a vendor, with the following warranties that the instrument is genuine and in all respects what it purports to be; that the indorser has a good title to it; that all prior parties had capacity to contract; and that the indorser has no knowledge of any fact which would impair the validity of the instrument or render it valueless; and under such an indorsement the party is not relieved from liability in case the instrument or any of the signatures or indorsements thereon are not genuine or that the indorser is not the rightful and legal holder thereof."

In other words, one who makes an indorsement of a promissory note "without recourse" still stands sponsor for the integrity and validity of the instrument indorsed by him and is pecuniarily responsible for any loss occurring to a subsequent holder by reason of any such defect in the indorsed instrument. The cases are so numerous to this effect that citation is unnecessary. They are, however,

collated in a note to the case of *Bank of Sampson v. Hatcher*, 134 Am. St. Rep. beginning at page 995.

[7] It is further insisted on the part of respondent that the writ of prohibition should not issue herein for the reason that other remedies exist. Such remedies, however, do not appear to the court to be speedy or adequate. Where a judge is disqualified to act in any proceeding or cause, the disability necessarily enters into all orders and decisions made by him other than those specially excepted and provided for in the Codes, and to refuse the writ on the ground that a remedy might be had in another manner would be to permit the trial to proceed to a final conclusion by the disqualified judge and then set aside the proceedings as void ab initio. Where a receiver has been appointed to take charge of property, such a course would not be either speedy or adequate but would in all probability lead to an entire dissipation or at least material loss of property. The cases of *Lindsay-Strathmore Irrigation District v. Superior Court of Tulare County*, 182 Cal. 315, 187 Pac. 1056, and *Consolidated Adjustment Co. of California v. Superior Court of Sonoma County*, 189 Cal. 92, 207 Pac. 552, appear to be conclusive answers to this contention. In both those cases the writ was granted, irrespective of the fact that the same ends might have been accomplished by the long and tedious course of appeal. In the *Strathmore Case* the same question was presented as is presented here, to wit, the disqualification of the trial judge, and it was there held that the interests of the judge rendered him disqualified, even though that pecuniary interest was small. In that case, as in this, it is not a question of whether the learned trial judge would or would not act impartially. A legal question only is presented. For the reasons given we think the Honorable Claude F. Purkitt was, during all the times mentioned herein, disqualified, and is still disqualified to hear and determine any matters in the case of *Barceloux v. Sacramento Valley Realty Company*, and this irrespective of whether, under the case of *Adams v. Minor*, supra, it is possible in this state to remove a disqualification. In other words, we do not express any opinion as to whether the *Adams Case* renders the removal of the disqualification after the beginning of an action insufficient to permit a once disqualified judge to thereafter act.

It is hereby ordered that the writ of prohibition as prayed for against the Hon. Claude F. Purkitt be, and the same is hereby, granted.

We concur: FINCH, P. J.; HARRIS, J.

64 Cal. App. 440

DISHIAN v. KISHISHIAN. (Civ. 2685.)

(District Court of Appeal, Third District, California. Nov. 17, 1923.)

Vendor and purchaser — 305—Obligation of purchaser to pay note maturing after termination of contract by vendor held terminated.

Where vendor terminated a contract for the sale of real property on purchaser's default prior to the maturity of a note given as part of the purchase price and transferred to innocent holder, the obligation of the purchaser to pay ceased, except to an innocent holder for value, and vendor having taken reassignment of the note after maturity could not enforce it, though contract provided for forfeiture of payments.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Haig Dishian against Dick Kishishian. Judgment for defendant, and plaintiff appeals. Affirmed.

Earl A. Bagby, of Bakersfield, for appellant.

Frank Lamberson, of Visalia, for respondent.

FINCH, P. J. Plaintiff sued to recover the amount of a promissory note given him by defendant. The defendant was given judgment for costs, and plaintiff appeals.

February 16, 1921, plaintiff and defendant entered into an agreement by the terms of which the former agreed to sell certain real property to the latter for the sum of \$10,250, as follows: "\$1,000 upon the execution of this agreement, the sum of \$2,000 on or before November 21, 1921, the payment of which shall be represented by a promissory note in the words and figures following:" Then follows a copy of the promissory note. The other deferred payments are not material here. The agreement made time of its essence and provided that upon failure of the defendant to perform any of the terms and conditions thereof then the plaintiff might, "at his option, declare this agreement to be at an end and to be null and void and all payments theretofore made by the second party shall be retained by the first party as further consideration for the execution of this agreement and as compensation to the first party for the occupancy of the real property hereinbefore described." The agreement provided that the defendant was to have immediate possession of the premises and to "continue such possession until the termination of this agreement by any default of the second party as hereinbefore provided, and upon such termination the second party will yield peaceable possession of said real property unto the first party." The defendant paid the \$1,000, and gave his promissory note, payable November 21, 1921,

as provided in the agreement, and was given possession of the premises.

For some default of defendant, not shown by the record, the plaintiff seems to have canceled the agreement, and, on the 4th day of November, 1921, brought an action of ejectment against defendant to recover the premises. The defendant duly filed his answer in that action, setting up the agreement and alleging that he had performed all the covenants thereof and was ready, able, and willing to pay said promissory note. January 28, 1922, plaintiff was given judgment restoring him to the possession of the premises.

Immediately after the execution of the promissory note plaintiff indorsed and assigned the same to one Davidian, who took the same as an innocent purchaser for value. December 12, 1921, Davidian commenced an action against plaintiff and defendant herein for the amount due on the note. January 16, 1922, plaintiff herein made a settlement with Davidian and took a reassignment of the note. Thereafter this action was commenced on the 30th day of January, 1922.

The judgment herein for defendant was manifestly proper. Had the plaintiff received promissory notes for all deferred payments, under the same conditions as the note in suit was received, and had immediately transferred them to innocent purchasers and then had declared the defendant's rights in the premises forfeited before the maturity of any one of such notes, by reason of some default on defendant's part, it would be a fraud against defendant to permit plaintiff to take a reassignment of the notes and collect the whole purchase price. The only difference between such conduct and that here involved is in the extent of the fraud.

The agreement and the promissory note are to be considered together as parts of one agreement. *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558. When plaintiff elected to declare the agreement to be at an end and brought an action to recover possession of the premises prior to the time when the note became due, defendant's obligation to pay the amount of the note to plaintiff ceased, and payment thereof could be enforced only by an innocent holder for value. *Glassell v. Coleman*, 94 Cal. 260, 29 Pac. 508. Under the express terms of the agreement the plaintiff, on electing to terminate the contract, had the right to retain the payments theretofore made on the purchase price of the land, but he did not have the right thereafter to collect payments falling due after the time of such termination, and it was his duty to return to defendant the promissory note which, by its terms, was made payable at a time subsequent to such termination. His position is in no wise strengthened by his failure to discharge this duty. Had plaintiff taken a reassignment

of the note before maturity and prior to the termination of the agreement, his rights would have been exactly what they would have been if the note had never been assigned, and the time of payment provided for in the note, which constituted one of the terms of the agreement, being subsequent to the termination of the contract, the obligation of defendant to make such payment would have ceased at the same time that the agreement came to an end. Plaintiff certainly acquired no greater right by the reassignment after maturity of the note than if it had been made before maturity.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

64 Cal. App. 387

WALLACE v. McINTOSH. (Civ. 4673.)

(District Court of Appeal, First District, Division 2, California. Nov. 15, 1923.)

Brokers — Successive documents construed as part of same transaction in determining time for performing services.

In action for commission for sale of leases of mining property, where defendant, on August 5th, executed option to plaintiff to sell mines, for which plaintiff was to receive commission, and on same date and at practically same time defendant executed another agreement certifying that he had option and lease on the mines, and was in possession, and that plaintiff could have 15 days in which to examine the property and close deal, in construing the documents together as part of the same transaction there was no error.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Edgar T. Wallace against Colin McIntosh. Judgment for defendant, and plaintiff appeals. Affirmed.

F. J. Solinsky and Edw. R. Solinsky, both of San Francisco, for appellant.

W. C. Sharpsteen, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action brought to recover the sum of \$5,000, commissions alleged to be due from the defendant to the plaintiff for the sale of certain leases of mining property in the state of Oregon.

The argument upon the appeal is that the evidence does not justify the judgment. An examination of the transcript on appeal discloses facts amply justifying the inference drawn by the trial court. The defendant was the owner of certain leases of mining property, and on August 5, 1920, wrote to the plaintiff, stating:

"In case you sell my option on Old Channel Mines for \$30,000, I will pay you \$5,000 commission for making sale—provided it is a cash sale—in other words, I want \$25,000 cash for the lease and option."

On the same date, and practically at the same time, defendant executed another agreement, which was properly construed by the trial court as inseparable from the first one quoted, which second agreement reads as follows:

"This is to certify that I have an option and lease on what is known as the Old Channel Mines in Josephine county, Oregon—Lease to expire May 26th, 1924. Purchase price of property under my option \$90,000—may be a few hundred more. I am now in possession of this property. I will take \$30,000 for my option and lease—to reimburse me for my outlay on the property. You can have fifteen days in which to examine said property and close the deal if you desire to purchase the lease."

The trial court was justified, under the testimony appearing in the record, in construing, as it did, these two documents together as part of the same transaction. Such a construction limited the time in which plaintiff could earn the \$5,000 commission to 15 days. Support is lent to such a view of the actual contract between the parties by their subsequent dealings, evidence of which was presented to the trial court. Plaintiff brought a prospective purchaser to the property, but no sale was concluded during the 15 days allowed for the same. Thereafter, on September 10, 1920, the plaintiff and defendant signed another agreement regarding the property by which, upon a consideration of \$500 paid by the plaintiff, defendant granted to him an option to purchase the lease—

"for a period of ten days from date, with the further understanding that an additional sum of fourteen thousand five hundred dollars shall be paid to me on or before Sept. 20, 1920, and a further understanding that the sum of fifteen thousand dollars in addition to the above sum shall be paid to me on or before December 20, 1920, making a sum total of thirty thousand dollars for said lease. It is fully understood that if the payments are not made as stipulated above, then the option shall become void, and of no force and effect, and the sum of \$500 above mentioned shall be forfeited. Time is the essence of this option."

The option given to the plaintiff by the above agreement was forfeited because of his failure to make the payment of \$14,500 due on September 20th. Later plaintiff found another prospective purchaser, and on November 3, 1920, succeeded in obtaining from the defendant the following agreement:

"I hereby make you the following proposition: If you advance a sufficient sum, say between \$3,000 and \$5,000 to start operations, etc., on what is commonly known as the Old

Channel Mines in Josephine County, Oregon, I will give to you an option to purchase my lease on the said property for a period to extend to Dec. 21, 1920, for the sum of \$30,000 cash, out of which sum I will pay to Robert J. Pringle, the sum of \$7,500 cash for the quarter interest which he is entitled to but is not on record. You are to be refunded the amount advanced by you from the first clean-up provided you do not dispose of the property. In case you do dispose of the property, you must look to the purchaser for the payment of the amount advanced by you. An acceptance of this proposition shall be considered as a contract between us."

Under this agreement plaintiff and one Holman started to work upon the mine and advanced money to the defendant and on November 8, 1920, another agreement was entered into between Holman and plaintiff as purchasers and defendant, providing for a sale of the lease upon the payment of \$6,500 upon the date of the signing of the agreement and installment payments thereafter. Various other details of the transaction were provided for by the writing and this agreement was fully performed by the parties. It did not provide for the payment of any commission to plaintiff and he appears therein as one of the purchasers at a price of \$30,000.

From the above statement of facts it is not only evident that the judgment was justified, but it is apparent that no other judgment could have been reached. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 184

PEOPLE v. FRANKOVICH et al. (Cr. 719.)

(District Court of Appeal, Third District, California. Oct. 19, 1923.)

1. Criminal law $\S$ 1023(8)—Order denying a motion for an arrest of judgment not appealable.

No appeal lies from an order denying a motion for an arrest of judgment, the points raised by a motion in arrest of judgment being reviewable on an appeal from the judgment.

2. Statutes $\S$ 51—Statute adopting by reference provisions of federal law not violative of Constitution.

The Wright Act (St. 1921, p. 79) adopting by reference all the penal provisions of the law enacted by Congress (U. S. Comp. St. Ann. Supp. 1923, $\S$ 10138½ et seq.) for the enforcement of Const. U. S. Amendment 18 is not violative of Const. art. 4, $\S$ 24, providing that no law shall be revised or amended by reference to its title, etc., that provision referring only to the revision or amendment of some law already enacted.

3. Criminal law $\S$ 970(1)—Indictment and Information $\S$ 196(1)—Defects in information other than failure to state a public offense waived by failure to demur.

Defects in the information under Pen. Code, $\S\S$ 950-952, other than failure to state a public offense, were waived by failure to demur, and not available on motion in arrest of judgment.

4. Indictment and Information $\S$ 110(31)—Information in language of statute for maintaining public nuisance held sufficient.

An information, charging the maintaining of a nuisance, in substantially the language of Volstead Act, $\S$ 21 (U. S. Comp. St. Ann. Supp. 1923, $\S$ 10138½jj), as adopted by the Wright Act, and stating the acts constituting the offense in such a manner as to enable a person of common understanding to know what is intended, as provided in Pen. Code, $\S$ 950, subd. 2, is sufficient.

5. Intoxicating liquors $\S$ 236(9)—Evidence held to sustain verdict for maintaining nuisance.

Evidence held sufficient to sustain a verdict of maintaining a nuisance, as defined by Volstead Act, $\S$ 21 (U. S. Comp. St. Ann. Supp. 1923, $\S$ 10138½jj), as adopted by the Wright Act.

6. Intoxicating liquors $\S$ 169—That bartender had no interest in business of selling liquor immaterial as to his guilt.

Where bartender sold and dispensed intoxicating liquors at his employer's place of business, though he had no interest in the business other than as an employee, he was guilty of maintaining a public nuisance, in view of Pen. Code, $\S$ 31, making an aider and abettor a principal in the offense committed.

7. Criminal law $\S$ 371(10)—Evidence that defendant sold liquor prior to time alleged in information held admissible.

In a prosecution for maintaining a public nuisance for sale of intoxicating liquors, evidence that defendant sold liquor prior to the time alleged in the information was admissible to show the character of the place and the purpose of defendant.

8. Criminal law $\S$ 371(10)—Testimony that defendant transported whisky admissible in prosecution for maintaining public nuisance.

In a prosecution for maintaining a public nuisance, testimony that witness saw a quantity of liquor in defendant's car, between the dates charged in the information, though showing another crime, was competent to show that defendant intended to sell the liquor at his place of business, where he had been driving towards his place of business until arrested by officers, and to show a disposition on part of defendant to engage in the sale of intoxicating liquors, this circumstance being corroborative of other testimony.

9. Intoxicating liquors $\S$ 131 — If defendant maintained or aided and abetted in maintaining nuisance he was guilty regardless of intent.

In a prosecution for maintaining a public nuisance, all that was necessary to support a verdict of guilty against any defendant was

that such defendant maintained, or aided and abetted in maintaining, the nuisance, and that intoxicating liquor was sold therein, intent being immaterial.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Steve Frankovich, Martin Gutenich, and William White were indicted for maintaining a common nuisance, as defined by the Volstead Act, § 21, as adopted by the Wright Act. Steve Frankovich and William White were convicted, and they appeal. Affirmed.

See, also, 213 Pac. 39.

J. Logan Beamer, of Eureka, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The district attorney of Humboldt county filed in the superior court of said county an information accusing the defendants of the crime of maintaining a common nuisance, as said offense is defined by section 21 of the Volstead Act, as adopted by the so-called Wright Act, enacted by the Legislature, and later approved by the people of California under the power of referendum, for the purpose of enforcing within the limits of said state the mandates of the Eighteenth Amendment to the federal Constitution. The defendants Frankovich and White were convicted, and the defendant Gutenich was acquitted by the jury of the crime so charged. Frankovich and White have removed the case to this court by an appeal from the judgment and the order denying them a new trial. They also make an attempt to appeal from the order denying their motion for an arrest of judgment.

[1] As has repeatedly been pointed out in the decisions, there is no authority for an appeal from the last-mentioned order, the points raised by a motion in arrest of judgment being reviewable on an appeal from the judgment.

The asserted failure of the information to state a public offense, alleged insufficiency of the evidence to support the verdict, and alleged errors in the court's rulings upon the question of the admissibility of certain testimony and in the giving and refusing to give certain instructions, constitute the general grounds upon which a reversal is urged.

[2] 1. The contention first made as to the alleged insufficiency of the information to state a public offense is grounded upon the proposition that there is no law in this state specifically denouncing as a common or criminal nuisance the act of maintaining a place or house, or building, etc., where intoxicating liquor is manufactured, sold, kept, or bartered, etc. The specific contention is, in effect, that the Legislature, in enacting the so-called Wright Act, violated the mandate

of section 24 of article 4 of our state Constitution, in that by said act it merely adopted by reference all the penal provisions of the law enacted by Congress for the enforcement of the terms of the Eighteenth Amendment to the federal Constitution. The section of the state Constitution referred to reads:

"No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."

In the recent case of *Ex parte Burke*, 212 Pac. 193, the Supreme Court had before it the precise question now before us. In fact, the law involved in that case was the Wright Act, and the attack launched against it therein was upon exactly the same grounds as those upon which the validity of said act is questioned herein. The Supreme Court held that the act was not obnoxious to the objection that the method of its enactment was contrary to section 24 of article 4 of the Constitution of this state, saying, among other things, that that provision of the Constitution "refers only to the revision or amendment of some law already enacted by our state Legislature, and has no reference to the enactment of a new provision. The principle that laws may be enacted in that fashion," proceeds the court, "is well established. In *People v. Whipple*, 47 Cal. 592, it was held that it was proper for the Legislature, in creating an office, to define the duties of the incumbent by reference to an existing statute, and to provide that those duties shall be the same as those required by the act referred to. The principle is that such legislation may consist in readopting by its title the provisions of another act adopted by another state or by the United States."

[3, 4] It is further contended that the information is bad because it does not conform to the requirements of sections 950, 951, and 952 of the Penal Code. There was no demurrer to the information, but the objections challenging the sufficiency of the information were raised by the motion in arrest of judgment. Except in so far as the said motion may involve an attack upon the information on the ground that it does not state a public offense (section 950, subd. 2, Pen. Code), any defects therein were waived by the failure to demur. We think, however, that the information, with the requisite clearness and directness, charges the offense sought to be therein stated. It is substantially in the language of the section of the Wright Act or Volstead Act (section 21) upon which it is founded (see *Fed. Stats. Anno. 2d Ed. 1919 Supp. p. 212, U. S. Comp. St. Ann. Supp. 1923, § 10138½jj*), and involves a statement of the acts constituting the offense denounced by said section "in such manner as to enable a person of common understanding to know what is intended"

(section 950, subd. 2, Pen. Code). No more is required of a criminal pleading than that "it be direct and certain, and allege all the acts and facts which the Legislature has said shall constitute the offense charged." *People v. Fowler*, 88 Cal. 136, 138, 25 Pac. 1110. No language could be added to section 21 of the Volstead Act, adopted by the Wright Act, which would render its definition of the crime of maintaining a common nuisance clearer or more direct, and hence the general rule that it is sufficient if a crime be stated in an information or indictment in substantial agreement with the language of the statute applies here.

[5] 2. The contention that the verdict is devoid of sufficient evidentiary support to uphold it is without merit. The information alleges that the defendants, "on or about the 1st day of February, 1923, and on divers other dates between said 1st day of February, 1923, and the 22d day of March, 1923," did " * * * maintain a common nuisance, to wit, a room, building and place, at No. 238 Second street, in the city of Eureka, said county and state, where intoxicating liquor, to wit, whisky and brandy, was kept, sold, and bartered," etc. The defendant Frankovich admitted that he was the owner of the business—ostensibly that of dispensing "soft drinks"—carried on at 238 Second street, in the city of Eureka, and the lessee of said place, and that he had been such owner and lessee and conducted said business continuously from some date in the month of June, 1922, down to the date upon which the information herein was filed, to wit, April 17, 1923; that the defendant White, during the months of January, February, and March, 1923, was employed by him as a barkeeper at said place, and during all of said time worked therein in that capacity. Some eight or ten witnesses—most of them in the employ of the district attorney and engaged in the investigation of "bootlegging" and the apprehension of "bootleggers" prosecuting their illicit activities in Humboldt county and the city of Eureka—positively testified that on many different occasions in the months of January, February, and March, 1923, and prior to the date of the filing of the information herein, they purchased, were served with, and drank whisky and "Jackass" brandy in the said place; that the defendant White, so some of these witnesses declared, waited on and served them with intoxicating liquors on some of the occasions referred to; that the price paid by them for the liquor so sold and served to them was 25 cents a drink. These witnesses generally visited the place and purchased the liquor in pairs—on some of the occasions more than two would appear together in the saloon and obtain intoxicating liquor there. Corroborative of the testimony of these witnesses was the fact that the room in which intoxicating liquors were

dispensed had been arranged with the evident purpose of evading detection by the public authorities of the unlawful traffic, or so that it could be carried on with as little probability or likelihood of detection as possible. The testimony shows that the main room, or the room into which customers or other persons ordinarily entered the place from the street or sidewalk, and the "back room," or the room in which the prohibited liquors were kept and sold, were divided by a partition. There was a door between the rooms, and to the latch thereof was attached a string which was long enough to extend to a point behind the bar. This string could be so manipulated by the man behind the bar "as to cause the door to open." Two "peepholes" were in the wall or partition, and through them the barkeeper could look (and it was shown he was often seen to look) into the main room and so ascertain the identity of the persons who had entered therein from the street or sidewalk. Manifestly, an inference which might reasonably be deduced from such an arrangement of the place, when considered in connection with the other facts, was that the defendant Frankovich deliberately planned preparations for the surreptitious prosecution of bootlegging activities in his "soft-drink" establishment. But, regardless of the probative value of these physical facts, or the weight attached to them by the jury, it is plainly true that the positive testimony of the witnesses for the state that intoxicating liquors were sold and served to them on the occasions mentioned by them at Frankovich's place of business affords ample support to the verdict.

[6] It is vigorously urged, however, that, even if the verdict is sufficiently buttressed as to the defendant Frankovich, there is a palpable insufficiency of proof of the guilt of the defendant White of the crime charged. This proposition seems to be inspired by the fact that the evidence, without conflict, shows that White was not an owner or part owner of the establishment, or, in other words, shows that said defendant had no interest of any kind or character in the business or the place where it was maintained. The argument from this hypothesis is that, unless it be true or is shown that a party is interested as an owner in the unlawful business, he cannot justly or legally be convicted under the statute of the crime here charged, notwithstanding that, as an employee, he may have assisted the owner in conducting the business of selling the contraband liquors, or in the doing of the acts constituting the crime here charged. The proposition cannot be sustained upon any consideration either of logic or the law of this state. The established rule in this state is that any person who aids and abets in the commission of a crime, whether it be a felony or misde-

meanor, is a principal in the crime so committed. Pen. Code, § 31. In this case there is, as seen, positive evidence that White personally, in his capacity of barkeeper for Frankovich, during the period of time or between the dates mentioned in the information, sold and served intoxicating liquors at No. 238 Second street, the place of business of the latter. This conduct brought him as clearly within the terms of section 31 of the Penal Code as would the act or acts of a party in aiding and abetting in the commission of any other offense known to the law.

[7, 8] 3. There are but two of the rulings affecting the question of the legal propriety of certain testimony which merit special attention herein. The first of these assignments involves the objection that error was committed by the allowance of testimony showing sales of intoxicating liquor made by the defendants at 238 Second street prior to the period of time during which the information alleges that the defendants committed the acts constituting the crime charged. The testimony was admissible "not for the purpose of proving another and distinct offense from that charged, but to show the character of the place and the purpose of the defendant." *People v. Pera*, 36 Cal. App. 292, 302, 171 Pac. 1091, 1095; *People v. Macy*, 43 Cal. App. 479, 483, 184 Pac. 1008. See, also, *People v. Cavallini*, 29 Cal. App. 526, 531, 156 Pac. 73; *Lawson et al. v. State*, 20 Ala. 65, 56 Am. Dec. 182; *State v. Snover*, 64 N. J. Law, 65, 44 Atl. 850. The second assignment under the present head arises out of the testimony of the state's witness McKay that on the 9th day of February, 1923, he met the defendant Frankovich in his auto near the courthouse, in Eureka, and that at that time the said defendant had in his car several jugs and small barrels containing intoxicating liquor. The objection to this testimony was and is that it revealed an entirely different crime from the one charged, and for that reason was irrelevant to this case and prejudicial to the defendants. It appears that on the 9th of February, and a short time prior to the appearance of said defendant near the courthouse, an attaché of the district attorney's office met Frankovich in his automobile on a country road while the latter was driving towards and approaching Eureka; that the officer stopped Frankovich and discovered in his auto the 35 gallons of liquor referred to by the witness, McKay; that the officer thereupon took the defendant into custody and to the justice's court, at the county courthouse, for the purpose of charging him with the crime of having in his possession intoxicating liquors; that it was at this time and place that the witness McKay saw the said defendant and also the vessels containing the thirty-five gallons of liquor in his car. The testimony, in so far at least as Frankovich was concerned, was proper. The circumstance

to which it related occurred between the 1st of February and the 22d of March, 1923, which embraced the period of time during which the defendants were accused of committing the acts constituting the crime charged in the information. It tended to show, or, at any rate, the jury could well have so inferred therefrom, that Frankovich, when intercepted on the road by the officer, intended to convey the liquor to his place at 238 Second street and there keep or sell it. It was not made to appear that there was any other place in Eureka to which he could have taken or intended to take the liquor. Moreover, under the cases above cited, it was admissible for the purpose of showing the disposition of Frankovich to engage in the sale of intoxicating liquors, and this would be a circumstance corroborative of the testimony showing that he did have in his possession and was engaged in the business of selling intoxicating liquors at 238 Second street during the times mentioned in the information.

[9] 4. There are too many specifications of error in the giving and the refusal to give certain instructions to justify an attempt to give each special notice herein. Indeed, we perceive no necessity for doing so. There is, however, one of the given instructions of which the defendants complain, contending that it involves a misstatement of the law, the objection to which will be specially considered. It is to the effect that intent to commit the crime charged in the information is not essential to the consummation thereof; that "all you are required to find, to reach a verdict of guilty against any defendant, is that such defendant at the time and place charged in the information maintained or aided and abetted in maintaining the place described in the information and that intoxicating liquor was either kept or sold therein." The instruction, in so far as it involves the statement of a legal proposition, and as applied to the class of cases to which the instant case belongs, is invulnerable. *People v. Pera*, 36 Cal. App. 292, 304, 171 Pac. 1091; *People v. Tomasovich*, 56 Cal. App. 520, 532, 206 Pac. 119; *Commonwealth v. Holstine*, 132 Pa. 357, 19 Atl. 273.

Some of the other given instructions are assailed on the ground that there is no law in California affording a basis for the charge set forth in the information. As shown, the same proposition constituted the foundation for the attack against the information first hereinabove considered, and, as seen, we held that it is untenable. The complaint against the action of the court in disallowing a number of instructions preferred by the defendants it is deemed unnecessary to specially consider herein. It is enough to say that the court's charge to the jury contains a full and correct statement of every principle of law applicable to the issues of the case, and

covers every pertinent principle which the defendants sought to have stated to the jury in the instructions submitted by them and rejected by the court.

The judgment and the order as to each of the appealing defendants are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 460

EMERICK v. JOHNSON. (Civ. 4669.)

(District Court of Appeal, First District, Division 2, California. Nov. 21, 1923. Hearing Denied by Supreme Court Jan. 17, 1924.)

Municipal corporations — 706(5)—Findings of negligent operation of automobile sustained.

Evidence held to sustain findings of the trial court as to the negligent operation of an automobile at a street intersection.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by W. R. Emerick against O. L. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for appellant.

Joseph J. Bullock, of Redwood City, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him in an action to recover for damage caused to plaintiff's automobile by a collision between it and defendant's automobile at a street intersection in South San Francisco.

As appellant states the appeal involves only a question of fact, it being his contention that the evidence fails to show negligence on the part of the defendant and shows negligence on the part of the plaintiff.

The case was tried without a jury and the court made the following pertinent findings of fact: That on February 7, 1921, in the city of South San Francisco, county of San Mateo, state of California, plaintiff was the owner of and was operating a certain automobile in a careful and prudent manner and at a lawful rate of speed along Miller street and was driving thereon in a general southeasterly direction and on the right-hand side of said street and toward the intersection of said Miller street with Linden avenue, another public street in said city; that about the same time defendant was operating his automobile in a careless and reckless manner and at an unlawful rate of speed along said Linden avenue, proceeding in a general northwesterly direction thereon and toward the said point of intersection of said street or avenue with said Miller street; that as plaintiff in his automobile reached the said point of intersection

of said two streets, defendant in his automobile was then on said Linden avenue and approaching said point of intersection from the right of plaintiff, and said defendant was then and there further from said point of intersection than was plaintiff. The court further finds that when the plaintiff had reached a point on said crossing an intersection beyond the center of said intersection, said defendant carelessly, negligently, recklessly, and unlawfully attempted to pass in front of plaintiff's automobile, and by reason of said recklessness and carelessness of defendant in so attempting to pass in front of said automobile of plaintiff, plaintiff's automobile collided with the automobile of the defendant, injuring and damaging plaintiff's automobile.

These findings are conclusive in this court if they are supported by any evidence in the record, and while the appellant makes a strong case by presenting excerpts from the record, an examination of the transcript discloses the following testimony by plaintiff:

"A. Yes, I had come from my residence, which is over in this direction. Q. Come on to Miller avenue? A. Yes, came up to here and came along Miller avenue (pointing). Q. Indicate with the chalk. A. This would be the center street here, and as I proceeded along here there was a car down here somewhere (indicating). Q. When you were proceeding along here and were close to the intersection, was this car quite a distance down? A. Yes, sir; it was. * * * Q. As you got close to the corner, you observed a car some distance down? A. Down the street, yes. Q. Now tell me, as you approached the intersection of the two streets known and designated one as Miller avenue and the other designated as Linden avenue, were you or were you not closer to that intersection than the car which was coming on Linden avenue and traveling in a northerly direction? (There was an objection to this question, and the court suggested that the witness indicate on the blackboard the positions of the automobiles.) A. I was just about even with the sidewalk here (pointing). Q. As you indicate on the map? A. Yes, sir; when I first observed this other machine—this would be my car traveling in this direction here (pointing). Q. That is where you were when you first observed it? A. Yes, sir. Q. Your answer is that you were about even with the curb line, is that it? A. Just about. Q. And where, will you kindly indicate on the diagram, will you say the car of the defendant was at that time? A. I would say it was probably 200 feet. Q. Say about 200 feet? A. He was. Q. Do you mean 200 feet from the intersection? A. Yes, from the sidewalk line. Q. From the sidewalk line of what street? A. Of Linden avenue—that must be Linden. Q. No, that is not Linden. A. Miller avenue. Q. About 200 feet from the sidewalk line of Miller avenue, is that right? A. Just an approximate estimate."

Plaintiff testified that when he observed the defendant's automobile in the distance,

plaintiff was traveling about 15 miles an hour; that he proceeded along in the usual manner; that he traveled straight ahead until he saw the defendant's automobile swing in front of him at a place indicated on the map before the trial court; that plaintiff's car had reached a point 7 feet and 1 inch from the curb line of Linden avenue when the collision occurred; that the rear of his car had passed the center of the crossing when the collision occurred.

The above-quoted testimony is sufficient to support the findings made by the trial court, and it also indicates that the court had before it a map or diagram illustrating the testimony of the witness. This diagram not being before us, we must assume that it lent aid to the findings made by the court.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

64 Cal. App. 399

CITY OF VALLEJO v. BURRILL.
(Civ. 2586.)

(District Court of Appeal, Third District, California. Nov. 15, 1923. Hearing Denied by Supreme Court Jan. 12, 1924.)

1. Waters and water courses ⚡157—Evidence held to show city entered premises to lay pipe line as licensee.

In city's action to recover possession of portion of unused pipe line on defendant's land, evidence held sufficient to show that the city did not enter such land to lay its pipe line as a trespasser, but entered at least as a licensee for consideration and expended a considerable sum in laying and maintaining its pipe line.

2. Waters and water courses ⚡157—City laying pipe line as licensee entitled to notice and time for removal of line.

Where city entered defendant's land to lay its pipe line as licensee for consideration and expended a considerable sum in laying and maintaining such line, the city owned an irrevocable license, or at least a license subject to revocation only upon notice with reasonable time allowed for removal of its property.

3. Fixtures ⚡24—Pipe line held not a fixture on lands of landowner granting license to lay line.

Where city entered defendant's land to lay its pipe line as licensee for consideration and expended a considerable sum in laying and maintaining such line, held, that such pipe line did not become a fixture and part and parcel of defendant's lands.

4. Abandonment ⚡2—Distinguished from neglect.

There is a distinction in law between abandonment of property such as to divest ownership or title thereto, and mere neglect.

5. Abandonment ⚡4—City held not to have abandoned pipe line.

Negligence of the officers of a city to keep a pipe line in repair in another section of the

line than that running through defendant's lands held not proof of abandonment of the portion of the pipe running through defendant's premises.

6. Adverse possession ⚡31—Owner must have knowledge.

To constitute an adverse possession, so as to set the statute of limitations in motion, the occupation of the one holding adversely must be open and notorious, under a claim of right, and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

Appeal from Superior Court, Solano County; W. A. Anderson, Judge.

Action by the City of Vallejo against Edward Burrill. From judgment for defendant, plaintiff appeals. Reversed.

L. G. Harrier, of Oakland, for appellant.
Edward S. Bell, of Oakland, for respondent.

PLUMMER, J. The plaintiff and appellant is a municipal corporation owning and operating its own water system. A portion of the water system is a pipe line running from the city of Vallejo to Green Valley, a distance of about 16 miles. The original pipe line was laid in 1893 and runs through the lands belonging to the defendant, but at that time owned by his father, Thomas Burrill. The defendant succeeded to his father's interest in the land referred to about the year 1900. In 1905 or 1906 a new line was constructed between Vallejo and Green Valley. This line was laid in two sections, the first section was laid between Vallejo and Creston; the second section some years later from Creston north to Green Valley. In building the second section the line was carried around, and not through, the lands belonging to the defendant. Use of the original line running through defendant's land was discontinued, but the pipe was not disturbed. This portion, as claimed by appellant, was left intact to be used as an extra or emergency pipe line. In August, 1918, owing to the great demand for pipe to assist in supplying water to the navy yard for war purposes, the city decided to use the old pipe. The portion in controversy was taken up by the plaintiff, but its removal from the ranch thereafter was objected to by the defendant; hence this action for possession of the pipe or its value. The court found that the defendant was and for a period of ten years had been the owner of and entitled to the actual possession of the pipe and other materials connected therewith.

There is no dispute that the 6,000 feet of pipe line in controversy was originally a part of the water system of the city of Val-

lejo and belonged to said city. It therefore follows that unless the city has parted with the ownership of said pipe line, it still belongs to and is property to which the city is entitled. There is no evidence in the record that the city parted with its ownership of said pipe line by either purchase or gift. The learned trial court made no findings of fact as to the manner in which the defendant became the owner of said pipe line, but the argument of counsel and the testimony introduced show that the trial was conducted on the part of the defendant upon the theory that the plaintiff had abandoned the property in question and on the part of appellant that no such abandonment had ever taken place.

Upon the question of abandonment the testimony establishes the following facts: That since the building of the new line the city has not used any portion of the pipe line running through defendant's lands as a water conduit; that such portion of the pipe line remained in an undisturbed condition until the year 1918, when it was dug up by the plaintiff; that other portions of the pipe line, to wit, that portion between Creston and Green Valley, also remained unused, but from this portion vents, turnouts, and blow-cocks were removed. There is also some testimony to the effect that short portions of this section were allowed to fall into disrepair.

[1] The point made for reversal is that the finding of the defendant's ownership is not supported by the testimony. The solution of this question depends upon the right, if any, of the plaintiff acquired in the first instance to enter upon the lands of Thomas Burrill and lay down and operate the pipe line in controversy, and secondly whether there has been any abandonment of the property, such as to transfer the ownership thereof to the defendant in this action. In the recent case of *City of Vallejo v. Scally* (Cal. Sup.) 219 P. 63, where the ownership of a portion of the same pipe line herein referred to was in controversy, it was held that where the city has acquired a right of way by deed, mere nonuser of a pipe line as a water conduit does not establish abandonment no matter how long continued. Are the city's rights in the premises such that the same principle should be applied in the determination of this case?

Upon the trial of the action no written grant or conveyance of the right of way from Thomas Burrill to the city of Vallejo was introduced in evidence, and, so far as the record shows, none is in existence, though a witness, James B. McCauley, a city official at the time of the building of the pipe line in controversy, stated that such an instrument had been executed. The testimony on the question of the rights acquired by the city and under and by virtue

of which it entered upon the premises then belonging to Thomas Burrill, as shown by the transcript, is as follows:

"The city trustee property minutes as admitted in evidence is as follows: 'Book entitled "Record of Trustees, July 6 to December 16, 1896."'

"Minutes of the meeting of the board of city trustees, August 8, 1894, at page 291.

"The board of trustees of this city met on this date and in the place above written in adjourned session at 8 o'clock p. m., and there were present President O'Grady, Vice President McCauley, Trustees McCudden, Frey, Browne, Deininger and Bergwall. Full board present.

"The president stated that the object of the meeting was to hear the report of the Chief Engineer Vischer and for such other business as might properly come before it.

"The following report from Chief Vischer was then presented and read by that gentleman:

Real Estate and Rights of Way.

Real Estate.

Hastings property, paid Mrs. Hastings.....	\$39,900 00
Advanced by John Frey.....	100 00
Madison ranch	9,318 25
John Votypka tract.....	2,500 00
John Fleming	300 00
J. Oberti	2,000 00

\$54,118 25

Rights of Way and Water Rights.

S. R. Gwinn.....	\$ 750 00
S. R. Gwinn.....	1,750 00
J. H. James.....	310 00
Mrs. M. Lynch.....	500 00
Seebe & Glasshoff.....	850 00
C. Wilson	400 00
L. Oberti	500 00
Estate of Doley.....	400 00
A. C. Watson.....	200 00
Thomas Burrill	500 00
Mrs. M. Scully.....	125 00
J. Fleming	428 85
M. Lewis & A. Costa.....	250 00
J. P. M. Phillips acc't Lewis & Costa.....	25 00
P. D. Walsh.....	150 00
Minor small rights of way.....	36 50

\$ 7,173 35

Interest on Deferred Payments.

Jos. Wilson	\$ 10 00
J. Oberti	100 00
	\$ 110 00
Taxes one year on Hastings Ranch.....	\$ 151 95
J. M. Gregory, costs of suit, condemnation papers, etc., Daley ranch.....	42 30
Lumber from J. Fleming as per right of way agreement	25 35

\$ 329 60

Total rights of way and real estate.... \$61,621 20

"Vallejo, August 8, 1894.

"Hubert Vischer, Chief Engineer."

In connection with this record the witness McCauley testified as follows:

"I was a member of the board of trustees of the city of Vallejo at the time of the building of the original water system.

"Q. Did you obtain a right of way from Thomas Burrill? A. We did.

"Q. By Mr. Bell: Was there such an instru-

ment in writing obtained from Mr. Burrill? A. There was.

"Q. What was paid him for that right of way? A. Well, I could not absolutely say that now; that is too long ago. I could not answer that.

"Q. Were you present at the meeting of the board of trustees on August 8, 1894? A. I was.

"Q. Did you hear read the report of the chief engineer of the water system in which it was stated that \$500 was paid to Thomas Burrill? A. I did.

"Q. What was it paid for? A. Well, I would say, of course this is 20 years or more is a long time while to say in detail what happened, and I have had no occasion to refresh my mind on the matter since, but there was no other transaction we had with Mr. Burrill except the right of way. The payment there was for the right of way; whether it covered anything else I could not say. I was a member of the special committee. The board had a special water committee consisting of three members under whose supervision this work was directly carried on, and Mr. Fry and I were the active members of that committee; so that I say that all of the deeds covering the right of way were passed on by our committee before they were submitted to the board. That is why I was so positive that all the rights of way had been covered, some of the deeds were recorded and some not. If I saw all the deeds, I saw the Thomas Burrill deed. I say positively that we had all the deeds at the time and there was no occasion to change my mind since."

[2] The court made no finding as to the existence or nonexistence of a deed granting the right of way to the city, hence we are not at liberty to give any consideration to appellant's argument based upon the intimation of the trial court that such an instrument probably had one time existed. Without deciding whether the foregoing testimony is sufficient to have justified the trial court in finding that a right of way was granted by Thomas Burrill to the city of Vallejo, we think it is nevertheless sufficient to show that the city did not enter the premises then belonging to Thomas Burrill as a trespasser, but did at least enter the premises as a licensee for consideration and after paying such consideration proceeded to and did expend a considerable sum of money in laying and maintaining its 6,000 feet of pipe, and under such circumstances the city owned and possessed an irrevocable or at least a license subject to revocation only upon notice with reasonable time allowed for the removal of its property. As stated on page 578, 17 R. C. L., the rule in many states is:

"That where a licensee has entered under a parcel license and has expended money or its equivalent in labor, it becomes irrevocable, and the licensee acquires a right of entry on the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for.

* * * The cases holding to this rule as to irrevocability of certain licenses proceed on two distinct theories, one theory being that when the licensee expends large sums of money in making the improvement, and such expenditure is made without opposition by the licensor, the license becomes executed and, as such, irrevocable; and that, in fact, what was at its inception a license becomes in reality a grant. The other theory and the reason most frequently given is that after the execution of the license, it would be a fraud on the licensee to permit a revocation."

It will be observed that these cases rest upon circumstances where no consideration appears to have been paid for the license in the first instance. In *Gravelly Ford Canal Co. v. Pope & Talbot*, 36 Cal. App. 717, 178 Pac. 155, this court, speaking through Presiding Justice Chipman, declares the law as follows:

"A license is defined as a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein.' (17 R. C. L. 584.) A license may be implied from the acts of the parties, from their relations, and from custom, and where the owner of land, with full knowledge of the facts, tacitly permits another to repeatedly do acts upon the land, the license may be implied from failure to object. (25 Cyc. 642.) The essential of a license that it be assented to may be shown by any acts which tend to show assent. (17 R. C. L. 572.) And the creation of a license privilege may be evidenced by acquiescence in its exercise. (Id.) A license by deed or parol, under the well-settled rule of the common law, is revocable at pleasure, unless under certain circumstances, among them, that it is executed and also unless, by reason of expenditures made by the licensee on the strength of the license it would otherwise be inequitable to permit the licensor to effect a revocation. In such case the license is irrevocable. (Id., 576, 578; *Stoner v. Zucker*, supra; *Miller & Lux v. Kern County Land Co.*, 154 Cal. 785 [99 Pac. 179].)"

The same rule was announced by the Supreme Court in *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704. In *Gosliner v. Briones*, 187 Cal. 557, 204 Pac. 19, the Supreme Court, having before it a somewhat similar question, uses the following language:

"Whatever the rights of a trespasser or entire stranger may be, the rule is that where structures are erected upon land by a person who occupies the land with the permission or license of the owner but who has no estate in the land, that is to say, by a mere licensee, consent on the part of the owner of the land that the structures shall remain the property of the person erecting them will be implied in the absence of any other facts or circumstances tending to show a different intention. (*Merchants' Nat. Bank v. Stanton*, 55 Minn. 211 [43 Am. St. Rep. 491, 56 N. W. 821]; * * * *Fischer v. Johnson*, 106 Iowa, 181 [76 N. W. 658].) There is no finding that the owner of the land granted Lauff or the plaintiff express permis-

sion to occupy the land, but a direct authorization is not essential to establish an occupancy by virtue of permission or acquiescence of the owner; a license may result from circumstances as, for instance, where a person has continued in possession for such a length of time and under such circumstances that objection might well have been expected had there been no assent."

In many cases where it is held that a license granted or presumed to exist under the circumstances which we have detailed, revocation may be had upon reasonable notice and opportunity to remove the improvements erected by a licensee. 17 R. C. L. 587. In the case at bar the testimony fails to show that any notice of revocation was ever given by the defendant or his predecessors in interest to the plaintiff herein. If we are right in holding that the testimony referred to and set out in this opinion is sufficient to show that at least the sum of \$500 was paid by the city of Vallejo to Thomas Burrill for the privilege of laying its pipe through his land, then and in that case it became also a license coupled with an interest and carried with it the right of the plaintiff to enter upon the lands and premises of the defendant and remove its pipe line. 22 R. C. L. 81; *Clements v. Philadelphia Co.*, 184 Pa. 28, 38 Atl. 1090, 39 L. R. A. 532. This latter case is strictly in point, as it involved the right of the Philadelphia Company to take up and remove a gas pipe belonging to it. That a licensee, even though his license is revocable, is entitled to reasonable notice and opportunity to remove his property is also supported by the following authorities: *Ingalls v. St. Paul*, 39 Minn. 479, 40 N. W. 524, 12 Am. St. Rep. 676; *Great Falls Water Works Co. v. Great Northern R. Co.*, 21 Mont. 487, 54 Pac. 963; *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360, 2 L. R. A. (N. S.) 1002. That such right of removal exists is also held in the case of *Gosliner v. Briones*, 187 Cal., at pages 561 and 562, 204 Pac. 19. To the same effect is *Flick v. Bell*, 5 Cal. Unrep. 206, 42 Pac. 813.

[3] Did the pipe line, installed as herein related by the city of Vallejo, become a fixture and a part and parcel of the Burrill lands? We think not. It is manifest from the testimony that the use of the pipe line was to convey water to the city of Vallejo. No part or parcel of the pipe line was installed for the purpose of use or with the intent of being used in connection with or as a part of the Burrill property. It was placed there, as it appears from the testimony, solely for the uses and purposes of the city. The circumstances attending the installation and use of the water pipe in controversy bring the instant case squarely within the decision of this court in *Breyfogle v. Tighe et al.*, 58 Cal. App. 301, 208 Pac. 1008, where it is said that three principles or tests must be applied in determining

whether personal property attached to land becomes a part of the realty: First, annexation; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention. Only one of these tests respond to the circumstances under consideration, to wit, being imbedded in the soil. That it was the intention that the pipe line should remain the property of the city, and that its uses were for the city alone, appears to be incontrovertible. Under these circumstances, the right of removal exists under the authorities we have cited unless the city has in some manner parted with its title. The rule generally adopted by other authorities is set forth in 11 R. C. L. 183, as follows:

"Generally a building erected on the land of another by his consent or license does not become part of the realty, but remains the property of the person annexing it, and may be removed by him, is subject to sale and mortgage as personal property, or may be taken on execution against him. Such a building does not pass to a purchaser of the land, and if he is wronged his remedy is upon the covenants in his deed. This rule certainly holds when there is an express reservation of a right to remove the building, and generally it is considered that where the landowner consents to the placing of a building on his land by another without an express agreement as to whether it shall become a part of the realty or remain personalty, an agreement will be implied that it is to continue personal property."

[4, 5] Is there anything in the record to show that the city has parted with its title? We think not. There is no pretense of a sale or transfer of title in the ordinary method. No gift could be made by the officers of the city and the defendant could only acquire title by abandonment on the part of the city if any such there be. As heretofore stated the testimony on the subject of abandonment simply establishes non-user of that part of the pipe line on the defendant's premises and the taking away of faucets, vents, and blowouts referred to on other portions of the line and the allowing of other portions of the line to fall into disrepair. Our attention has not been called to any other testimony that can reasonably be said to bear upon the question of abandonment. It must be borne in mind that there is a distinction in law between abandonment of property, such as to divest ownership or title thereto, and mere neglect. Ordinarily, as said by the Supreme Court of this state in the case of *Board of Education v. Martin*, 92 Cal. 209,¹ "the public is not to lose its rights through the negligence of its agents." We do not well see how the negligence of the officers of the city of Vallejo to keep the pipe in repair in another section of its line can be held to be proof of abandonment of the pipe running through the premises be-

¹ 28 Pac. 799.

longing to the defendant. The city itself took no official act evidencing an intention to abandon its property and if any such intention existed it can only be inferred from what has heretofore been mentioned. To sustain the theory of abandonment the defendant relies strongly upon the case of *Norton v. Duluth Transfer Co.*, 129 Minn. 126, 151 N. W. 907, Ann. Cas. 1916E, 760. Upon the subject of abandonment the court in that case says:

"This intention" to abandon "need not appear by express declaration, but may be shown by acts and conduct clearly inconsistent with an intention to continue the use of the property for the purposes for which it was acquired."

[6] It is there stated, however, that to have the effect of divesting title the abandonment must have been more than a mere nonuser and must appear to have been an intentional relinquishment of the rights granted. The facts in that case also show that the defendant had taken up its tracks, ties, bridges, etc., and had taken away all its property from the right of way in controversy. The California cases cited in support of the doctrine of abandonment have reference to the giving up of possessory claims to real estate and are not pertinent to the issues herein involved. Our attention has not been called to any testimony which would establish title in the defendant by adverse possession or which would take this case from under the operation of the rule announced in *Thompson v. Pioche*, 44 Cal. 508, to wit:

"To constitute an adverse possession, so as to set the Statute of Limitations in motion, the occupation of the one holding adversely must be open and notorious, under a claim of right, and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right."

It would seem also that title acquired by abandonment would be inconsistent with the claim of title acquired by adverse possession. The testimony of defendant upon his use of the pipe line is as follows:

"Q. When did you talk with Chappell about this matter? A. About 1910. Q. Why did you go to see Chappell? A. I went to see George

Savage. Q. Why did you go to see George Savage? A. Because I wished to use some of the pipe that was vacant or idle there at that time. * * * To get some to use as culverts across a private road, across the place there. Q. Then at that time you went to the city of Vallejo to ask permission to use a part of their pipe? A. Yes. Q. And you were taken to see Chappell? A. Yes. Q. What did Chappell tell you? A. He told me that they had talked that matter over quite recently, and he said, 'We have concluded that the pipe does not belong to us, that the pipe belongs to the ranches in which it runs through.' And he said, 'After we take the faucets and blow-offs and air valves off there and the like, that way,' I could do what I pleased with the balance. I know that Savage and Chappell are dead. I never talked to anybody else but those two parties. Q. Then you understood from Chappell's words that the city had given you that pipe? A. Yes."

That Chappell and Savage had no authority to give away the property of the city requires no citation of authority. Other than what has been stated, our attention has not been called to any testimony of any acts of ownership or control of the pipe line by the defendant save and except that the defendant was the owner and in possession of the lands and premises through which the pipe line was laid by the city of Vallejo as hereinbefore stated. It being admitted that the pipe line in controversy was owned by the city of Vallejo at the time it was laid, and all the testimony on the subject tending to show that the city was a licensee upon consideration, the city was entitled to reasonable notice of revocation and reasonable time to remove its property, assuming that such a license is revocable. No notice of revocation was ever given. The city did not acquire its rights in the premises from use alone and therefore did not lose its rights by mere nonuser, and as there is no substantial evidence of abandonment except nonuser and no other substantial evidence of an intention to abandon, it necessarily results that the finding of the court that the defendant is the owner of the property in question is not supported by the evidence.

For the reasons given, we think the judgment of the trial court should be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 364

TIETKE v. FORREST. (Civ. 4457.)

(District Court of Appeal, Second District, Division 2, California. Nov. 9, 1923.)

1. Appeal and error §193(9)—Sufficiency of complaint may be first urged on appeal.

That a complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur, but may be raised first on appeal.

2. Pleading §34(7)—Complaint first attacked on appeal liberally construed.

Where complaint is first attacked on appeal as not stating facts sufficient to constitute a cause of action, it will then be liberally construed and upheld, if necessary facts appear by implication only, or as a conclusion of law.

3. Negligence §111(1)—Averment in general terms sufficient.

While it must appear from facts averred that negligence caused or contributed to injury and complaint is not sufficient if no fact is stated which shows how the injury was caused, yet an averment of facts constituting negligence in general terms is sufficient.

4. Gas §20(1)—Negligence in installing stove held sufficiently alleged.

Where complaint, in action for personal injury resulting from explosion of a gas stove installed by defendant, alleged that he was careless and negligent in the installation, in that the oven burner was improperly adjusted so that it had an insufficient supply of secondary air and that it was placed too close to the wall to permit sufficient air to enter the oven burner, it sufficiently alleged negligence.

5. Gas §20(1)—Omission in complaint held not misleading.

Where complaint in action for personal injury from explosion of a gas stove alleged that defendant was negligent in installation, in that the oven burner was improperly adjusted so that it had an insufficient supply of secondary air, even though complaint did not clearly allege the importance of secondary air to safe operation of the stove, defendant held not thereby misled.

6. Appeal and error §1002—Conflict in testimony not ground for reversal.

A conflict in the testimony can never be a ground for reversal.

7. Gas §20(2)—Evidence held to show negligence in installing gas stove.

In action for personal injuries from explosion of a gas stove purchased from and installed by defendant, evidence held sufficient to sustain verdict for plaintiff either on the theory of faulty installation or that the explosion was due to insufficient secondary air, which defect could have been remedied so as to have allowed proper ventilation.

8. Appeal and error §995—Rule as to two possible causes for injury, one of which relieves defendant, is matter for jury.

Rule where there are two or more possible causes of injury for one or more of which de-

fendant is not responsible, and evidence leaves it just as probable that injury was the result of one cause as of the other, then plaintiff cannot recover, is applicable more as rule for guidance of jury than for appellate court in passing on sufficiency of evidence.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Elsie Tietke, an unmarried woman, against Fred Forrest, doing business under the fictitious firm name and style of Forrest Stove Works, and individually. Judgment for plaintiff, and defendant appeals. Affirmed.

Moote & Patterson and Harold S. Kiggins, all of Los Angeles, for appellant.

Charles Robert McCarty, of Los Angeles, for respondent.

CRAIG, J. This is an action brought to recover damages for personal injuries sustained by the plaintiff as a result of the explosion of a gas stove purchased from and installed by the defendant. The cause was tried before a jury, and a verdict was rendered in favor of plaintiff, and judgment was entered in accordance therewith, from which judgment defendant now appeals.

It appears that at the time of the occurrence which gave rise to this action, and for some years previously thereto, the defendant conducted a business of selling and installing gas stoves for cooking purposes in the city of Los Angeles, and known as the Forrest Stove Works. He sold one of such stoves to the plaintiff, and installed in her home a secondhand stove, to be used until such time as he could deliver the new one; the stove temporarily in use was lighted at the oven, in the ordinary performance of household duties, and when the oven was subsequently opened by plaintiff there was an explosion of gas, which burned her about the face, arms, and hands. The complaint alleges that defendant was careless and negligent in the installation of said stove in that the oven burner thereof was improperly adjusted, so that it had an insufficient supply of secondary air; that the stove was placed too close to the wall to permit sufficient secondary air to enter said oven burner; that the said defects were not known to plaintiff. The complaint further alleges that defendant advised the plaintiff that said stove was properly installed and was ready and safe for use, but that by reason of said lack of secondary air the oven burner, after being so lighted, and after the closing of said oven door, and without negligence on the part of plaintiff, went out, and the oven was filled with gas; that thereafter the plaintiff opened said door, and the gas so collected in said oven, as aforesaid, exploded and inflicted upon plaintiff's person the alleged injuries.

It is further charged that the plaintiff's injuries were proximately caused by the afore-said negligence on the part of defendant, and not otherwise.

An answer was filed herein, denying generally and specifically each of these allegations, and the case went to trial upon the pleadings, resulting in a verdict in favor of the plaintiff.

[1, 2] No demurrer was interposed to the complaint, but defendant here contends that it does not state facts sufficient to constitute a cause of action, in that there is no allegation from which it may be inferred that secondary air, and a sufficient supply thereof, is so vital to the proper or safe operation of a gas stove as to make an installation negligent or careless when it failed to provide therefor. It was argued that the complaint must necessarily show wherein the acts or omissions complained of constitute carelessness or negligence.

[3-5] The objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur, but may be raised for the first time on appeal, but the pleading will then be liberally construed, and if the necessary facts appear by implication only, or as a conclusion of law, it will be upheld. *Ohio Electric Car Co. v. MacIntosh*, 182 Cal. 450, 188 Pac. 982. It has repeatedly been held to be the rule in this state that, while it must appear from the facts averred that the negligence caused or contributed to the injury, and that a complaint is not sufficient if no fact is stated which shows how the injury was caused, or that it was not caused through a patent defect (*Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29), yet an averment of the facts constituting the negligence, in general terms, is sufficient; the more specific facts being generally more largely within the knowledge of the defendant than that of the plaintiff (*Cunningham v. Los Angeles R. Co.*, 115 Cal. 561, 47 Pac. 452; *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; *Cahill v. E. B. & A. L. Stone Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. [N. S.] 1094; *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691, 105 Pac. 976). It is sufficient to call attention to the rule frequently announced by the Supreme Court that it is necessary only to allege negligence by general averment that defendant negligently did the particular act which resulted in the damage to plaintiff. *Rathbun v. White*, 157 Cal. 248, 254, 107 Pac. 309; *Smith v. Buttner*, 90 Cal. 95, 99, 27 Pac. 29. The complaint fully measures up to the standard required by these authorities. From the excerpts which we have set forth, in substance or in hæc verba, it is apparent that it contains more than an allegation of negligence on the part of the defendant in general terms, and specifies with considerable

particularity conduct which it is alleged was negligent, and was the proximate cause of the plaintiff's injury. Again, the matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to his injury. *Stein v. United Railroads of San Francisco*, 159 Cal. 368, 113 Pac. 663. If it were true, as urged by appellant, that the complaint does not clearly allege the importance of secondary air to the proper or safe operation of the gas stove in question, he cannot be said to have been misled by this omission.

[6, 7] The next and only remaining point made by appellant is that the evidence falls far short of bearing out the allegations of the complaint and wholly fails to support the verdict of the jury. Testimony was introduced by the respondent tending to show that appellant hurriedly connected the stove when it was installed by him, that plaintiff remarked at the time that she smelled escaping gas, but that appellant made no test, and assured her that the stove was in proper condition for use. Plaintiff was supported in these statements by her mother and sister, and witnesses experienced in the construction and installation of gas stoves of the style here involved testified that secondary air is taken in from the outside to feed the burner. One expert witness stated positively that in his opinion the lack of secondary air caused the fire to go out. Others stated that the stove was set too close to the wall, and that the trouble was due to insufficient secondary air, and that the defect could have been remedied so as to have allowed proper ventilation and the entrance of secondary air. The appellant testified that he tested the stove, and that it was in good condition and properly installed; that there was no lack of secondary air, but that there were various ways that an explosion could occur. This and other evidence to the same effect constitutes nothing more than a conflict in the testimony, which can never be a ground for reversal.

It is obvious that the case was tried by both sides upon the theory presented by the complaint, and it cannot be said that there was no evidence to support the elements necessary to constitute respondent's case, or that any element thereof was merely inferred by the jury without substantial evidence to justify it. If, as was testified the stove was placed so near the wall that proper ventilation was rendered impossible, and this prevented secondary air to enter, causing gas to accumulate, float, and explode, and there were not sufficient holes in the bottom, which contributed to the same difficulty, appellant, while engaged in installing an instrument consuming a dangerous substance such as fuel gas, would be presumed to know what

adjustments were proper and expected to make them.

[8] Considerable evidence was offered going to show that the explosion might have been the result of other causes than the appellant's negligence. It will serve no good purpose to quote this testimony here. Appellant seems to rely upon the rule that where there are two or more possible causes of injury, for one or more of which the defendant is not responsible, if the evidence leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover. However, this principle is applicable more as a rule for the guidance of the jury in passing upon the facts than for the appellate court in passing upon the sufficiency of the evidence. *Peters v. McKay*, 136 Cal. 73, 68 Pac. 478.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

64 Cal. App. 381

GOSS et al. v. BROWN. (Civ. 3915.)

(District Court of Appeal, First District, Division 2, California. Nov. 14, 1923. Hearing Denied by Supreme Court Jan. 10, 1924.)

Venue  77—Right to change not waived by filing cross-complaint with moving papers.

Defendant, filing an affidavit of merits and demanding a change of venue when he answers or demurs, as required by Code Civ. Proc. § 396, does not waive his right to the change by also filing a cross-complaint, which can be filed only by the court's permission after the answer is filed. Code Civ. Proc. § 442.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nstrand, Judge.

Action by Charles E. Goss and others, co-partners, doing business as Chas. E. Goss & Son, against George Brown. From an order granting a motion for a change of venue, plaintiffs appeal. Affirmed.

Hankins & Hankins and Olin F. Nuckolls, both of San Francisco, for appellants.

A. J. Carlson, of Modesto, for respondent.

NOURSE, J. Plaintiffs appeal from an order granting defendant's motion for a change of place of trial from the city and county of San Francisco, in which the action was commenced, to Stanislaus county, the county of defendant's residence.

The moving papers are conceded to be in due and proper form, and to entitle defendant to a change of venue, except that, concurrently with their service and filing, the defendant also filed a cross-complaint. The only point involved on appeal is whether de-

fendant, by filing a cross-complaint with his answer at the time he filed the moving papers, waived his right to have the place of trial changed to the county of his residence.

Undoubtedly a failure to assert this right in the manner provided by section 396 of the Code of Civil Procedure would be deemed a waiver of the right. But defendant has strictly complied with the provisions of that section. It requires that a defendant file an affidavit of merits and make the demand for the change of the place of trial at the time he answers or demurs. This the defendant did. We do not think he lost the right which then arose under the statute, merely because, in addition, he filed a cross-complaint. Section 442 of the Code of Civil Procedure provides that a cross-complaint may be filed at the same time as the answer, or by permission of the court subsequently. As said in a somewhat similar situation in *Pittman v. Carstenbrook*, 11 Cal. App. 224, 228, 230, 104 Pac. 699, 702:

"It would be a very harsh rule to hold that by following the statute the defendant waives a privilege conferred by the statute. * * * It is true that the privilege [to have the place of trial changed] may be waived impliedly as well as expressly, but in order to do so there must be some act of the moving party tending to show his intent to invoke the jurisdiction of the court of first instance for the trial of questions of fact or of law. The filing of the amended demurrer does not indicate this intention, although it might just as well have been filed after the cause was transferred."

In the case at bar the defendant, in order to protect his rights under the cross-complaint, was required to either file his cross-complaint with his answer or to trust to the discretion of the trial court to permit him to file it after the cause had been transferred. A similar situation arose also in *Wood, Curtis & Co. v. Herman Mining Co.*, 139 Cal. 713, 717, 73 Pac. 588, 589, where the court says:

"He [defendant] must either appear by answer or demurrer, and if he does either he is entitled to be heard on his motion. We see no reason why the defendants in the present case could not also file a motion to strike out parts of the complaint. The purpose of the statute is to require the defendant to appear, and also to show that he has a meritorious defense. * * * We think the motion was no waiver of defendants' rights."

In view of the statutory provisions referred to, we do not think the reasoning of the Texas cases cited by appellant applicable in this jurisdiction.

Order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 443

PEOPLE v. CROSS. (Cr. 1007.)

(District Court of Appeal, Second District, Division 2, California. Nov. 19, 1923.)

1. Criminal law §1166½(8)—Failure to sustain challenge to jurors held not prejudicial where they did not serve.

The disallowance of accused's challenges for cause to jurors because of their testimony that they were prejudiced in narcotic cases, for which accused was being tried, was not prejudicial as respects certain of such jurors who did not serve upon the case.

2. Jury §97(4)—Juror held not disqualified in misdemeanor case.

In trial for selling narcotic, testimony by a woman juror that she was prejudiced "from the very nature of the charge," followed by testimony that she would be fair, that she entertained no prejudice and could and would lay it aside and accept the instructions of the court, furnishes no ground for accused's objection to such juror's competency.

3. Jury §110(1)—Objection to competency waived by failure to challenge.

In a narcotic law violation prosecution, held that, if accused considered a woman juror incompetent to serve, he waived such objection by failure to make any challenge, peremptory or for cause, as to such juror.

4. Poisons §9—Evidence as to violation of narcotic law sufficiently corroborated.

In prosecution for violation of St. 1907, p. 124, as amended, by the sale of morphine, evidence held sufficient corroboration of the prosecuting witness' testimony to sustain conviction.

5. Criminal law §1163(6)—Separation of the jury presumptively prejudicial.

Separation of the jury after submission is presumptively prejudicial.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Gilbert Cross was convicted of violating the state Poison Act, and appeals. Reversed.

J. W. Wright, of Tulare, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was convicted of a misdemeanor, it being charged that on or about the 8th day of March, 1923, he willfully and unlawfully sold and furnished a quantity of morphine, contrary to the provisions of the Act of March 6, 1907 (St. 1907, p. 124), as amended, regulating the sale of poisons.

[1-3] It is contended, first, that appellant's challenges for cause should have been allowed by the court as to four jurors, because they had testified that they were prejudiced in narcotic cases. Three of such jurors did not serve upon the case, and hence no prej-

udicial error could result. In *People v. Schafer*, 161 Cal. 573, 576, 119 Pac. 920, 921, it was said:

"While the record shows that the defendant did subsequently exhaust his 10 peremptory challenges, it does not appear that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. * * * This is not enough to warrant reversal for error in the ruling on the challenge for cause. * * *

This states the situation in the instant case. The same rule is announced in *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599, and *People v. McMillan* (Cal. App.) 212 Pac. 38. The fourth juror, a woman who at first stated that she was prejudiced "from the very nature of the charge," testified to all subsequent questioning that she would be fair, and that she entertained no prejudice, but could and would lay it aside and accept the instructions of the court, and try the case upon the evidence as fairly as any other; that she did not know of any reason why she could not be fair and impartial as a juror, both for the people and for the defendant. We think this testimony, taken as a whole, furnishes no ground for the appellant's objection to the competency of this juror. Besides, the record nowhere discloses any challenge, peremptory or for cause, as to this juror, and if appellant considered her incompetent to serve he waived such objection. *People v. Sanford*, 43 Cal. 29, 32.

Much argument is indulged in to discredit the testimony of the principal witness for the people, it being contended that her reputation for truth, honesty, and integrity in the community of Visalia was bad; that she had offered to accept a bribe of \$100 to leave the county and not testify against appellant, and that she was a "stool pigeon" for the officers, who agreed to pay her \$50 if appellant should be convicted; also, that her testimony was contradicted by that of the two officers who testified that they worked with her upon the case. It is true that witnesses called on behalf of appellant did, when asked the direct question, state that the witness' reputation was bad, but none of them appear from their testimony to have known what constituted general reputation for truth, honesty, and integrity; although they were repeatedly prompted and instructed by the court and by counsel to answer "yes" or "no" to the question whether or not they knew her general reputation. Answers that the prosecuting witness was "untruthful" were stricken out as not responsive, which is assigned as error, and it is insisted that the interruptions and explanations by the court embarrassed the witnesses before the jury and discredited their testimony. It does not appear that the court

expressed any criticism as to the credibility of any witness. The explanatory remarks to which exception is taken were prompted either by objections of the district attorney or by the witnesses, in an endeavor to assist them.

The jury were instructed that the court in no manner expressed or desired to express any opinion on the weight of the testimony of any witness; that with questions of fact, the weight of evidence and the credit to be given any witness the court had nothing to do; that they were not to infer, from any of the rulings or remarks of the court during the trial, how the court might think the case should be decided. They were further instructed that all witnesses are presumed to speak the truth, but that this presumption may be repelled and overcome by the manner in which they testify, by the manner and character of their testimony, by contradictory evidence, or when impeached by evidence that their reputation for truth, honesty, or integrity was bad. The complaining witness denied that she had ever discussed the subject of a bribe, or that she had heard it discussed, and all of the matters to which appellant here directs attention constituted questions of fact, and were covered by the instructions of the court.

[4] Appellant next asserts that when the record is carefully examined it will be noted that the jury convicted him upon the testimony of the prosecuting witness alone, and that she was not corroborated. Such a claim is entirely without foundation. The witness in question testified that she arranged with the defendant to furnish her some narcotics, and that she drove to a house in her automobile, stopping near and directly in front of a window where two officers were concealed who could see all that transpired; that the defendant followed in another automobile; and that he stopped just to the rear of her car, alighted, came to the car in which she remained seated, and handed her a small package of narcotics, which she later gave to the officers, and which was introduced in evidence. The officers each testified to the positions of the automobiles, and of the parties, and positively stated that they witnessed the transfer of the narcotics, which were subsequently handed to them, and brought into court by them. There was abundant evidence justifying the jury in concluding that the defendant was guilty. The defendant as a witness denied only the delivery of the narcotics, strenuously insisting that he merely placed some groceries in her arms before she entered the house. His testimony only raises a conflict in the evidence, which cannot be reviewed.

[5] A more serious question was raised, however, upon appellant's motion for a new trial. He and three other persons furnished affidavits stating that after the cause had been submitted to the jury the jurors sep-

arated, some of them talking among themselves and with other parties in the courtroom, some in the hallway and others in the toilet. Respondent filed no counter affidavit, but contends that there is no merit in appellant's motion for a new trial, citing *People v. Knight* (Cal. App.) 218 Pac. 79. In that case it does not appear that the jurors conversed with other persons, or that any one spoke to them; but it does appear that some of them were permitted to go down the hall to a toilet, and talked among themselves in the hallway, also that the officer entered the jury room on several occasions. The court stated in its opinion that there was nothing in the facts shown that would furnish a sufficient cause for granting a new trial.

On the other hand, certain rulings of the Supreme Court of this state seem controlling, and conclusive, upon the facts presented. In *People v. Brannigan*, 21 Cal. 337, 339, it was said:

"The language of the oath administered to the officer having the jury in charge points out with clearness his duties. He is required to 'keep them *together*'; that is, he must not permit them to separate. He must keep them 'in some *private* and convenient place'; that is, removed from access by strangers. He must not 'permit any person to speak to them,' a duty which can only be performed by following the previous requirement of keeping them in a private place. And, finally he must not speak to them himself, except to ask them whether they have agreed upon a verdict. When either of these requirements is disregarded by the officer, he fails to perform his duty, and the trial is irregularly conducted. If a conviction follows, the prisoner has ground to complain of the irregularity. He is entitled to all the protection which the statute intends to secure, against any interference with the action of the jury, whether arising from the hostility of personal enemies or popular prejudice. If such protection be not afforded, suspicions are excited and confidence in the justice of their decision is destroyed. It would seem therefore but reasonable, where an irregularity has been committed, which *may* have affected the jury, that the government seeking to uphold their action, should be called upon to show that no injury to the prisoner has followed from the irregularity complained of. If this can be shown, their verdict will not be disturbed—for the end which the law contemplated by its provisions has been attained. In the present case the irregularity consisted in the unauthorized separation of the jury, after retiring to deliberate upon their verdict. The prisoner, in his affidavit, upon which the motion for a new trial was based, alleges the separation, and the fact is not controverted, nor is any explanation of it attempted by the state. The district attorney appears to have considered it incumbent upon the prisoner to show affirmatively injury to himself resulting from the separation, or at least reason to suspect such injury. There are authorities which support this view. Such are the cases cited from the New York courts. But there are authorities of equal weight the other way, and the lat-

ter, we think, are supported by better reasons." (Italics by the court.)

In *People v. Adams*, 143 Cal. 208, 76 Pac. 954, 66 L. R. A. 247, 101 Am. St. Rep. 92, it was said:

"Under our law there is a marked difference between a separation during the progress of the trial and a separation after final submission of the case. As to the former there is no law requiring the jury to be kept together, although the court may order them to be so kept; and it is not necessary in the case at bar to consider the significance of a violation of such an order. But it is provided in the Penal Code (sections 1128, 1135, 1136) that after the jury have finally retired for deliberation they must be kept together; and one of the express grounds for a new trial is 'when the jury has separated without leave of the court after retiring to deliberate upon their verdict' (section 1181). * * *

"And it is clear that the burden was not on appellant of proving affirmatively that she was prejudiced by the said separation of the jury. In this state the law on the subject was first declared in *People v. Backus*, 5 Cal. 275."

See, also, *People v. Symonds*, 22 Cal. 348; *People v. Cord*, 157 Cal. 562, 571, 108 Pac. 511; and *People v. Hawley*, 111 Cal. 78, 43 Pac. 404, to the same effect.

In the instant case, as in that of *People v. Brannigan*, supra, an irregularity is shown to have been committed which may have affected the jury to the appellant's injury; here also no counter affidavits were filed by the people. The district attorney has not attempted to show affirmatively that the separation of the jurors after final submission of the case, and the fact of their conversing with others, did not prejudice the defendant and result in a verdict against him. Under these circumstances such injury to the defendant stands as a conceded fact established by presumption of law, and a reversal is necessary.

Appellant's exceptions to the refusal of requested instructions are untenable, since the general charge covers the matters embodied therein. However, for the reasons herein set forth, a new trial should have been granted, and the judgment appealed from is therefore reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

64 Cal. App. 410

ANDERSON v. STANDARD LUMBER CO.
(Civ. 2534.)

(District Court of Appeal, Third District, California. Nov. 16, 1923. Hearing Denied by Supreme Court Jan. 12, 1924.)

1. Corporations §406(4)—Lumber company held not bound by mill superintendent's contract employing foreman.

A lumber company authorizing its sawmill superintendent to employ lumber pilers and

pond men at stipulated rates per thousand feet and per hour, respectively, held not bound by the superintendent's contract, executed before entering on his duties, employing a "green lumber foreman" or "all around yard man" at \$250 per month, in the absence of evidence that such employee had any knowledge of the superintendent's authority, except from his statement, contract, or letter of authorization to employ men.

2. Master and servant §7—Contract abandoned by accepting other work at smaller salary.

An employee, stating that he could not do the work for which employed and agreeing to do other work at a smaller salary, abandons the first contract and cannot recover thereon.

3. Appeal and error §1011(1)—Abandonment of contract by employee held for trial court.

Whether an employee abandoned his contract held exclusively for the trial court on conflicting evidence as to whether he stated that he could not do the work and agreed to accept other work at a smaller salary.

4. Master and servant §80(9)—Employee shown to have quit work.

Evidence held to show that employee voluntarily quit work before he had been on the job for the time required to entitle him to reimbursement for transportation to his place of work, and was not discharged.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by George A. Anderson against the Standard Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 213 Pac. 65.

H. W. Zagoren, of Sacramento, for appellant.

J. B. Curtin, of Sonora, for respondent.

FINCH, P. J. Plaintiff sued to recover for services alleged to have been performed by him for defendant and for the amount of a claim of one Ole Orr against defendant which had been assigned to plaintiff. The court found against plaintiff and gave defendant judgment for costs. This appeal is from the judgment.

July 28, 1920, the defendant employed P. S. Dainard to act as superintendent of its sawmill at Standard, Tuolumne county; the contract of employment being in the form of a letter, signed by D. H. Steinmetz, defendant's general manager, containing the following:

"Per the arrangements made with you today, we will agree to pay you on the basis of \$4,000.00 per year, to take the position as superintendent at Standard, in full charge of sawmill, pond and yard. * * * It is understood that you will make your arrangements to be at Standard not later than the 15th to the 20th of August."

Dainard entered upon the discharge of his duties as such superintendent about the 1st of September, 1920.

For many years prior to his employment by defendant, Dainard had occupied similar positions in various eastern and Canadian saw-mills and had a wide acquaintance with men working therein. The defendant desired to secure the services of some of these men, and on July 28, 1920, Steinmetz gave Dainard, who was about to go to Minnesota to bring his family thence to Standard, written authorization to employ men as follows:

"In connection with the help that we would like to have you pick up, we can use: 6 or 8 good first-class lumber pilers, and we will pay the following rates: 5/4 and 6/4 and 8/4 & better, 60 cents per thousand feet; 4/4, 67½ cents per thousand feet. * * * All piles will be covered with 1½" box lumber, which will be paid for at the regular 6/4 rate, 60 cents.

"We would like to have you look up two or three pond men to work on the water at 57½ per hour; 1 or 2 setters, 70 cents per hour; doggers, 62½ cents per hour; 2 edgemen, 75 cents; 2 trimmermen, 65 cents; 2 oilers, 60 cents. We can use from six to twelve good mill men, common laborers, at 50 cents per hour.

"You can say to the men that you employ that the work will be steady the year around, and we will furnish transportation to such men as you select, with the understanding that it is to be paid back to us, and with the further understanding that if they stay with us for six months that the company will refund the railroad fare."

Dainard testified that Steinmetz orally authorized him to employ men and said:

"You know what you need as well as I do. However, I better give you some letter so it will bear out our part. You can hire what you need."

Steinmetz denied having made the statement, and further testified that the only authority given Dainard to employ men was that contained in the letter quoted and that defendant never departed from such written authorization. Steinmetz also testified that Dainard was not in the employ of defendant during August, 1920. August 16, 1920, in Minnesota, Dainard and plaintiff executed the following instrument:

"This is to evidence that Geo. A. Anderson has this day been employed by the Standard Lumber Company as an all around yard man at \$250 per month looking after hauling out lath lumber and piling.

"Transportation to be furnished to said employee by said company to the place where work is to be performed, the same to be deducted from his wages; but in case said employee works continuously for said company for a period of six months the amount so deducted for said transportation is to be refunded to him by said company.

"Dated this 16 day of August, 1920.

"The Standard Lumber Company,

"By P. S. Dainard Agt.

"Geo. A. Anderson."

While in Minnesota, after the execution of the instrument last quoted, the plaintiff procured 18 men for the defendant at Dainard's request, the latter agreeing to pay plaintiff his expenses incurred in procuring them. Plaintiff and these 18 men then came to California, arriving at Standard August 25th. Plaintiff testified that he presented his agreement with Dainard to Steinmetz and Ben J. Zeigler, who was general yard superintendent, on August 26th, and that Steinmetz looked at the contract and then said: "I am satisfied you are just the kind of man we want." Plaintiff further testified that nothing was then said about paying him less than \$250 a month. Steinmetz testified that he did not authorize Dainard to incur any expenses in procuring men, that he did not know that plaintiff had a contract until after the latter had been discharged, and that Ziegler had authority to employ men and that he (Zeigler) put plaintiff to work. Plaintiff testified that he was employed by Dainard as green lumber foreman "to handle the green lumber from the mill saw to the pile." Ziegler testified that on plaintiff's arrival at Standard "he showed me a contract but I didn't read the contract." "I gave it back to him without reading it." "He told me he was hired as a green lumber yard foreman, and he further stated that he didn't feel competent, owing to the different conditions that existed here and back there, and he asked me to keep on the man we had as green lumber foreman until he got acquainted." W. H. Cross, who was yard foreman in charge of the green lumber at the time of plaintiff's arrival, testified that the latter said to the witness, "You stay three or four weeks, I want to get onto the lumber," and further said "he couldn't handle the job"; that "he didn't know sugar pine from white pine." Ziegler testified that plaintiff agreed to take charge of "the green lumber chain at nights" at \$225 a month. He worked in this capacity for six weeks, at the end of which time defendant "let the chain out by contract," Ziegler then offered plaintiff work in scaling lumber at 65 cents an hour, but the plaintiff declined. Two or three days later plaintiff was given work in the box factory. Nothing seems to have been said at that time relative to the wages he was to receive in the box factory. He was paid at the rate of \$5 a day, the wages paid others for like work. After working there for a few days plaintiff left the factory one evening 12 minutes before the whistle blew for the men to cease work, and he was thereupon discharged. He admitted that he left 6 minutes early. The defendant has received payment for his services at the rate of \$225 a month for the time he had charge of the green lumber chain. He refused to accept payment at the rate of \$5 a day for the time he worked in the box factory and took the matter up with the state labor commissioner.

Defendant thereupon paid the amount due plaintiff to the commissioner. There was no attempt made to show that the services rendered were reasonably worth more than the amounts paid therefor.

Appellant contends that the defendant is bound by Dainard's agreement to make payment at the rate of \$250 a month, notwithstanding the fact that Dainard exceeded his authority in making the agreement. *Whitton v. Sullivan*, 96 Cal. 480, 31 Pac. 1115, is cited in support of this contention. In that case the defendant's attorney had employed the plaintiff to take and transcribe testimony in an election contest at a certain rate per folio, and the services had been performed without knowledge on the part of plaintiff that the defendant had placed a limit on the price to be paid for the work. The court said:

"Bowden was authorized by appellant to make a contract with respondent to perform this work, and under such authorization he made a contract with respondent, who performed the work thereunder. Appellant's cause of complaint is, simply, that his agent, Bowden, exceeded the limitations placed upon his powers, by contracting to pay respondent a greater price for the work than was included in his authority of agency. But this is a matter between the principal and his agent, and with which the party doing the work has no concern.

"This principle is clearly declared in *Mechem on Agency*, § 283, where the author, speaking as to general and special agents, says: 'In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, and not upon the instructions given.'"

In the employment of *Whitton*, Bowden had not exceeded the authority usually exercised by an attorney in the conduct of his client's case. In *Mechem on Agency* (2d Ed.) § 710, it is said:

"The criterion in this case, as in others, is the character bestowed by the principal. * * * Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third persons, if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess. But if the agent be not held out as one possessing other than the limited and restricted authority, then the instructions and the authority may coincide."

This statement of the law is in harmony with section 2317 of the Civil Code, which provides:

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

In *Harris v. San Deigo Flume Co.*, 87 Cal. 526, 528, 25 Pac. 758, it is said:

"There are two essential features of an authority of this character, viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient."

[1] The evidence does not show what information plaintiff had relative to Dainard's authority at the time the contract between them was executed. It does not appear that he could have had any knowledge thereof except from Dainard's statements to him, or from Dainard's contract with defendant or the letter of authorization to employ men. The defendant was not bound by Dainard's statements as to the extent of his authority, and neither the contract nor the letter show any authority in Dainard to execute the contract on which the suit is based. The letter did not authorize Dainard to employ a "green lumber foreman" or "an all around yard man" or to agree to pay any man \$250 a month. Neither did Dainard have authority, on August 16, 1920, merely by virtue of his contract to act as superintendent, to employ men. His authority at that time was such only as was specially given him by the defendant's letter of authorization. He did not enter upon his duties as superintendent until after he had employed plaintiff. Dainard's contract with defendant provided that he was to be at Standard not later than August 15th or 20th. This time was extended. He was in North Dakota on his way to California August 28th. He was not in the employ of defendant as superintendent during August. From the foregoing it clearly appears that the defendant was not bound by the agreement on which the plaintiff sues.

[2, 3] Even if the contract had been binding on defendant, nevertheless, when plaintiff, on his arrival, stated that he could not do the work for which he had been employed and agreed to do other work at a smaller salary, he thereby abandoned the first contract. It is not a question of the oral modification of a written contract, but an abandonment thereof and the substitution of the oral contract in its stead. It is true that plaintiff testified that he did not state that he could not do the work for which he was employed by Dainard and denied that he agreed to accept other work at \$225 a month, but this testimony only created a conflict in the evidence which was exclusively for the determination of the trial court.

Dainard told plaintiff that the latter's salary was to commence from the date of the written agreement between them and that the defendant would reimburse him for his expenses incurred in procuring men for defendant. From what has been said, it appears that Dainard was without authority to so bind the defendant or to employ anyone to procure men for defendant.

[4] Ole Orr was employed by Dainard to

pile lumber at certain rates per thousand feet. The contract provided that if he remained "on the job for a period of six months," his railroad fare from Minnesota to Standard would be paid him by the defendant. He worked for defendant "close to two months" and was paid for his services. He claimed reimbursement from defendant in the amount paid by him for transportation and assigned his claim therefor to plaintiff. The complaint alleges that he was wrongfully discharged and is therefore entitled to such reimbursement, even though he did not "remain on the job" for six months. Orr testified as follows:

"Q. Why did you leave? A. This day I got sore, Mr. Ziegler and his foreman was out there. Q. What was the foreman's name? A. Bill Cross. Q. What happened? A. He said, 'Go and get your time.' * * * Q. You said a while ago that you were kicking about it? A. Because every time I wanted to spot the lumber, the teamster would leave it 300 or 400 feet from the loads. * * * Q. Then you went to the foreman and Mr. Ziegler and Mr. Cross? A. I wanted to get some of the lumber spotted so that I could work. Q. What was said? A. Said if I didn't like it here to go and get my time. Q. Then what did you do? A. I went and got my time. Q. You did not offer to do any other work? A. No. * * * Q. And your (work) was not satisfactory to either one of the bosses, Cross or Ziegler, is that correct? A. He told the boss my work was satisfactory, and he didn't want me to go, and that he would have the lumber spotted, and I didn't like that idea that I should sit there and wait every day for the lumber to come in. Q. You didn't like to wait? A. We had to work, contract, and didn't want to sit there and do nothing; like to make a few dollars. * * * Q. And by spotting lumber you mean putting the lumber at a certain point? A. Putting it where it is supposed to be piled. * * * I was fired."

In relation to the same subject-matter, Ziegler testified as follows:

"Did he quit voluntarily or was he discharged? A. He said he was going to quit."

Orr left the employ of defendant October 22d. During the first half of September he earned and was paid \$143.12; during the first half of October, \$117.62; and from the middle of October to the time he quit, \$41.50. During the latter period he "laid off a couple of days." The record does not show what he earned during the second half of September. It thus appears that his average earnings were in excess of \$250 a month, and hence it may fairly be inferred that his work was not greatly interfered with the defendant's failure to spot cars as he desired.

But one point is relied on for a reversal of the judgment in so far as the Orr claim is concerned. In his brief appellant says:

"The only question in this matter is: Did Ole Orr quit of his own accord, was he dis-

charged with cause, or was he discharged without cause?"

The only inference to be drawn from Orr's own testimony is that he quit of his own accord. He testified that he was "fired"; but this conclusion can be given no weight against the facts related by him, which show that he voluntarily quit his employment.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

64 Cal. App. 418

Ex parte GERE. (Cr. 1035.)

(District Court of Appeal, Second District, Division 1, California. Nov. 16, 1923.)

1. Habeas corpus $\S$ 85(1)—Prosecution must show good cause for delay in bringing accused to trial.

The burden of showing good cause for failure to bring accused to trial within 60 days after indictment, as required by Pen. Code, $\S$ 1382, is on the prosecution.

2. Criminal law $\S$ 576(4)—Guaranty of speedy trial not available to accused, whose arrest is delayed because of his own wrong.

The constitutional guaranty of speedy trial and Pen. Code, $\S$ 1382, adopted pursuant thereto, do not operate in favor of one whose dissimulation, falsity, and deceit, as by assuming fictitious names, contributed to delay in arresting him, in which case such right would be available only after he had been taken into custody.

3. Habeas corpus $\S$ 85(1)—Good cause for delay in apprehending and trying accused held shown.

Evidence of the prosecution's attempts to locate accused and the latter's misconduct in evading arrest by assuming fictitious names held sufficient to show good cause for delay in apprehending him and failure to bring him to trial within the time required by Pen. Code, $\S$ 1382.

4. Indictment and information $\S$ 34(4)—Nonindorsement of witness' names on indictment held not shown.

Testimony of the foreman and secretary of the grand jury held not to show that the names of all the witnesses appearing against accused were not indorsed on the indictment, so as to require that it be set aside under Pen. Code, $\S$ 995.

5. Indictment and information $\S$ 34(4)—Foreman and secretary of grand jury alone competent to prove nonindorsement of witnesses' names on indictment.

Accused cannot examine the records of the grand jury, nor prove his contention that the names of witnesses appearing against him were not indorsed on the indictment by the reporter of the testimony; the only witnesses competent to prove such contention, under Pen. Code, $\S$ 995, being the foreman and secretary of the grand jury.

Application by Thomas P. Gere for writ of habeas corpus. Writ discharged, and petitioner remanded.

Cooper, Collings & Shreve, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., of Los Angeles, for respondent.

SHENK, Justice pro tem. On the 8th day of September, 1920, an indictment was found by the grand jury of Los Angeles county and returned to the superior court, charging the petitioner and others with the crime of grand larceny. Thereupon the court ordered bench warrants issued for the apprehension of the several defendants and fixed bail thereon. The case is referred to as one of a series of "bunco cases." A codefendant of petitioner, one Otis B. Berry, was arrested, tried, and convicted. The judgment as to him was affirmed in *People v. Berry* (Cal. Sup.) 215 Pac. 74. On September 20, 1920, the sheriff received the warrant for the arrest of the petitioner. He was taken into custody in the city of Los Angeles on August 13, 1923, duly arraigned in the superior court, and on his plea of not guilty the case was set down for trial on October 8. The petition herein was filed on September 26, and the trial has been continued, pending a determination of this proceeding.

Petitioner alleges that he is unlawfully restrained of his liberty, first, in that his case was not brought to trial within 60 days after the finding of the indictment and no good cause shown for the delay, and, secondly, in that the names of all the witnesses appearing against him before the grand jury were not indorsed on the indictment before it was presented to the court.

After his arraignment and before his plea, the petitioner moved the trial court to dismiss the indictment on the same grounds now alleged in his petition for a writ of habeas corpus. The trial court took testimony for and against the motion, extending over a period of several weeks as the business of the court would permit, and denied the motion. When the matter was called in this court the same was submitted for decision on the petition and return, on the records of the trial court, and on the transcript of the testimony taken by that court on the hearing of the motion to dismiss.

In support of his first contention, the petitioner relies on the following provisions of section 1382 of the Penal Code:

"The court, unless good cause to the contrary is shown, must order the prosecution dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

And he bases his right to test, in a proceeding of this kind, the question of his un-

lawful detention after the expiration of the 60-day period on *In re Begerow*, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, where the petitioner was discharged for the reason that no good cause for a delay beyond the statutory period was shown. It is therefore necessary to determine whether or not the facts and circumstances here shown constituted good cause for delay.

It is the contention of the petitioner that since the finding of the indictment he has lived continuously in the city of Los Angeles, and that, if the prosecution had exercised reasonable diligence he could have been arrested and brought to trial without delay. On the part of the respondent it is contended that the petitioner went under numerous assumed names and made false statements for the purpose of avoiding identification, and that his conduct in that respect was so culpable as to deprive him of the benefit of the law requiring diligent prosecution.

[1] The burden of showing good cause for delay is upon the prosecution. *People v. Morino*, 85 Cal. 515, 24 Pac. 892. In this behalf the respondent shows that under date of September 15, 1920, the district attorney of Los Angeles county caused to be printed and sent to the police departments of the principal cities of the United States a circular bearing what purported to be a photographic likeness of the petitioner over which were the words "Arrest this man," and beneath which was the name "Louis Gear" in large letters, followed by smaller lettered words of description, including the following:

"Alias Thomas Gere, alias Thomas McLain, alias George Wilson, * * * This man is wanted for the crime of grand larceny, having buncoed a man out of fifty thousand dollars by means of fake stock deals. Address all communications or wire information to"

—the district attorney of Los Angeles county. These circulars were not broadcast in the city of Los Angeles, but deputy sheriffs were detailed to the especial duty of ferreting out and arresting men guilty of this particular class of crime. The deputy sheriff in charge of these investigations at the time of the finding of the indictment against petitioner died shortly thereafter, and another deputy was assigned in his place. Just what efforts he employed during the short time he was in charge is not disclosed, but in April, 1921, another officer was placed in charge who sought in numerous ways to locate the petitioner. In company with the complaining witness, John F. Herr, this officer went out some two dozen times in an endeavor to locate him, but without avail.

The photograph of petitioner, hereinbefore mentioned, was obtained from the Los Angeles police department, and on it is indorsed "L. Gear," as the name of the person

whose photograph it purported to be. Petitioner was also known as Louis Gear, Louise Gere, Thomas Gere, Thomas Geere, Thomas McLain, George Wilson, George Baily, and Fred Williams. A witness who was a neighbor of petitioner for over two years testified that he knew him as Gere (pronounced Ge-ray). The complaining witness knew him as Fred Williams. In this connection it may be related that the petitioner was designated in the indictment as Fred Williams. The Supreme Court refers to him in the case of *People v. Berry*, 215 Pac. at page 78, in the following quotation:

"Mr. Herr [the prosecuting witness] made the acquaintance of Fred Williams in a city park in Los Angeles. They soon thereafter visited another of the city's recreation grounds, namely, Westlake Park, where they had the misfortune (for Herr) to meet Dorchester. We have already had some inkling of Dorchester's pursuits, which, the sequel shows, were shared by Williams. Herr was induced by these worthies to enter into a fictitious stock transaction, during the course of which he intrusted to Williams, duly indorsed, 60 shares of Pennsylvania Railroad stock, 1,000 shares of Guarantee Trust Company stock, a bank certificate for \$500, \$620 in travelers' checks, together with \$12,000 of Liberty bonds. All these valuables were by Williams 'lost' in the same manner as Donohue's securities, and Herr was hurried off to New Orleans, where his recently found friends were to join him and together they were to retrieve their ill fortune."

The foregoing is recited, not as indicating petitioner's guilt, for he has not been tried, but for the purpose of suggesting the likelihood of petitioner's endeavor to conceal his identity and thus avoid arrest, if the recited facts be true.

Petitioner was taken into custody on August 13, not because he was recognized as the defendant in said action, but because of the suspicious circumstance that he was seen in the company of one Gleason, who was wanted in the state of Georgia on a similar charge. The officer who took petitioner into custody testified that when the arrest was made the petitioner gave his name as Williams or Wilson. Petitioner was taken to the district attorney's office and questioned. He there stated that he was a newspaper man employed on a New York newspaper, and had been in California between two and three months. He was then placed in the county jail. When he was booked at the jail he stated to the clerk that his residence was at Rivera, and that he had been in this state three weeks. Then or shortly thereafter he was identified as the Fred Williams named as a defendant in the indictment then pending. When arraigned he first gave his true name as Louis Geere. Later on in the trial court he gave his true name as Thomas P. Gere, and the proceeding in this court is conducted by him under the name last given.

[2] It is conceded that the constitutional guaranty of a speedy trial and the provisions of section 1382 of the Penal Code, adopted in pursuance thereof, do not operate in favor of a fugitive from justice. It must also be true that the law on this subject should not be permitted to work to the advantage of one whose arrest has been delayed because of his own wrong. In other words, one whose dissimulation, falsity, and deceit have been a contributory factor in the delay in the matter of his apprehension is in no position to complain that he was not arrested and his case not brought to trial within 60 days after the filing of the indictment or information. In such a case the constitutional and statutory right to a speedy trial would be available to him only after he had been taken into custody, and the court had acquired jurisdiction to proceed with the trial. In *Ford v. Superior Court*, 17 Cal. App. 1, 118 Pac. 96, the court, in an original proceeding in mandate, ordered a prosecution dismissed because no good cause for the delay had been shown. The only reason three given for the delay was that an alleged material witness for the prosecution, not under subpoena or order of court, was out of the state and was expected to return at some future time. In commenting on the facts and circumstances shown in that case, the court said:

"Of course, underlying all that has been said is the familiar maxim of jurisprudence that 'No one can take advantage of his own wrong'; and a showing that the absence of an adverse witness was instigated, or knowingly aided and abetted, by a defendant would be ample justification for prolonged, if not indefinite, continuances, in aid of a bona fide endeavor to apprehend a defaulting witness which in all likelihood will result in his return to the jurisdiction of the court."

[3] The petitioner sought to rebut the showing of diligence on the part of the prosecution by proof, in response to allegations of the petition, that he had lived in the city of Los Angeles continuously since the finding of the indictment. A brother-in-law of petitioner testified that he had known petitioner for about six years; that for three years he had visited at his place of residence several times; that for about one year prior to his arrest the petitioner had been engaged with him in a financial way in his business as a ditch-digging contractor; that he did not know what petitioner's business was prior to the past year; that petitioner had lived in Los Angeles for over three years and had gone freely about the streets as a pedestrian and riding in automobiles; and that he had never disguised himself. Petitioner's mother-in-law also testified that he had lived in Los Angeles during the past three years. A neighbor of petitioner testified that she knew him under the name of Thomas Geere. An employee of the brother-in-

law testified that he had known petitioner for over two years as Tom Geere. Another witness testified that he had seen petitioner six or seven times during the past six or seven years. It is also shown that the Los Angeles city directory for the year 1920 contained the name "Thomas P. Gere, real estate, 4900 5th ave.;" for the year 1921, the name "Thomas P. Gere, traveling salesman, 4900 5th ave.;" for the year 1922 the name "Thomas R. Gere, 1117 West 78th, writer;" and for the year 1923 the name "Thomas Gere, salesman, 1117 West 76th st."

Such, in brief, was the showing by petitioner of his presence in Los Angeles since the finding of the indictment. But, notwithstanding such showing, we have the proof as above outlined, which satisfied us that the prosecution exercised reasonable diligence under the circumstances in an attempt to locate the petitioner. In addition, it is reasonable to conclude from the facts disclosed in the record that the only purpose of petitioner in assuming numerous fictitious names from a time even prior to the finding of the indictment was to render his arrest less likely. No reason for the change of names in the 1922 and 1923 directories is suggested, and we have the admission of petitioner, which is not denied, that he had been in California but three weeks prior to his arrest. The showing by the prosecution of what was done to locate the petitioner and also of his own misconduct in our opinion constitute good cause for the delay in his apprehension. And, of course, no trial could be had unless he were in custody. If he had succeeded in his purpose to deceive the authorities at the time he was taken into custody, the period of time between the finding of the indictment and his arrest would perhaps have been indefinitely lengthened.

Petitioner contends that as his photograph was in the possession of the police department it would be reasonable to suppose that he could be identified. An observation of his dapper personal appearance in court, and an inspection of the collarless and unshaven subject of the photograph, lead to the conclusion that a casual or even a close observer would have difficulty in determining that the two were one and the same person.

[4] The second contention of the petitioner, namely, that the names of all of the witnesses appearing against him before the grand jury were not indorsed on the indictment, may be answered by the statement

that the proof is entirely lacking in support of the contention. Section 995 of the Penal Code provides that an indictment must be set aside—

"when it appears by the testimony of the foreman or secretary of the grand jury that the names of the witnesses examined before the grand jury, * * * are not inserted at the foot of the indictment or indorsed thereon."

[5] Respondent presents cogent reasons, but without the citation of authority, why the court should not entertain this point in this proceeding. The argument is that an order denying a motion to set aside the indictment on this ground is, if improperly made, no more than an error in the course of the proceedings in the trial court and reviewable only on appeal, and that, when the motion is denied, the defendant, under section 995 of the Penal Code, must immediately answer the indictment by demurring or pleading thereto. But assuming that the contention may properly be passed upon, it appears that the foreman of the grand jury was called as a witness for petitioner. He stated that he could not recall the names of all witnesses who appeared before the grand jury in the matter, and that the only way he could ascertain them was by reference to the records which were in the hands of the secretary. The secretary was then called. He testified that no witnesses appeared before the grand jury in the case against Gere other than those names appeared on the indictment. Counsel for petitioner sought himself to examine the records of the grand jury, and further sought to prove his contention by the phonographic reporter, who took down and transcribed the testimony of the witnesses who appeared before the grand jury. He was very properly not permitted to do so. Obviously, the only witnesses competent to prove his contention were, under said section 995, the foreman and secretary of the grand jury. The foreman had not sufficient recollection on the subject to state the facts, and by the secretary it was shown that there was no basis for the contention.

Other points are made by the respondent, but we deem it unnecessary to discuss them, in view of our conclusions as to the contentions of the petitioner.

The writ is discharged, and the petitioner is remanded.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 375

PEOPLE v. HINKLE. (Cr. 1017.)

(District Court of Appeal, Second District, Division 2, California. Nov. 10, 1923. Hearing Denied by Supreme Court Jan. 7, 1924.)

1. Criminal law —478(1)—Officers held qualified to give expert testimony as to gambling paraphernalia.

Officers who have been specially detailed to ferret out cases of race track gambling, and who have gained a special knowledge of such matter, may testify as experts that papers taken from defendant were a "register of bets" and a "bookmaker's chart"; the extent of their qualification going to the weight, rather than the admissibility, of their testimony.

2. Criminal law —481, 1153(2)—Qualifications of officers to testify as experts on race track gambling in discretion of court.

Qualifications of officers to testify as experts as to the modus operandi of race track gambling is a matter largely in the court's discretion, whose action will not be disturbed except for actual want of evidence to support or a clear abuse of discretion.

3. Criminal law —304(21)—Judicial notice not taken of gambling symbols.

The courts do not take judicial notice of the meaning of the signs and characters used by horse race gamblers.

4. Criminal law —449(1)—Meaning of symbols on "register of bets" and "bookmaker's chart" proper subjects for opinion testimony.

Papers taken from defendants charged with race track gambling called a "register of bets" and a "bookmaker's chart" held proper subjects for opinion testimony by officers as to the meaning of letters and figures thereon.

5. Gaming —98(3)—Evidence held to sustain conviction.

Evidence held to sustain conviction under Pen. Code, § 337a, subd. 2, for occupying a room with papers for the purpose of recording bets on horse races.

6. Gaming —73—Proof that bet was made or race actually run unnecessary to sustain conviction for bookmaking.

To sustain conviction under Pen. Code, § 337a, subd. 2, for occupying a room with papers for the purpose of recording bets on horse races, it is unnecessary to show the bet made or the race run.

7. Criminal law —480—Refusal to permit preliminary cross-examination as to qualifications of expert not reversible error.

Whether qualifications of an expert witness shall be tested by cross-examination before or after stating his opinion is a matter of procedure, not of right, and refusal to permit a preliminary cross-examination, though perhaps not best practice, is not reversible error.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

William Hinkle was convicted of race track gambling, and he appeals. Affirmed.

Wright & McKee, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. By an information containing three counts defendant was charged, in the first count, with the crime of occupying a room with papers for the purpose of recording bets upon the result of a contest of speed between horses—the offense defined in subdivision 2 of section 337a of the Penal Code. In the second and third counts he was charged, respectively, with the offenses defined in subdivisions 3 and 4 of the section. The jury returned a verdict of guilty on all three of the counts. A new trial was granted as to counts 2 and 3. The appeal is from the judgment of conviction on count 1 and from the order denying defendant a new trial on that count.

The facts, in brief, are as follows: Defendant was the proprietor of a cigar store on the ground floor of a building fronting on a street in the city of San Diego. At the time mentioned in the information two San Diego police officers, while driving in an automobile along the street on which the store faced, saw two men inside defendant's premises. These two persons were seen standing in front of the cigar counter engaged in conversation with defendant. One of the men was leaning over the counter. As the officers rode by they observed defendant writing on a pad of paper which lay on the counter. This document, later taken from defendant's person by one of the officers, was, so the officers testified, a "register of bets"—a document ordinarily used by bookmakers for the purpose of recording bets on horse races. As the officers passed the store they observed another man, an employee of defendant, whom the officers referred to in their testimony as the "lookout." He was standing at the door which led into defendant's store. Observing these things, the officers hurriedly parked their automobile near by and immediately returned to defendant's place of business. As they entered, defendant's employee—the person whom the officers previously had observed standing in the doorway—turned toward defendant and exclaimed, "Look out!" By that time the two men whom the officers had seen in the store talking with defendant while the latter was writing on the pad of paper had moved from the spot where they had stood in front of the cigar counter and were then standing on the sidewalk in front of the store. Defendant was telephoning when the officers entered the store. Between the time when the officers first observed defendant as they drove by and the time when they walked into the store—a brief period, not exceeding two minutes—defendant had taken from the cigar stand the pad of paper—the document which

was described by the officers as a "register of bets"—and had folded it and put it in his pocket. One of the officers demanded that he surrender it. Defendant refused to hand it over. Whereupon the officer forcibly took the document from him. Referring to this incident, the officer testified:

"I came in, and he took it [the register of bets] up off the counter, folded it up, and started to put it in his pocket, and he started backing away from me and would not give it to me, so I backed him up against the wall and took it away from him."

Defendant told the officers that he had just made two bets and was sending the paper to the race track at Tia Juana. At the same time the officers took from defendant, or from under his cigar counter, another document which they described as a "bookmaker's chart."

[1] Appellant claims that the court erred in permitting the arresting officers to testify that the two papers which they took from him were, respectively, a register of bets and a bookmaker's chart, and are such papers as ordinarily are used by bookmakers. The officers were qualified by experience to give expert testimony. Long prior to the time when they arrested appellant they had been specially detailed to work on cases of this character. Their duties often took them to the race track at Tia Juana, where, as well as in the haunts of the bookmakers, pursuing their calling in the city of San Diego, they had made a study of race track gambling and its *modus operandi*. They had acquired experience in ferreting out offenders engaged in violating the provisions of this act. As a part of their duties they had familiarized themselves with the papers, books and paraphernalia ordinarily used by bookmakers. They had acquired some special knowledge of a subject which is not within the common experience of mankind generally. They possessed a knowledge which ordinarily does not come within the ken of the average member of a mixed jury of men and women—the juror who has moved in only the routine walks of an exemplary life and has not permitted his feet to wander into the forbidden byways frequented by the gamester. The experience thus gained by the officers was clearly sufficient to establish *prima facie* their competency to give expert testimony as to the character of the documents which they had taken from appellant, as well as to the significance of the cryptic letters and figures which were written on those documents. See *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 570, 571, 147 Pac. 238, and *Miller v. State*, 9 Okl. Cr. 255, 131 Pac. 717, L. R. A. 1915A, p. 1088. The extent of the special knowledge acquired by these officers went to the weight of their testimony rather than to its admissibility. In *State v. Wolfey*, 75 Kan. 406, 89 Pac. 1046, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, it is said:

"There was no error in allowing opinions to be given regarding the inferences to be drawn from the appearance of cattle brands, even by witnesses whose experience was not such as to enable them to speak with authority, for they had some special training in the matter—the extent of it went to the weight rather than to the admissibility of their testimony."

See, also, *Corpus Juris*, vol. 22, p. 522, § 607.

[2] Whether or not the qualification of a witness with respect to knowledge or special experience is sufficiently established is a matter resting largely in the discretion of the trial court, and its determination of the matter will not be overturned on appeal unless there be an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, supra.

[3,4] Not only were the arresting officers qualified by experience to give expert testimony, but the nature of the documents taken from appellant's possession was such as to call for opinion evidence to explain their hidden meaning. Courts do not take judicial notice of the meaning of the signs and characters used by horse race gamblers. Neither the judge nor the jury could properly speculate upon what was the peculiar significance to be given to the kabalistic letters and figures which appeared on the papers taken from appellant, or what meaning they would convey to the minds of men instructed in the bookmakers' school. But while these characters were a concealed mystery to the uninitiated, they were as an open book to those who, by their study of the methods and instrumentalities employed by bookmakers, had been inducted into the arcana of the gambler's craft. It was therefore proper to permit the officers to explain to the jury the nature and character of the papers taken from appellant and to state what, in their opinion, is the peculiar significance attaching to the letters and figures which appeared on these two exhibits. *State v. Gaines*, 32 R. I. 462, 79 Atl. 1107; *People v. Sutherland*, (Cal. App.) 210 Pac. 965; *People v. Emerson* (Sup.) 5 N. Y. Supp. 374; sec. 1863, Code Civ. Proc. See, also, *State v. McKone*, 31 N. D. 547, 154 N. W. 256; *State v. Rothschild*, 19 Mo. App. 137; *State v. Wetherell*, 70 Vt. 274, 40 Atl. 728; *Becker v. Fitch*, 66 Okl. 57, 167 Pac. 202, 2 A. L. R. 340; *McGarity v. State*, 151 Ark. 423, 236 S. W. 611; and *McGuffin v. State*, 156 Ark. 392, 246 S. W. 478.

[5,6] The evidence is sufficient to justify the verdict. It was not necessary to show that a horse race was actually run. *People v. Carroll*, 54 Cal. App. 684, 202 Pac. 885. Nor was it necessary to show that a bet was actually made. An offense of the character charged in the first count of this information—the offense defined in the second subdivi-

sion of section 337a—is complete when it is shown that the accused occupied a room or inclosure with a paper for the purpose of recording a bet or bets on the result or purported result of any horse race or purported horse race. It is the occupancy of a room with a paper for the purpose of recording such bets, not the actual making of the bets, which constitutes the offense denounced by this subdivision of the Code section. Here the evidence of the arresting officers warranted the jury in finding that at least one of the papers in appellant's possession was such as is ordinarily used for the purpose of recording bets on horse races. The possession of such a paper, when considered in the light of appellant's conduct immediately prior to and at the time of his arrest, fully warranted the jury in inferring that he was occupying his cigar store with this paper for the purpose of recording bets on the result of a contest of speed between horses. It is hardly to be supposed that one innocently in possession of such a paper would seek to conceal it from the police officers, as defendant did. The circumstances of the case point unerringly to the conclusion that appellant had the paper in his possession for the unlawful purpose defined by the act. That the paper was in a room occupied by him is not disputed. Every element of the offense was, therefore, sufficiently established.

[7] While it may be the better rule to allow cross-examination of an expert as to his competency before he gives his opinion, it was not error, certainly not reversible error, to refuse appellant's counsel permission to cross-examine the police officers as to their qualifications before they were permitted to give their opinion evidence. On regular cross-examination, after the witness has completed his direct examination, his competency as an expert can be tested. That was the procedure which the court enforced in the instant case. Such cross-examination, conducted after each officer had concluded his direct examination, did not affect in any material degree the evidence which the witness had given on his direct examination respecting his competency. Whether an opposing party shall be accorded permission to test the qualifications of an expert by a preliminary cross-examination before the witness states his opinion, or whether the privilege of testing the witness' competency shall be exercised on his regular cross-examination after he has given his opinion and has concluded his direct examination, involves, not a matter of right, but a question of procedure which lies within the discretionary power of the trial court. *Finch v. Chicago, etc., Ry. Co.*, 46 Minn. 250, 48 N. W. 915; *City of Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; *Sarle v. Arnold*, 7 R. I. 582; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385.

We have examined the record with care and have found no substantial ground for complaint against the manner in which the case was tried by the court below. In other words, we have found no prejudicial error.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 352
PEOPLE v. HUBER. (Cr. 727.)

(District Court of Appeal, Third District, California. Nov. 8, 1923.)

1. Highways $\S$ 186—Indictment and information $\S$ 110(47)—Information charging failure to stop automobile after accident or render assistance and give required information held sufficient, though not sufficiently alleging necessity of assistance; failure to comply with any requirement of Motor Vehicle Act is offense.

An information charging, in language almost identical with that of Motor Vehicle Act, $\S$ 21, that defendant failed to stop his automobile after striking a pedestrian, or to render assistance to the latter, and give him the number of the automobile or name of the owner, held not objectionable as not conforming to the requirements of Pen. Code, $\S\S$ 950, 952, though it did not allege with certainty that any assistance was necessary; failure to comply with any of the requirements of section 21 constituting a complete offense.

2. Criminal law $\S$ 1169(2)—Admission of testimony that automobilist striking pedestrian did not give required information to bystander held not prejudicial error.

In a prosecution of an automobile driver for failure to stop after striking a pedestrian and give him the information required by Motor Vehicle Act, $\S$ 21, admission of a bystander's testimony that defendant did not give the witness such information held not prejudicial to defendant, in view of his own statement as to facts from which any jury would know that no such information was given to any one.

3. Highways $\S$ 186—Automobile driver's ignorance of extent of injuries to pedestrian no defense to prosecution for failure to offer assistance.

An automobile driver's ignorance of the extent of injuries to a pedestrian struck by his car is no defense to a prosecution for failing to offer assistance as required by Motor Vehicle Act, $\S$ 21.

4. Highways $\S$ 186—Inability of pedestrian struck by automobile to receive required information from driver no excuse for failure to stop and offer assistance.

That a pedestrian struck by an automobile was rendered unconscious and unable to receive the information required of the driver by Motor Vehicle Act, $\S$ 21, is no excuse for violating the act by failing to stop and offer assistance.

5. Criminal law — § 1169(1)—Error in admission of testimony as to matters known to jury not prejudicial.

Technical errors in admission of testimony as to matters of which the jury had knowledge are not prejudicial.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Joe Huber was convicted of violating Motor Vehicle Act, § 21, and he appeals. Affirmed.

Holl & Waggoner, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of violating the provisions of section 21 of the Motor Vehicle Act approved May 10, 1915 (St. 1915, p. 397), and prosecutes this appeal therefrom. It appears from the transcript that along about 7 o'clock on the evening of the 23d of December, 1922, the defendant was driving a Ford automobile on one of the roads leading from the town of Susanville; that as he neared a small place called Halltown his car collided with and knocked down a man by the name of Steve Begley; said Steve Begley and his son Deryl Begley were walking along the highway toward their home; Deryl stepped to one side and the car passed him without doing any injury. The responsibility for the collision or injury has no place in this case. After knocking down Begley, the defendant continued on his course for some little distance; just how far the evidence does not clearly establish, the testimony being, according to various witnesses, from 70 feet to 200 yards. After stopping his machine, the defendant merely looked back and then drove on. There is no dispute in the testimony upon this point. The defendant did not take the witness stand upon the trial of this case, but at the coroner's inquest he did give his version of the incident, and this version was introduced in evidence by the district attorney and is substantially as follows: I had been out hunting, came back to town, had supper, went to a bakery shop, I drove around town a few minutes, took my car, and started to go home. There were lots of cars going with bright lights that were blinding my eyes. I tried to speed along up a little hill and, bang. I never saw that man before. I thought the machine had passed. I got out and drove for about 200 yards and stopped and saw nobody. The windshield was broken, and I thought I had hit a man and drove over and around by the butcher shop to Emigs. Mr. Goodfellow came in and asked me where I hit a man, and I said I did not hit a man. I was down there with another fellow at the cabin, and he said, "Joe, it is better that you go over there and report it," and I walked

in the house and took a drink. It was so excited myself and thought I had hurt a man a little. Then I took a drink, and the sheriff came in and wanted to take the bottle out of my pocket. Whether the defendant had been drinking prior to the collision does not appear from the testimony. Suffice it so say that he was not prosecuted under any provisions of the Motor Vehicle Act than those contained in section 21, hereinbefore referred to. Upon arraignment defendant interposed a demurrer setting forth eight different grounds why it should be sustained, the principal ones being that the information does not conform to the requirements of sections 950 and 952 of the Penal Code. The charging part of the information, after giving date and place, reads as follows:

"Was then and there driving a motor vehicle, to wit, an automobile, and while so driving said automobile, said automobile struck and collided with a person, to wit, Steve Begley, as he the said Joe Huber then and there well knew and although said Joe Huber knew that his said automobile had struck and collided with said person, Steve Begley, he, the said Joe Huber, did then and there unlawfully, willfully and feloniously fail and refuse to stop or cause to be stopped, either immediately or at all his said automobile, or to forthwith or at all render all necessary or any assistance to the said Steve Begley, the person who was then and there struck and collided with by the automobile so driven by the said Joe Huber and the said Joe Huber did then and there fail and refuse to carry the said Steve Begley to a physician or surgeon for medical or surgical treatment, and the said Joe Huber then and there failed and refused to give or cause to be given to the said Steve Begley the person collided with and struck by the automobile so driven by the said Joe Huber, the number of said automobile, or the name of the owner of said automobile or the name of the passenger or any passenger in the said automobile at the time of the said striking and collision aforesaid or at all."

[1] It will thus be seen that the information is almost identical with the language used in section 21 of the Motor Vehicle Act. It is true that there are a number of specific things required to be done by that section in the event of a collision with or injury to a person on the highway, yet the information following the language of the statute, as above quoted, charges in fact but one offense. That but one offense is charged is clearly established by the case of *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572. It is the failure to comply with any one of the requirements of said section that renders the person so failing amenable to prosecution. It is not alleged in the information that any assistance was necessary to be given to the injured person, but the information nevertheless charges a complete offense in that it is therein stated in both clear and concise lan-

guage that the defendant did not stop his automobile and also failed and neglected to give the information required by the statute. Having charged sufficient to constitute an offense the demurrer was properly overruled, even though it be admitted that the information does not with sufficient certainty show that any assistance should have been given by the defendant to Steve Begley, the injured person.

[2] It is also strongly contended that the court erred in permitting the witness Deryl Begley to testify that the defendant did not give him (the witness) any of the information required by section 21 of the Motor Vehicle Act to be given to the injured person. The statute does not in terms require such information to be given to a bystander, but we cannot very well see how the defendant has been injured by the admission of such testimony. His own statement shows that he drove on some little distance, merely stopped, did not get out of the machine, did not go back to the scene of the collision, but drove away and remained away until apprehended by the officers. Any jury of reasonable intelligence would necessarily know that no such information was given to any one by the defendant for the simple reason that he did not return to where the collision had taken place to make it possible for him to comply with the terms and provisions of the statute. The statute clearly means, if it means anything, that the defendant under such circumstances must stop his automobile as soon as reasonably possible, return to the scene of the collision and offer to do all and singular the acts required by section 21 of the Motor Vehicle Act. It does not mean that a person under such circumstances is excusable if he simply stops his machine, looks back, learns nothing of what he has done, and then drives on, leaving his helpless victim to the tender mercies of chance passers-by.

[3] It cannot be the law that the innocence of an automobile driver depends upon his ignorance of the extent of the injuries he has committed. In this particular the appellant complains strongly of instruction number 14½, given by the trial court of its own motion. It is:

"You are instructed that if you find from the evidence in this case, to and beyond a reasonable doubt, that a motor vehicle driven by the defendant did strike one Steve Begley, and that he, the said defendant, knew that he had so struck the said Steve Begley and did fail to stop his said motor vehicle or stopping said motor vehicle immediately drove away and failed to do any of the things required to be done by him under the circumstances by the statute hereinabove read, and as charged in the information, then it is your duty to find the defendant guilty as charged in the information."

As we have shown, the defendant by his own testimony establishes the fact of his knowledge of having hit a man and also that

he drove away without attempting or offering to render any assistance to the person injured or to do any of the things required by the Motor Vehicle Act under such circumstances. In this connection the appellant asked, and the court refused to give, the following instruction:

"A man cannot be guilty by reason of his failure to do a certain thing, unless he knows the facts which make it his duty to do that thing."

In other words, if the defendant failed to stop his machine, failed to make any inquiries to ascertain the damages or injuries inflicted upon the person with whom he had collided, and failed to do everything required to be done by the statute, then and in that case the jury should be told to acquit because the defendant was ignorant of what he should do under such circumstances. Again, we say we cannot subscribe to the doctrine that an automobile driver's innocence depends upon his ignorance of the extent of the injuries he has inflicted. Instruction No. 16, given by the court at the request of the defendant, was certainly as favorable as could have been reasonably asked for. It is as follows:

"If you find that after the collision all assistance necessarily was rendered to the person collided with, more promptly than it was possible for the defendant to have rendered it, and that the defendant had reason to believe and did believe that such assistance was being so rendered, then you should not find the defendant guilty because he did not personally render such assistance."

[4] As the defendant immediately drove away, and did not return to the scene of the collision to learn what was being done, we do not see how the jury, even under so favorable an instruction, could conclude that the defendant either believed, or had any reason to believe, that any assistance whatever was being given to Steve Begley unless it be that automobile drivers have the right to depend upon the humanitarian instincts of passers-by who are not responsible for damages done or injuries inflicted. Nor do we think the defendant was injured by reason of the refusal to give instructions Nos. 5, 6, 7, 8, and 9 which have to do with giving information to the person where the person to whom the information is to be given is unconscious or is in a condition unable to receive such information.

[5] It appears from the testimony that the injured person was rendered unconscious and of course, could not at the immediate time of the injury or within a short period thereafter and during the time he was unconscious have received such information. Giving the information required by the statute is only a part of some of the things required to be done on the part of an automobile driver and to render himself excusable it is necessary for the driver who strikes down

a person on the highway to stop his machine and stand ready and offer to comply with the various provisions of the Motor Vehicle Act and because he cannot do all he cannot be excused for failure to do and perform all and singular the acts which he might have done. In this case, as we have seen, the defendant made no attempt to comply with any of the provisions of the law applicable in the event of collisions or injuries to persons or property upon the highway. The testimony shows an aggravated case fully warranting the verdict of the jury and the sentence imposed by the court, to wit, imprisonment in the state prison. The technical errors in the admission of testimony to which we have adverted relate to matters of which the jury had knowledge and, therefore could not in any manner have been prejudicial.

We think the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 470

OBERKOTTER v. SPRECKELS et al.
(Civ. 4211.)

(District Court of Appeal, Second District, Division 2, California. Nov. 21, 1923. Hearing Denied by Supreme Court Jan. 17, 1924.)

1. Appeal and error §544(3)—Printed transcript containing no copy of bills of exceptions, judgment roll alone considered.

Where record of appeal was not brought up under the alternative method, and printed transcript contains no copy of any bill of exceptions, only the judgment roll, consisting of pleadings, orders on demurrers, and judgment of dismissal, may be considered.

2. Dismissal and nonsuit §60(1)—Inherent power in court to dismiss action for lack of diligent prosecution.

Where jury disagreed in trial of cause on April 9, 1920, and on April 20, 1922, defendant moved for dismissal because plaintiff had not diligently prosecuted, if Code Civ. Proc. § 583, providing that trial court may dismiss actions for want of prosecution whenever plaintiff has failed for two years after answer filed to bring action to trial, was not applicable, trial court could resort to its inherent power to pass on motion and grant or deny it.

3. Dismissal and nonsuit §60(1)—Defendant may move to dismiss without showing effort to bring about trial.

Where two years after jury disagreed at trial, defendant could properly move to dismiss for want of diligent prosecution, without showing an effort on its part to bring about a trial.

4. Appeal and error §907(3)—On appeal on judgment roll alone, intendments favor trial court's action.

On appeal on judgment roll alone, all intendments will be made in favor of trial court's action, and support of judgment, and if error

is claimed the record must contain sufficient legal evidence of it.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Louis M. Oberkotter against John D. Spreckels and another, copartners doing business as and under the fictitious name of the Tribune Company, a partnership. From judgment of dismissal, plaintiff appeals. Affirmed.

W. S. Staley and Marcus W. Robbins, both of San Diego, for appellant.

Read G. Dilworth, of Coronado, and Titus & Macomber and V. F. Bennett, all of San Diego, for respondents.

FINLAYSON, P. J. Plaintiff appeals from a judgment based on an order dismissing the action for lack of diligent prosecution.

[1] The record on appeal was not brought up under the so-called alternative method, and the printed transcript contains no copy of any bill of exceptions. This is pointed out in the opinion filed by us when denying respondents' motion to dismiss the appeal (Cal. App.) 219 Pac. 1010. Since no bill of exceptions appears in the printed record, we may properly consider naught but the judgment roll—that is, naught but the pleadings, the orders made on demurrer and the judgment of dismissal. It is from these, and from these only, that we must learn of the facts which confronted the trial court when it granted defendants' motion to dismiss the action.

[2] The following are the facts as shown by those parts of the printed transcript which we may consider:

"The action is one to recover damages for an alleged libel. Plaintiff filed his complaint June 7, 1919. A demurrer thereto was sustained November 3, 1919. An amended complaint was filed by plaintiff November 13, 1919. A demurrer to the amended complaint was overruled, and defendant answered January 5, 1920. The case was set for trial before a jury on April 5, 1920. The trial consumed about four days. After the introduction of evidence the cause was submitted to the jury, and on April 9, 1920, that body returned to the courtroom and announced that it was unable to agree upon a verdict; whereupon the jury was dismissed. No further action was taken in the case until the expiration of more than two years, when defendants, on April 17, 1922, filed notice of their intention to move for a dismissal of the action upon the ground that plaintiff had not diligently prosecuted it. The motion to dismiss came on for hearing April 24, 1922. On that day the court, according to a recital in its judgment of dismissal, examined the record and affidavits on file, and from such examination found that no sufficient excuse has been given by the plaintiff for his lack of diligence in prosecuting said action, and that said action should be dismissed."

Whereupon it was ordered that the cause be dismissed, and judgment of dismissal was entered accordingly. Though it is recited in the judgment of dismissal that the trial court "examined the records * * * and affidavits on file herein," we have no means of knowing the contents of those affidavits, because, as we have said, the appeal has not been prosecuted under the so-called alternative method, and no bill of exceptions appears in the printed transcript.

The evident reason for the dismissal of the action was that plaintiff permitted a period of more than two years to elapse after the first and only trial of the case without doing anything further to expedite his cause to a final determination. It is provided by section 583 of the Code of Civil Procedure that the trial court may in its discretion dismiss an action for want of prosecution, "whenever plaintiff has failed for two years after answer filed to bring such action to trial." Because the action was in fact brought to trial within the two-year period designated in the section, it is argued by appellant that the case is not one of those intended to be covered by that legislative provision. We do not find it necessary to pass upon this question. Section 583 certainly does not forbid a dismissal of the action under the circumstances here presented, and, if authority for the dismissal cannot be found in that legislative enactment, it can be found in the court's inherent power to dismiss an action for lack of diligent prosecution. There is nothing in the record before us to show that the trial court abused its discretion. If, therefore, the Legislature intended that section 583 should be applicable where, as here, the action was brought to trial within two years after answer filed, but the jury disagreed and nothing more was done during the ensuing two years, then the dismissal was proper because authorized by the statute. If, on the other hand, this Code section was not intended to cover a situation such as that here presented, then we have a case where no statutory authority for the dismissal exists. But if the case is not embraced by the terms of the statute, then the court could resort to its inherent power to pass on the motion and to grant it or deny it. See *Kaster v. Superior Court*, 34 Cal. App. 88, 166 Pac. 852.

"It is settled by numerous decisions in this state that the superior court, without the aid of statutory authority, has power to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence." *Romeo v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

[3, 4] What we thus far have said seems to be conceded. It is claimed, however, that if the dismissal was not made under section 583, but in the exercise of the court's inherent power, then the motion to dismiss should

have been denied for the reason that defendants made no effort to have the case set for trial. The argument is that it was equally within the power of defendants, as it was equally their duty, to have the case set for trial, and that, since plaintiff and defendants stood upon precisely the same ground in this regard, neither could charge the other with a lack of diligence.

The contention lacks merit. In the first place, even if it were the rule that a defendant must himself seek to have the cause set for trial before he can successfully prosecute a motion to dismiss, we would be compelled to assume, in the absence of a bill of exceptions showing the contrary, that defendants did seek to have the case set for trial, but that plaintiff chose not to try it. When an appeal to this court is to be determined upon the judgment roll alone, all intendments will be made in favor of the action of the trial court and in support of the judgment; and if error is claimed the record on appeal must contain sufficient legal evidence of it. *Waymire v. California Trona Co.*, 176 Cal. 399, 168 Pac. 563. But appellant is mistaken in assuming that a defendant must seek to have the action set for trial before he can move its dismissal for want of diligent prosecution.

The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination. It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary, and his attitude toward it is quite different from that of the plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step. *Mowry v. Weisenborn*, 137 Cal. 113, 69 Pac. 971. *Simmons v. Keller*, 50 Cal. 38, is directly in point. There the plaintiff, appealing from a judgment dismissing the action for want of prosecution, urged, as does appellant here, that—

"When the defendant can himself bring the cause to trial he cannot have judgment, as in the case of nonsuit, for the obvious reason that he is as much in default as the plaintiff for not bringing the case to trial."

The judgment of dismissal was, nevertheless, affirmed.

We have considered the points raised by appellant, notwithstanding the briefs filed in his behalf contain language which so reflects upon the character of the trial judge as to require that they be stricken from the files. To save appellant from the consequences of his counsel's improprieties we have examined the briefs, but we cannot permit them to remain a part of the records of this court.

It is ordered that appellant's opening and closing briefs be stricken from the files. The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 230

MOTOR INV. CO. v. BRESLAUER et al.
(Civ. 2532.)

(District Court of Appeal, Third District, California. Oct. 25, 1923. Rehearing Denied Nov. 25, 1923.)

1. Evidence $\S$ 517—Testimony of lawyer that affidavit of good faith was not required by law of other state in which mortgage was executed held competent.

In claim and delivery for possession of an automobile removed from another state in violation of a chattel mortgage executed therein without an accompanying affidavit of good faith, as required by Civ. Code, $\S$ 2957, subd. 1, to make it a valid lien against mortgagor's creditors and subsequent purchasers and incumbrancers in good faith and for value, testimony of plaintiff's general manager, who had practiced law in, and was skilled in the laws of, such state, that such an affidavit was not required by any law thereof was competent. Code Civ. Proc. $\S$ 1902.

2. Statutes $\S$ 289—Finding that affidavit of good faith was not required by law of state in which mortgage was executed sustained.

In claim and delivery for possession of an automobile removed from another state in violation of a chattel mortgage executed therein without an accompanying affidavit of good faith, as required by Civ. Code, $\S$ 2957, subd. 1, evidence held sufficient to support a finding that no such affidavit was required in that state.

3. Chattel mortgages $\S$ 89—California statutes do not require that mortgages recorded in other states be recorded in California when chattel is removed thereto.

A chattel mortgage duly executed and recorded in another state need not be recorded in this state to be valid and enforceable herein, where the mortgaged property is removed to this state; the California statutes as to execution and recording of chattel mortgages referring to mortgages executed within this state on property here situated.

4. Chattel mortgages $\S$ 89—State to which mortgaged chattel is removed will recognize lien even as against innocent purchasers or incumbrancers.

Under the rule of comity between states, a state to which a mortgaged chattel is removed will recognize and sanction enforcement of the lien even as against innocent purchasers or incumbrancers in good faith and for value.

5. Roplevin $\S$ 1—Ultimate issue is plaintiff's right to possession of specific personalty.

The ultimate issue in an action in claim and delivery is whether plaintiff is entitled to possession of the specific personalty concerned.

6. Chattel mortgages $\S$ 172(5)—Proof necessary to support mortgagee's action for possession of mortgaged truck stated.

In claim and delivery for possession of a truck removed from another state in violation of a chattel mortgage executed therein, plaintiff need merely show its right to possession by proof that mortgagor owed plaintiff a debt, to secure which he duly executed a mortgage stipulating that on default in payment of the debt plaintiff could take possession of the truck, and that he did default in such payment.

7. Evidence $\S$ 353(15), 383(7)—Mortgage executed and recorded in another state held competent and sufficient evidence of debt, terms of payment, and consequence of default.

A chattel mortgage executed and recorded in another state held competent and sufficient evidence of the debt secured, terms of payment, and consequences of default, in the absence of a sufficient counter showing, irrespective of the sufficiency of the recording officer's certificate as evidence of its recordation.

8. Chattel mortgages $\S$ 68—Execution in mode prescribed by laws of state in which executed held shown.

Testimony and an admission as to execution of a chattel mortgage, according in form and other respects with the requirements of the laws of the state in which executed, held sufficient to show its execution in the mode prescribed by such laws.

9. Evidence $\S$ 343(4)—Recording officer not required to hold "legal custody of original instrument."

The officer recording a mortgage has the legal custody of the record of the original instrument, but does not have and is not required by Code Civ. Proc. $\S$ 1918, subd. 7, requiring certification of copies "by the officer having the legal custody of the original," to have such custody of the original itself.

10. Pleading $\S$ 126—Issue as to recordation held not raised by negative pregnant.

An answer denying "that said mortgage was after the execution thereof and on the 7th day of October, 1920, duly recorded," etc., held to have tendered no issue on the question of recordation; such denial involving a negative pregnant.

11. Chattel mortgages $\S$ 93—Presence of mortgaged chattel in state at time of recordation held sufficiently shown.

Testimony that a truck covered by a mortgage executed in another state was in such state at the time held sufficient to show that it was there when the mortgage was recorded, in the absence of sufficient countervailing proof to dispel the presumption created by Code Civ. Proc. $\S$ 1963, subs. 19, 20, 32.

12. Appeal and error $\S$ 1010(1)—Sufficiency of evidence to overcome presumption generally for trial court.

Whether evidence is sufficient to destroy the presumption created by Code Civ. Proc. $\S$ 1963, subs. 19, 20, 32, that a mortgaged chattel was in the state wherein the mortgage was recorded on such date, is peculiarly the function of the trial court, whose findings will not

be disturbed unless there is something in the nature of the evidence requiring a court of review to declare it sufficient.

13. Evidence — 589—Testimony in support of contention that mortgaged truck was in state on day mortgage was recorded in another state held properly disregarded.

In claim and delivery for possession of a truck removed from another state in violation of a chattel mortgage executed and recorded therein, the court, in the exercise of its discretion in passing on the credibility of witnesses and weight of evidence, did not err in disregarding the testimony of a second mortgagee that, if mortgagor first appeared in California with the truck on the day the first mortgage was recorded, the witness "must" have seen him and the truck the following day.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Motor Investment Company against Leon Breslauer and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. Oscar Goldstein, of Chico, for appellants.
Bond & Deirup, of Chico, for respondent.

HART, J. This action, in claim and delivery, was brought by the plaintiff to recover possession of a Day-Elder motor truck, or, in case possession thereof cannot be had, judgment for the sum of \$1,400, the alleged value of said truck.

The plaintiff was awarded judgment as prayed for, and the defendants appeal therefrom upon a record prepared according to the alternative method.

The claim of plaintiff to the right to the possession of the truck arises out of a chattel mortgage alleged to have been executed by one William England, then owner of said truck, in favor of plaintiff, a duly organized corporation of the state of Oregon, to secure the purchase price of said truck, which was the sum of \$2,150.05; the plaintiff having sold the truck to said England. Said mortgage was executed on the 30th day of September, 1920, in Jackson county, state of Oregon. At that time England was a resident of said county and state, and the said truck was then situated therein. The mortgage was recorded in the proper office of the said county of Jackson on the 7th day of October, 1920. The instrument provided for the payment of the purchase price in monthly installments of \$215 each; the first installment being payable thereunder one month and ten days after the date of said mortgage, and each of the remaining installments being payable every month and ten days thereafter until the same is paid. The mortgage also provided that in case of default in the payment of any of said installments when the same became due, or in case the mortgagor made default in the perform-

ance of any of the covenants or conditions "to be by him kept," etc., the mortgagee was at liberty to declare the whole sum of both principal and interest due and payable and at once proceed to collect the same, and either foreclose the mortgage or take possession of the truck, wherever the same might be found. It further provided that the mortgagor should not, without the written consent of the mortgagee, remove the property from the state of Oregon. The mortgage was not accompanied by the affidavit of good faith which is required by our own statute to be attached to a chattel mortgage to constitute it a valid lien as against the creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value. See section 2957, Civ. Code, subd. 1.

It appears that subsequently to the execution of said mortgage, England surreptitiously, or without the knowledge or the consent of the plaintiff, removed the mortgaged truck to the county of Butte in the state of California. Having shortly after such removal learned thereof, the plaintiff caused its said mortgage to be recorded in the office of the county recorder of said Butte county on the 13th day of November, 1920.

On the 12th day of May, 1921, approximately six months after the said mortgage had been filed for recordation with the county recorder of Butte county, the defendant Breslauer and one G. W. Wright loaned England the sum of \$600, and the latter executed and delivered to the former his promissory note for said sum, payable on the 23d day of May, 1921. To secure the payment of said note, England executed to Breslauer and Wright a mortgage on the truck in dispute. This mortgage was in all respects in the form required by the laws of California and was recorded, in the office of the county recorder of Butte county on the 13th day of May, 1921. In the month of June, 1921, England having defaulted in the payment of the Breslauer and Wright note, said Breslauer, in pursuance of the authority vested in him and said Wright by their mortgage, took possession of the truck. The plaintiff thereafter replevied and so secured possession of the truck.

The foregoing facts were found by the court to be true. As to the plaintiff's mortgage, it was further found that the same, as "drawn, executed and recorded, contained all the matters and things required to be contained therein by the laws of the state of Oregon in order to make said chattel mortgage, when so recorded, a first lien upon said truck wherever the same might be found." The court further found that the laws of the state of Oregon do not require that a chattel mortgage executed in that state, to be valid as against creditors of the mortgagor and subsequent purchasers and incumbranc-

ers of the property in good faith and for value, shall be accompanied by or have attached thereto an affidavit of the parties that the same was made in good faith and without any design to hinder, delay, or defraud creditors; that said chattel mortgage, under the laws of Oregon, "was and is valid as against the defendants herein," etc.

As to the mortgage of the defendants, the court found that the same was taken by Breslauer and Wright without actual knowledge of the existence of any lien attaching to or prior mortgage covering the truck in question; that said mortgage was duly recorded in the office of the county recorder of Butte county; that said mortgage was received by Breslauer and Wright without any design to hinder, delay, or defraud any creditor or creditors of England. But, in this connection, the court further found that the chattel mortgage of the plaintiff was, at the time the mortgage of Breslauer and Wright was recorded, in full force and effect and "was a first lien on said truck and was of record in the office of the county recorder of said county of Butte, and that said Leon Breslauer and G. W. Wright had constructive notice of the existence and contents of said mortgage to plaintiff at the time when they accepted said mortgage from said William England."

[1, 2] The plaintiff, for the purpose of stalling the operation of the presumption, otherwise to be indulged, that the laws of the state of Oregon relating to the legal essentials of a chattel mortgage were not, in all particulars, the same as the law of California relating to the same subject, introduced in evidence the said laws of the former state; it having specifically pleaded in its complaint that the laws of Oregon did not, at the time of the transaction culminating in the execution by England to plaintiff of the mortgage on the truck in controversy, require that an affidavit of good faith should be attached to a chattel mortgage to constitute it a valid lien as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value. The laws so introduced consisted of all the sections of the laws of Oregon pertaining to chattel mortgages, and were taken from Olsen's General Laws of Oregon, which the attorney for the defendants stipulated contained all of the laws of that state. These laws, introduced in evidence, contained no provision requiring an affidavit of good faith to accompany or be attached to a chattel mortgage. The plaintiff's general manager, C. C. Hall, who also had been for twelve years a practicing attorney at law in the state of Oregon, and who qualified himself as being skilled in the laws of said state, testified that an affidavit of good faith as a part of a chattel mortgage was not required by any law of the state of Oregon. This was competent testimony. Section 1902, Code Civ.

Proc.; Estate of Faber, 163 Cal. 491, 143 Pac. 737. Thus it is to be seen that the finding that no such an affidavit was required to be attached to a chattel mortgage executed in the state of Oregon, when the mortgage of plaintiff was executed, is well supported.

[3] There is no law in California expressly requiring chattel mortgages properly executed and recorded in a sister state to be recorded in this state in order to perpetuate their validity and force herein, where such mortgaged property has been removed to this state. The California statutes prescribing the mode and manner of executing and recording mortgages on personal property have reference to mortgages executed within this state upon property here situated. It has been said by our Supreme Court, however, that—

"In the absence of any specific * * * provision regarding the removal of mortgaged property, the record of a chattel mortgage in the town or county where it is required to be originally filed for record is held to be constructive notice to all the world, and the mortgage is valid, even though the property may be removed to another town or county, or even to another state." *Hammels v. Sentous*, 151 Cal. 520, 523, 524, 91 Pac. 327, 328 (12 Ann. Cas. 945) and cases therein cited.

In *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62, the mortgage was executed and recorded in the state of New York according to the laws of that state and the mortgaged chattel thereafter, and while the lien of the mortgage still remained undischarged, was removed to the state of Ohio, where default in the payment of an installment of the purchase price occurred, and where the property was sold by the mortgagor, through a public auctioneer, to a third party. The mortgage was not recorded in Ohio, and neither the auctioneer nor his vendee had notice of the mortgage. As here, the mortgage provided that failure by the mortgagor to pay any of the installments at the time it fell due would entitle the mortgagee to take possession of the chattel. The contention of the defendant (vendee) was that the lien of the mortgage was lost by the removal of the property from the state of New York to the state of Ohio. The Ohio court, affirming the judgment in favor of the plaintiff (mortgagee), said, among other things:

"Gregory held the property subject to the condition of the mortgage, which was the payment of the money, as specified therein, or in case of default, the plaintiff was authorized to take possession of, and to sell it. The default occurred after the property had been removed into a foreign jurisdiction. Gregory had no power to confer any better title than he held; and those who might desire to purchase of him, were bound by the rule of caveat emptor. True, there was no record of the mortgage in Ohio, but Gregory was a stranger to Moore, and apprised him that his late residence was Buffalo. This ought to have excited inquiry by Moore,

which might quite as well have been instituted in Buffalo as in another county of this state. He cannot charge upon the plaintiff the consequences of this neglect of his. He took the property subject to the incumbrance upon it; and that amount, we think, was very properly found and reported by the jury in favor of plaintiff."

See, also, *Pease v. Odenkirchen*, 42 Conn. 415; *Barrows v. Turner*, 50 Me. 127; *Brigham v. Weaver*, 6 Cush. (Mass.) 298; *Whitney v. Heywood*, 6 Cush. (Mass.) 82; *Hoit v. Remick*, 11 N. H. 285; *Hicks v. Williams*, 17 Barb. (N. Y.) 523; *Greenville Nat. Bank v. Evans*, 9 Okl. 353, 60 Pac. 249; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556.

[4] But even if it were true that the effect of the due decordation of a chattel mortgage in the state where it was executed according to the law of such state is not to charge all persons in another state to which the mortgaged chattel may have been removed with constructive notice of the mortgage, or that the recordation of the mortgage in the latter state imparts no such notice, or that the doctrine of caveat emptor may not, in such a case, be invoked as a protection of the rights of the mortgagee as against the creditors of the mortgagor or subsequent purchasers and incumbrancers of the property in good faith, yet it is clear from all the authorities that, upon the rule of comity between the states, the state to which the property has been removed will recognize the validity of the lien and sanction its enforcement, notwithstanding that the chattel may have fallen into the hands of innocent purchasers or incumbrancers in good faith and for value. Indeed, counsel for the defendants conceded at the trial, substantially, that, if the plaintiff's mortgage, in its execution and recordation, complied in all material respects with the requirements of the laws of the state of Oregon relating to the execution and recordation of chattel mortgages and the property mortgaged was situated in said state when the mortgage was executed and recorded, the effect of the removal of the mortgaged property from the state of Oregon to the state of California would not be to destroy the lien of the mortgage or the force and effect thereof. The doctrine, approved by all the cases and authorities to which our attention has been directed, is enunciated as follows in *Shapard v. Hynes*, 104 Fed. 449, 452, 45 C. C. A. 271, 274 (52 L. R. A. 675):

"There has been much discussion concerning the effect of the removal of mortgaged goods and chattels from the state where the mortgage was made and recorded, to another state. The general consensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by the local law, so as to create a valid lien, the lien remains good and effectual, although the

property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not rerecorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity."

See *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322, and other cases cited in *Shapard v. Hynes*, 104 Fed. 453, 45 C. C. A. 271, 52 L. R. A. 675. See, also, 5 *Ruling Case Law*, p. 399, § 21; *Alferitz v. Ingalls* (C. C.) 83 Fed. 964; *Bonin v. Robertson*, 2 Terr. Law. Repts. (N. W. Terr.) 21, 24, et seq.

In the case from which the foregoing excerpt is taken, it is said that, after a careful research, there was found but one state (Michigan) in which the rule of comity in such cases as this was not recognized and applied. The rule, however, appears to be founded upon the principles of equity and natural justice. As applied to cases of the character of the one before us, it can produce no harsh or unjust results. The principle underlying it may be analogized to that upon which the owner of property stolen from him and taken or transported to another state may follow the thief into the latter state and reclaim or take possession of the pilfered goods or chattels wherever found. A state may, it is true, refuse to recognize the rule of comity in such cases; but, should it do so, it would become a party to every such fraudulent transaction. It is not going too far to say and to hold that it is preferable and more desirable that an innocent purchaser or incumbrancer of personal property brought into a state under such circumstances as those characterizing the transaction with which we are here concerned should suffer loss, which possibly his own providence or want of diligence has brought to him, than that the state should assume and maintain an attitude towards such transaction which would necessarily stigmatize it as an accessory after the fact to the fraud inhering therein. See *Bonin v. Robertson*, supra.

But it is further contended that, granting the soundness of the above-considered principles and that they apply, under appropriate circumstances, to cases of this character, the judgment must, nevertheless, be reversed for these asserted reasons: (1) That plaintiff failed to prove the note or debt to secure the payment of which the mortgage was given; (2) that it was not shown that the plaintiff's mortgage was executed and recorded according to the mode prescribed by the laws of the state of Oregon; (3) that the mortgaged chattel was not in the state of Oregon at the time of the recordation of the mortgage in Jackson county, said state.

[5-7] 1. Replying to the proposition first stated, it is to be remarked that this is not an action to recover on a promissory note or a debt. The action is in replevin, or, as our own

Code designates the action, in claim and delivery. The ultimate issue or fact in such an action, as the name of the action plainly implies, involves the single question whether the plaintiff is entitled to the possession of the specific personal property or chattel concerned. In this case the plaintiff, to support its action, was required merely to show that it had the right to the possession of the truck, and to do this all it was compelled to do was to prove that England owed it a debt, that he had duly executed a mortgage on the truck in its favor to secure said debt, and that it was stipulated in the mortgage that if he defaulted in the payment of the debt or any part thereof, the plaintiff would be entitled, upon such default, to take and hold possession of the truck, and that he did default in such payment. These facts were shown by the mortgage itself, which was introduced in evidence, and by the testimony of the general manager of the plaintiff that default by England in the payment of the installment of the purchase price of the truck had occurred. It will not be questioned that, even if it be conceded, as the attorney for the defendants contends, that the certificate indorsed on the original mortgage by the recording officer of Jackson county in the state of Oregon to the effect that the instrument had been recorded in said county and state is not competent evidence of such recordation, the mortgage, nevertheless, constitutes competent evidence of the debt and the terms and conditions of payment and of the consequence following from failure to pay at the time or times therein specified. Nor will it be questioned that the mortgage itself will stand as sufficient proof of all those facts except the fact of the default, in the absence of such a counter showing as will destroy the probative force thereof. No such counter showing was made or attempted.

[8] 2. To the contention, made on this appeal, that it was not shown that the mortgage was executed according to the mode prescribed in such cases by the laws of the state of Oregon, the answer is that a comparison of the original mortgage with the requirements of the laws of the state of Oregon relating to the execution and recordation of chattel mortgages will show that the instrument as to its form as well as in other respects accords with the provisions of said laws, and from an examination of the testimony of the witness Hall, who prepared the mortgage, it will be seen that he testified that he was present and saw England subscribe his name to the instrument in the presence of the subscribing witnesses. In fact, counsel for defendants virtually admitted the execution of the mortgage in the following language:

"I simply admit that Mr. England executed that proposed to be mortgage to the Motor Investment Company."

[9, 10] As to the act of recording the mortgage, the attorney for the defendants contends that the instrument, bearing the certificate of the recording officer of Jackson county, Or., that the same had been recorded on the 7th day of October, 1920, is not itself competent proof of such recordation, since there was not attached to the instrument a certificate of any of the officers named in subdivision 7 of section 1918 of the Code of Civil Procedure, "that he copy is duly certified by the officer having the legal custody of the original." While, as presently we shall see, it is not necessary to decide this question here, it is deemed not amiss to say that the writer, speaking for himself and not for the court, is not prepared now to accept counsel's construction of said subdivision of section 1918. The precise point, so far as we are advised to the contrary, has never been passed upon in this state. It will be noted, however, that the subdivision mentioned appears to limit its application to copies and not to the originals of the documents therein referred to. If it were not for the concluding words of the subdivision, to wit, "having the legal custody of the original," the problem would be easy of solution. In the case of the recordation of a mortgage or a deed, the recording officer, while having the legal custody of the record of the original instrument, does not have nor is he required to hold the legal custody of the original itself. The question, however, need not be further considered here, since the defendants in their answer failed to tender an issue on the question of the recordation of the mortgage. The complaint alleges that the mortgage in question was executed on the 30th day of September, 1920, and that the instrument was duly recorded in the office of the county clerk (also county recorder) of Jackson county, Oregon, on the 7th day of October, 1920. The answer, as to said allegation of the complaint, is as follows:

"Deny that said mortgage was, after the execution thereof, and on the 7th day of October, 1920, duly recorded in the office of the County Recorder," etc.

This denial involves, obviously, a negative pregnant, and tendered no issue upon the question of the recordation of the mortgage. If it were necessary to cite authorities to confirm the correctness of the conclusion thus announced upon the point in hand, it would be sufficient to refer to the comparatively recent case of *Janeway and Carpender v. Long Beach Paper & Paint Co.* (Sup.) 211 Pac. 6. In this connection, it may be stated that several other of the denials of the answer of important averments of the complaint were in the same insufficient form, but as to those we preferred, as we found could be done, to dispose of the points based thereon upon the merits rather than upon a technical rule of pleading.

[11, 12] 3. The claim that the evidence shows that the mortgaged truck was not in the state of Oregon at the time of the recordation therein of the plaintiff's mortgage is not sustained by the record. The witness Hall testified (and as to this his testimony is not contradicted) that the truck in dispute was situated in the state of Oregon on the 30th day of September, 1920, at which time, as seen, the mortgage was executed by England. There is, it is true, no direct or positive evidence that the truck was in the state of Oregon on the 7th day of October, 1920, the day on which the mortgage was recorded. But the presumption is that it was in said state on the last-named day (Code Civ. Proc., § 1963, subds. 19, 20, and 32), and this presumption will stand as a sufficient predicate for a finding or a judgment until there has been presented countervailing proof of sufficient probative strength to dispel it. And, generally speaking, or unless there is something in the nature of the testimony or evidence received against such presumption which would require a court of review to declare it sufficient to overcome its effect, it is peculiarly the function of the trial court or the jury to determine whether the testimony or evidence so offered and received was sufficient in evidentiary force to destroy the effect of the presumption. Code Civ. Proc., § 2061, subd. 2; *People v. Milner*, 122 Cal. 179, 54 Pac. 833; *Sarraille v. Calmon*, 142 Cal. 651, 655, 76 Pac. 497; *Adams v. Hopkins*, 144 Cal. 19, 36, 77 Pac. 712; *Moore v. Gould*, 151 Cal. 723, 726, 91 Pac. 616; *Keating v. Morrissey*, 6 Cal. App. 163, 168, 91 Pac. 677; *Ruth v. Krone*, 10 Cal. App. 770, 773, 103 Pac. 960; *Rec. Dist. No. 70 v. Sherman*, 11 Cal. App. 399, 419, 105 Pac. 277; *Hitchcock v. Rooney*, 171 Cal. 285, 152 Pac. 913; *Davis v. Judson*, 159 Cal. 121, 128, 113 Pac. 147; *Blanc v. Connor*, 167 Cal. 719, 722, 141 Pac. 217; *Cox v. Schnerr*, 172 Cal. 379, 156 Pac. 509.

[13] The only testimony presented by the defendants for the purpose of showing that the truck was in Chico, in this state, and not in the state of Oregon, on the day the plaintiff's mortgage was recorded in Jackson county, Or., was given by the proprietor of the hotel in Chico at which England and his wife registered and resided for several days, and the defendant Breslauer. The former stated that he had no independent recollection of the time when England and his wife first went to the hotel as guests thereof, but from the registration of said hotel he testified that England and his wife first registered there on the 7th day of October, 1920. Breslauer, in response to questions by his attorney, testified as follows:

"Q. I want to ask you about when did you first meet Mr. England? A. Oh, let's see, some time in 1920, the latter part of 1920. Q. Well, in the month of October—do you know what date, approximately? A. Just the day before—the day after he came to Chico. Q. If the evidence shows that he came to Chico on the 7th, when, in that connection, would you say that you met him or saw him? A. Well, now, it must have been on the 8th. Q. Where did you see him? A. I saw him on Main street, right by the store. Q. Did he have this Day-Elder truck with him at that time? A. Yes, sir; he did. Q. That is the same truck that was subsequently taken possession of by you? A. Yes, sir."

It requires no critical analysis of Breslauer's testimony to compel the conclusion that, even upon its face, it is not convincing. It will be noted that the statement that he first met England in Chico was in the month of October was not made by him, but was suggested in a question propounded to him by his attorney. Furthermore, he did not say that he knew when England first arrived in Chico, nor did he say that he derived any knowledge as to that fact through an inspection of the hotel register. His testimony on the point merely amounted to the declaration that, if England first made his advent into Chico on the 7th day of October, 1920, then he "must" have seen him and the truck the following day. We are not able to follow his reasoning in that particular. In other words, it is not conceived how he could say that he met England with the truck the day following the latter's arrival in Chico if he did not know of his own knowledge the day of England's arrival in said city. If he based his knowledge of the latter fact upon what some other person told him or on what some other person told him of the fact that England had registered at the hotel, the testimony would be hearsay, and upon that ground alone the court could have refused to give it credence. However, even if the testimony were not characterized by the infirmities pointed out, as has been shown and as is obvious, the trial court, in the exercise of its discretion in passing upon the credibility of witnesses and the weight of evidence, could have disregarded it as unworthy of belief. The trial court, as we are to assume from the result reached below, did disregard or discard it, and with the exercise of its discretion in that particular this court cannot justly interfere.

There are other points, specifically made, subsidiary, however, to the principal questions presented here, which, it is thought, it is not necessary to consider herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 347

In re De VORE. (Cr. 1025.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1923.)

1. Infants $\hookrightarrow$ 16—Evidence of neglect by parents of juvenile court ward unnecessary to authorize taking him from their custody.

Evidence that parents of a juvenile court ward have failed to properly provide for his care and training is unnecessary to authorize an order taking him from their custody without their consent under Juvenile Court Law, § 9b, which also authorizes such action on a finding that his welfare requires it.

2. Infants $\hookrightarrow$ 16—Finding that minor's welfare required taking from custody of parents held warranted.

Evidence held to support a finding that the welfare of a juvenile court ward required that he be taken from his parent's custody, as authorized by Juvenile Court Law, § 9b, and committed to a reform school.

3. Infants $\hookrightarrow$ 16—Appellate court may consider preponderance of evidence on appeal from juvenile court.

Under Juvenile Court Law, the appellate court is not bound by the juvenile court's findings on disputed evidence as to whether the welfare of a ward requires that he be taken from the custody of his parents, as authorized by section 9b, and may read the entire record to determine where the evidence preponderates.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Harold De Vore, a minor, was committed to a reform school, and his parents appeal. Affirmed.

Charles W. Ostrom, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondents.

WORKS, J. Harold De Vore, a minor of the age of 14 years, was by the juvenile court committed to the Whittier State School until he reaches the age of 21. The parents of the minor appeal from the order of commitment.

The minor met a boy of his acquaintance, the latter being in possession of an automobile which he had stolen. The two together then stole a second car, and drove the vehicles to a spot where they proceeded to "strip" both of some of their accessories. They placed in one of the automobiles the property thus removed from both, and were about to drive away with it when they were apprehended by the police, and placed under arrest. Young De Vore was released on bail, and his hearing before the juvenile court was set for a certain date. On the evening before that day he stole another automobile. The hearing was had upon the day set, and the minor was adjudged a ward of the juvenile court, and was ordered to Juvenile Hall for a period of two weeks, then to be returned

to the court for further hearing. At the time of the making of this order the judge of the juvenile court was not aware of the theft of the automobile which De Vore stole after he was admitted to bail upon the original charge, as the circumstance had not then come to light. While at Juvenile Hall under the order for his detention there, De Vore effected his escape from the institution, but he was immediately reapprehended upon information as to his whereabouts given by his father. When he testified upon the hearing at which he was declared a ward of the court, the minor denied the theft of the car which he had stolen in company with the other boy and told an improbable story as to his presence at the place of arrest when he was apprehended for the theft. He had told this story to his parents immediately after the arrest, and he persisted in it throughout the hearing. He later admitted that the story was false, and confessed that he had participated in the theft of the car. According to the reporter's transcript, the following occurred toward the close of the hearing at which the minor was declared a ward of the juvenile court:

"The Court: * * * I am going to have you go down to Juvenile Hall, and remain there for a couple of weeks. It is going to depend on your conduct there as to what will be the future disposition of your case. You have a chance now here to let this be a lesson to you. If you were a little bit older, probably you would go to the penitentiary for this. They are going there every day. I am just wondering whether or not you sense the seriousness of it. If you do, there is hope this may be a lesson to you. If you don't, why this will be a mere incident in your career, and the next time it may be something serious. The Boy: It will be a lesson. The Court: How is it going to be? A. Just behave myself, that's all. The Court: You just keep that up with that idea, and buckle down and everything will go along all right. This is all we are here for, we want to get you fellows to see the right way, and as soon as we get a fellow to see the right way, we will get along fine."

It was after all these matters had transpired and at a hearing held at the end of the two weeks for which the minor was ordered to Juvenile Hall, that he was committed to the Whittier State School. The order of commitment was made upon a finding that "the welfare of the said Harold De Vore requires that he be taken from the custody of his parents." Section 9b of the Juvenile Court Law (Stats. 1915, p. 1225; Deering's Gen. Laws, 1915, Act. 1770a) reads as follows:

"No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and educa-

tion for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

[1] Appellants contend that the evidence is insufficient to support the finding upon which the order of commitment was made, in that there was no evidence to show "that the parents have failed, neglected, or refused to care for or provide the care and training contemplated by good law and good morals," or that the parents were responsible for the minor's wrongdoing. We are further told that there is no evidence in the record "to sustain the findings that the welfare of the said ward requires that he be taken from the custody of his parents; but on the contrary, the court said, 'You have had good training. You did not come from a home without good training.'" Other points of a similar nature are made, but these will suffice to indicate the position taken by appellants. The arguments advanced in support of that position are demolished by a reading of the section of the statute above set forth. In it the circumstances under which a minor may be taken from the custody of his parents without their consent are stated in the disjunctive. It is enough that De Vore was committed upon a finding that his welfare demanded that he be removed from the custody of his natural guardians. Evidence was not necessary as to circumstances covered by the other branches of section 9b.

[2, 3] In addition to the specific questions above mentioned, appellants make the general point that the evidence is insufficient to support the finding that the minor's welfare required that he be taken from the custody of his parents. The finding seems to us to be amply justified by the showing that young De Vore first stole a car; that he then aided in the spoliation of that car and another; that, after his arrest and admission to bail on a charge involving the above-mentioned matters, and upon the eve of his hearing concerning them, he stole another car; that he persisted in a false story as to the first offense stated against him, and that, notwithstanding the fair statement of the judge of the purpose in sending him temporarily to Juvenile Hall and his own statement that he would profit by the lesson and "behave," he effected an escape from the institution. The judge properly concluded from these untoward happenings that the minor's welfare required a restraint and an isolation from the world such as could be secured only by his detention in an institution provided under the law for such cases. The correctness of this conclusion is further indicated by a matter shown in the record, and to which we have

not yet adverted. At his last hearing in response to remarks by the court concerning the theft of the automobile on the night before his first hearing and while he was out on bail, the boy said, "I just got in with the same crowd again." Because under the Juvenile Court Law we may consider where the evidence preponderates in matters of this character, and are not bound by the findings of the juvenile court upon disputed evidence (Matter of Cannon, 27 Cal. App. 549, 150 Pac. 794), we have carefully read the entire record on this appeal. We see no reason for disturbing the order from which the appeal is taken.

Some exception is taken to the form of the petition pursuant to which the order of commitment was made, but we can perceive no defects in it.

Order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

192 Cal. 748

PEOPLE v. BRINGHURST et al. (Cr. 2532.)(Supreme Court of California. Dec. 27, 1923.
Rehearing Denied Jan. 24, 1924.)**1. Homicide —250—Evidence held to support conviction for murder.**

Evidence held to support conviction for murder.

2. Homicide —29—Defendants' participation in conspiracy to resist arrest held sufficient to create guilt of murder of policemen in attempt to escape.

Where there was an understanding among five men to commit robbery or burglary, and, if detected by officers, to resist arrest, all participants were equally guilty of any crime which was the natural and probable consequence thereof, whether one of them personally committed the act, or whether its commission was done by any one or more of the associates in carrying out the common purpose.

3. Homicide —268—Whether murder of policemen was probable effect of common design held a question for the jury.

Where there was an understanding among five men to commit robbery or burglary, and, if detected by officers, to resist arrest, whether the murder of two policemen in resisting arrest was the ordinary and probable effect of the common design was a question for the jury.

4. Homicide —166(10)—Evidence of robbery three nights previous to killing admissible to show motive for killing.

In a prosecution for the murder of two policemen killed while arresting defendants, evidence that defendants had participated in a robbery three nights before was admissible as tending to show a motive for the killing.

5. Criminal law —528—Confessions of accomplices competent, though made in absence of defendants.

In a murder prosecution, confessions of accomplices were competent evidence to explain the conduct of defendants, though made in their absence, which deprived them of a right to raise a question as to whether they were voluntarily obtained, where they did raise a question on trial, and the trial court went fully into the matter, and further, when the confessions were read to defendants, they made no denial.

6. Criminal law —407(2)—Silence of defendant in face of accusation of crime evidence of guilt.

When a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence, indicating an admission of guilt.

7. Criminal law —564(1)—Venue of offense amply proven by testimony of witnesses.

In a prosecution of murder, venue of the offense was amply proven where witnesses testified that the shooting took place in the city where the prosecution was had.

8. Criminal law —622(1)—No error in trying defendants jointly in prosecution of murder.

In a murder prosecution, no error was committed in trying defendants jointly, in view of Pen. Code § 1098, as amended by St. 1921, p. 90, providing that, when two or more defendants are jointly charged with any public offense, they must be tried jointly, unless the court orders separate trials.

9. Criminal law —829(4)—Unnecessary to give every requested instruction, where court fairly states the law.

It is unnecessary that the court give every instruction requested by a defendant, although they may be proper instructions, where the court correctly and fairly states the law governing the subject-matter of the defense.

10. Criminal law —822(1)—Defendant cannot complain of instruction, where charge to jury is fair.

Defendants cannot complain by reason of instructions given or refused, though some of the instructions given in the case standing alone may be subject to criticism, where the charge to the jury taken as a whole is correct and fair.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

William A. Bringhurst and Willard Thompson were convicted of murder. They appeal. Affirmed.

R. T. Walters, of Los Angeles, and Chas. I. Rosen, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WASTE, J. The two defendants, who are appellants here, were accused by the grand jury of Los Angeles county, jointly with James Wheaton, Calvin Rowell, and Jess Wendell, of the murder of Harry Clester and W. L. Brett, two police officers of the city of Los Angeles. The indictment was based upon a crime in which all of the defendants named therein participated. The defendants Wheaton and Rowell were tried together, as were these appellants. Wheaton and Rowell were sentenced to the state penitentiary for life. The judgment in their case was affirmed (People v. Wheaton and Rowell [Cal. App.] 220 Pac. 451), and a petition to have the cause heard in the Supreme Court was denied. Bringhurst and Thompson, these appellants, were sentenced to pay the death penalty, from which judgment they prosecute this appeal.

Several assignments of error are made. It is first contended that the evidence is insufficient to justify or sustain the verdict rendered against the appellants or either of them. This contention is without merit. A complete and comprehensive statement of the events preceding and leading up to the killing of Clester and Brett is to be found in the opinion of the court in People v. Wheaton

and Rowell, *supra*. It is unnecessary to do more than summarize them here. Briefly, the facts are that all of those mentioned in the indictment were together on the night of the 6th of December, 1921. All of them, except Wheaton, carried revolvers. Three nights prior thereto they had participated in a robbery. On the evening in question they planned other similar offenses, but were deterred from carrying their plans into execution, and became suspicious that they were being watched by the police. At about 11 o'clock that night they were all together in an automobile with its lights out. Witnesses narrated how the two police officers in another automobile drew alongside of that occupied by the defendants, and told them to stop. The officers, who were in uniform, got out of their machine, and began to interrogate the defendants, and one of the policemen started to get into the automobile with them. A number of shots were fired from the unlighted machine, in which were the defendants, and it moved rapidly away. While the shooting was going on, witnesses saw the two police officers fall. It was found that each had been shot several times, and when the witnesses reached them they were lying dead in the street. A man, identified as the appellant Thompson, was seen to get out of the unlighted machine and run rapidly away during the shooting. The actions of the defendants in the days following the shooting indicated an attempt at concealment. After the arrest of Wheaton and Rowell, they made statements regarding the killing of the two policemen which implicated all of the defendants.

[1-3] The evidence clearly indicates that the appellants had participated in committing a robbery on December 3d, and, with their codefendants, had planned to commit burglary on the night in question. The jury was justified in believing that they and the others implicated were jointly engaged in an expedition of crime, and were prepared to kill any police officers or others who might interfere with their plans. All the defendants were equally guilty of any crime that was the natural and probable consequence of such an enterprise, whether one of them personally committed the act, or whether its commission was done by any one or more of the associates in carrying out the common purpose. *People v. Wheaton and Rowell, supra*. Whether or not the murder of the two policemen was the ordinary and probable effect of the common design was a question of fact to be determined by the jury. *People v. Kauffman*, 152 Cal. 331, 335, 92 Pac. 861. Its finding was adverse to the contention of the appellants, and the evidence in the record amply supports the verdict.

[4] Over the objection of the defendants, the court admitted evidence of a robbery in which the defendants participated on the

night of December 3, 1921. The admission of this evidence is assigned by the appellants as reversible error. Without discussing any other points raised by the contention, the testimony was—

"admissible as tending to show a motive on the part of the defendants for the homicide of the two policemen. It explained why the defendants were so anxious to prevent arrest. * * * Knowing that they were all guilty of the crime of robbery, it is easy to understand why they might even take life before they would suffer themselves to be arrested, their crime found out, and the severe punishment meted out to them which the law affixes to the crime of robbery. *People v. Pool*, 27 Cal. 572; *People v. Prantikos*, 164 Cal. 113-116, 127 Pac. 1029." *People v. Wheaton and Rowell* (Cal. App.) 220 Pac. 451.

[5, 6] Appellants' next contention is that the confessions of Rowell and Wheaton, read to the jury over the objection of the appellants, were incompetent evidence, for the reason that the confessions were made in the absence of either of these appellants, and appellants could not raise the question as to the confessions being free and voluntary or obtained under threat, duress, or promise. The record indicates, however, that they did raise the question, and that the trial court went fully into the matter of the voluntary character of the confessions, and the circumstances under which each was made. From the evidence taken for that purpose, it was fully convinced that the confessions were freely and voluntarily made, and were not attended with any circumstances that would render them inadmissible. For another reason it was proper to read the confessions in the presence of the jury. When they were read to the appellant Thompson before the trial, he did not deny the accusatory statements, but said he had nothing to say. In the same connection the defendant Bringhurst stated there were statements in the confession which were not correct. He did not promptly and fully deny the accusations. It has become a well-established rule that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The reason for admitting the accusation in such cases is to explain the conduct of the accused. *People v. Lapara*, 181 Cal. 66, 71, 183 Pac. 545; *People v. Gordon* (Cal. App.) 214 Pac. 276.

[7] There is no merit in the contention of the appellants that the venue of the offense was not proven. Witnesses testified that the shooting of the policemen who were members of the police department of the city of Los Angeles, occurred in the street in front of or close by 543 South Lorena street, Los Angeles, Cal

[8] The trial court did not commit error in denying the motion of the appellants Bringhurst and Thompson that they be tried separately. Section 1098 of the Penal Code, as amended (Stats. 1921, p. 90), provides:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant."

[9, 10] A considerable portion of the brief for the appellants is devoted to their contention that the court erred in giving certain instructions at the request of the prosecution, and in refusing instructions requested by the defendants. Some forty specifications of error are made in this connection. We have carefully examined the instructions given and refused, and find the contention to be without foundation. The charge to the jury, given by the trial court, is full, clear, and comprehensive. It does not, in our opinion, go outside of or enlarge the case presented to the jury, yet it presents, we think, every phase of the case necessary to fully advise that body as to the law governing the facts presented for their consideration. Some of the instructions requested by the defendants were proper instructions, but the points involved were fully covered by the court in other instructions given by it. It has been repeatedly held that it is not necessary that the court give every instruction requested by a defendant—although they may be proper instructions—provided the court correctly and fairly states the law governing the subject-matter of the defense. *People v. Wilson* (Cal. App.) 215 Pac. 565. Some of the instructions given in this case, standing alone, may be subject to criticism, but the charge to the jury, taken as a whole, is correct and fair, and appellants have no reasonable ground of complaint by reason of instructions given or refused. *People v. Hatch*, 163 Cal. 368, 382, 125 Pac. 907; *People v. Lee Chuck*, 78 Cal. 317, 339, 20 Pac. 719.

No matters relating to the trial of the appellants in any way prejudicially affecting their rights having been called to our attention, and no errors appearing warranting a reversal, the orders denying their respective motions for a new trial are, and the judgment in the case of each of the appellants is, affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

WHANN v. DOELL. (S. F. 10419.)

192 Cal. 680

(Supreme Court of California, Dec. 24, 1923.
Rehearing Denied Jan. 21, 1924.)

1. Account $\S$ 11—Existence of relationship requiring accounting and statement that balance is due plaintiff may be only issues raised by pleadings.

The issues raised by the pleadings in an action for an accounting may be only those as to the existence of the partnership or other relationship requiring an accounting and the statement that some balance is due plaintiff; other issues being raised by the account and exceptions thereto.

2. Account $\S$ 11—Mere statement of balance due without setting out items or showing disposition of controversy as to particular items insufficient.

A statement of the balance due plaintiff in findings by the court without a reference, account, or exceptions to specific items is not a proper disposition of an action for an accounting, the issues not being so framed or disposed of as to show how the result was reached and enable the aggrieved party to present his grievances to an appellate tribunal.

3. Appeal and error $\S$ 931(3)—Determination of controverted facts favorably to respondent assumed on appeal.

The Supreme Court must assume, in support of a judgment stating an account, that every controverted fact was determined in respondent's favor.

4. Appeal and error $\S$ 931(1)—Presumption in favor of trial court's action on contested items.

On appeal from a judgment stating an account, the presumption is in favor of the trial court's action on contested items.

5. Account $\S$ 11—Any procedure or record from which issues and disposition thereof may be ascertained sufficient statement.

An account need not be stated in accepted bookkeeping fashion, any procedure or record from which the issues and the court's disposition thereof can be intelligently ascertained being sufficient, whether it be the findings, decree, bill of exceptions, or a typewritten record prepared under Code Civ. Proc. $\S$ 953a et seq., particularly in view of Const. art. 6, $\S$ 4½, restricting the Supreme Court's power to order a retrial to cases where, on the whole record, there has been a miscarriage of justice.

6. Appeal and error $\S$ 1033(7)—Appellant cannot complain of general finding according with her own claims.

Appellant cannot complain of a general finding in accord with her own claims and adverse to those of appellee.

7. Appeal and error $\S$ 1071(6)—Failure to find as to matter not disputed not ground for retrial.

Failure to specifically find as to a matter not disputed is not a ground for retrial.

8. Partnership ⚡342—General finding of ownership of property by partnership held sufficient in action for accounting.

In an action for an accounting of partnership assets invested in property in defendant's name, a general finding that such property belonged to the partners in equal parts *held* sufficient.

9. Partnership ⚡327(6) — Claims as to amounts of partnership and individual assets invested in property held not inconsistent.

In an action for an accounting of partnership assets invested in property in defendant's name, plaintiff's claim that a certain sum was thus invested *held* not inconsistent with her testimony that part of such amount was paid from defendant's bank account, which plaintiff testified was a partnership account.

10. Partnership ⚡329—Amount of separate funds invested in partnership property held for trial court.

In an action for an accounting of partnership profits invested in property, in which defendant also invested separate funds, where defendant testified that she did not know the exact amount of her own money so invested, the court did not err in accepting plaintiff's testimony as to the amount thereof, even if defendant was entitled to full credit for the amount claimed by her, there being merely a conflict in the evidence for the trial court's determination.

11. Partnership ⚡5—Parties jointly owning proceeds of business held partners.

Where parties jointly owned the proceeds of a business and each was entitled to half thereof, subject only to a claim by one that their joint living expenses were to be paid therefrom, there was a partnership.

12. Courts ⚡212—Cause transferred to Supreme Court because of respondent's failure to meet appellant's objections.

A petition for transfer to the Supreme Court, after a judgment by the District Court of Appeals stating an account, granted because of respondent's failure, in her brief or reply to the petition, to adequately meet appellant's claim that the items of account allowed and disallowed should have been stated, and her presentation of difficulties pointed out by appellant as necessitating reversal.

13. Appeal and error ⚡1071(6)—Appellant held not prejudiced by court's failure to find on contested items of account.

Where each item protested by defendant, in an action for an accounting, was properly allowed, she was not prejudiced on appeal by the general presumption in favor of the judgment, and hence not injuriously affected by the court's failure to find on specific contested items.

14. Courts ⚡487(7)—Supreme Court decisions on application for transfer from Court of Appeals must be made within ten days.

Supreme Court decisions on applications for transfers to it from the District Courts of Appeals must be made under its own rules and within ten days, as required by Const. art. 6, § 4, and rule 30 (177 Cal. 57).

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Marguerite R. Whann against Betta M. Doell. Judgment for plaintiff, and defendant appeals. Affirmed.

A. J. Treat, of San Francisco, and Royle A. Carter, of Fresno, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

WILBUR, C. J. This action is brought by the plaintiff to secure an accounting of the partnership business and a distribution of the assets of partnership alleged by her to have existed between the plaintiff and defendant from the period of February, 1907, to May, 1918. The plaintiff alleges that this copartnership was engaged in the business of manufacturing and selling a proprietary medicine known as "Chewalla" and that part of the proceeds of this business were invested in certain apartment houses and other real estate described in the complaint to which title was taken in the name of the defendant. The plaintiff prays that her one-half interest in the real estate in question be declared; that an accounting of the rents, issues, and profits of the real estate and of the partnership business be had; that the assets of the partnership be distributed and the partnership be dissolved.

By an amendment to the complaint the plaintiff alleged that the rents and profits of the real estate amounted to \$18,844.22.

The defendant alleged in her answer that the net receipts from the sale of the medicine was \$37,580.08, of which she was entitled to one-half, not as partnership profits but as wages; that plaintiff had paid her \$21,629.36 and no more for such wages and for living expenses, which were also to be shared equally; that the living expenses of the plaintiff (her one-half) amounted to \$6,065, of which she had paid \$2,839.32 (being the difference between \$21,629.36 and one-half of the profits, \$37,580.08, to wit, \$18,790.04). Defendant admitted that the profits of the real estate were \$17,938.25, but claimed the same as her own.

A trial was had before the court without a jury and without a reference to a master or referee and without an interlocutory decree ordering an accounting. The trial court found that there was a copartnership between the parties; that the real estate involved was partnership property; that the total rents, issues, and profits thereof were \$17,938.25 (as alleged by the defendant); that \$11,945.95 thereof had been expended for the joint benefit of the partners, leaving a balance belonging to the copartnership of \$5,992.25; that plaintiff had accounted for all moneys re-

ceived by her which had been used for the copartnership; that \$1,600 par value of United States government securities had been purchased by the partnership; that certain furniture described in detail in the findings belonged to the partnership; that the defendant had \$1,462.94 partnership money on deposit in her name in a savings bank; that the plaintiff was not indebted to the defendant, as claimed, for a balance of \$3,215.68 for living expenses, or for any sum for rent. The court thereupon divided the balance of rents retained by the defendant, to wit, \$5,992.26, by correspondingly increasing the interest of the plaintiff in the real estate and property of the copartnership, after directing the payment to her of the money on hand and by directing a sale of the property.

It will be observed that the only issue as to the rents, issues, and profits of the real estate was whether those profits were \$18,844.22, as alleged by the plaintiff, or were \$905.97 less, as alleged by the defendant, less, also, the expenses. As to the net receipts from the business of manufacturing and selling medicine, defendant admitted them to be \$37,580.08, to which each party was entitled to one-half, and that she had been overpaid \$2,839.32, unless she was allowed her claim of \$6,065 for living expenses, which the court did in fact disallow. The court thus found the net profits of the business to be the amount alleged by the defendant, to wit, \$37,580.08.

We have thus stated the findings and the issues because the appellant's main objection to the action of the trial court is based upon its alleged failure to state an account in the findings. The appellant complains that the findings of the trial court merely determine the balance due to the plaintiff from the defendant and appellant, and do not set forth any of the items of the accounting between the parties which covered a period of about 14 years. The appellant cites and relies upon the case of *Barnebee v. Beckley*, 43 Mich. 613, 5 N. W. 976, as holding that an essential feature of an accounting is the stating of an account between the parties, even where the case is tried by the court without a reference, and that in the absence of such a statement of account the case may be sent back for a retrial. A similar conclusion is reached in the case of *Tatum v. Shenk*, 221 Fed. 182, 136 C. C. A. 598, by the United States Circuit Court of Appeals of the Fifth District.

[1-4] The situation presented by an action for an accounting is unique in that the issues raised by the pleadings may be only those with relation to the existence of the copartnership or other relationship which requires an accounting and the statement that some balance is due plaintiff. Accounts and Accounting, §§ 98, 101, 102, 1 C. J. 633, 634, 635. The other issues are raised by the account and the exceptions thereto, and not by

the pleadings. It is obvious that a statement of the balance due in the findings of the court, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of such an action, because the issues between the parties are not framed or disposed of in such manner as to show the method by which the general result is reached, and the aggrieved party cannot successfully present his grievances to an appellate tribunal, because on such an appeal this court must assume in support of the judgment that every controverted fact was determined in favor of the respondent, and even if there was both the disposition and the power on the part of the appellate tribunal to re-examine the entire account, the presumption in favor of the action of the trial court as to the contested items would ordinarily render such action wholly nugatory.

[5] On the other hand, the contention that an account must be stated in accepted book-keeping fashion cannot be maintained. The question presented by such an appeal is a practical one in such cases, particularly in view of our restricted powers under the Constitution (article 6, § 4½), namely: Can this court upon the whole record say that there has been a miscarriage of justice in the trial court? Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof. It may be possible, also, to show such action by a typewritten record prepared under section 953a et seq., Code of Civil Procedure.

The respondent cites the following cases as holding that a statement of a general balance in the findings is sufficient in an action for an accounting: *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Jacobs v. Ludemann*, 137 Cal. 176, 69 Pac. 965; *Tower v. Wilson*, 45 Cal. App. 123, 188 Pac. 87; *Reed v. Cornell*, 54 Cal. App. 179, 201 Pac. 608.

The case of *Murdock v. Clarke*, supra, was one by a mortgagor against a mortgagee in possession. In answer to appellant's claim that the findings should have been "in reality an itemized statement of the account, rather than a summary of the transactions," the court there stated:

"It was not necessary for the findings to give the items of the account. It is not necessary in pleadings to give an itemized account (Code Civ. Proc. § 454), and a finding which follows the pleading is sufficient. In this as in other cases, it is sufficient to find the ultimate facts, or secondary facts from which the ultimate fact necessarily follows."

The court also pointed out that, where a finding is objected to in the specification of

errors in general terms, there is no remedy on appeal, as follows:

"The action of the court below is presumed to be correct, and upon an appeal therefrom it is incumbent upon counsel to point out the error. *This, in a case like the present, where an account has extended over many years, can be done only by taking the account as a whole, rather than selecting individual items, and expecting this court to examine the entire record for the purpose of determining whether, in connection with the result as finally ascertained, those items have been properly allowed.*" (Italics ours.)

We have examined the record in the case of *Murdock v. Clarke*, supra, and find that the account is in fact stated in considerable detail in the findings. Not only are the receipts and expenditures for each year separately stated, but there are other specific findings as to the disposition of the property in the custody of the mortgagee. That case is not authority for the proposition that in an action for an accounting a statement of the general balance due is a proper disposition of the case.

In *Jacobs v. Ludemann*, supra, the plaintiff's action was to establish a trust in land to which the defendant held legal title. The defendant answered admitting the trust, but claimed certain credits for money advanced, less deductions for money paid and crops received, all itemized in the answer, and stated that the balance due the defendant was \$1,267.90. The trial court made findings with relation to some of the items, such as the purchase price of the land as \$2,000, and declared the balance due the defendant to be \$800. The plaintiff appealed, and the court there said:

"Plaintiff contends that the finding of this balance is but a conclusion of law, and that the court should have found the items—debit and credit—so as to show the figures from which the conclusion was deduced. It was not necessary for the court to do this. The ultimate fact was the amount, if anything, due from plaintiff to defendant, and this was ascertained and found from the evidence submitted to the court."

These decisions in no wise militate against the contention that there should be a sufficient statement of an account to show the main features of the account and the disposition of the various controversies arising thereon in an action for an accounting.

[6-8] We will now consider whether or not the defendant was prejudiced by the method of trial and decision adopted by the trial court. The court found that the defendant had in her possession \$5,992.26 of the rents, issues, and profits of the partnership real estate as alleged by her, and she cannot justly complain of this general finding, which ac-

cords with her own claims and is adverse to the plaintiff's claims. The court disallowed the defendant's claim for \$6,065 for living expenses on the theory that the living expenses were to be paid from the profits of the medicine business, and not from the plaintiff's share of the business. This general finding disposes of the defendant's claim as to the counterclaim or credit of \$6,065, and is supported by the evidence. These findings dispose of all the issues on the accounting except the investment of the partnership assets in the real and personal property standing in the name of the defendant; as to these the court found that such property belonged to the copartnership, one-half to each. There is no specific finding as to the exact amount of the net profits of the medicine business, but there was apparently no dispute on that subject. The defendant alleged the amount to be \$37,580.08, and the plaintiff testified to that exact amount. The parties having thus agreed upon the amount of the profits from the business, and the court having found the facts in favor of the defendant upon the issue as to rents, issues, and profits of the real estate, the only remaining question was as to the investment of these proceeds in the partnership property, and upon this issue the general finding of ownership is under the circumstances of this case a sufficient finding.

[9, 10] The defendant attacks certain items of the account, one an item of \$1,500 credit allowed to the plaintiff, another for a balance of \$500 on a loan of \$1,500 made by plaintiff. There was sufficient evidence to support the allowance of these items. The appellant calls attention to plaintiff's claim that \$30,639 of the profits of the medicine business were invested in the properties, because it also appears from her testimony that \$2,771.10 of this amount was paid from the defendant's bank account. There is no inconsistency, for the plaintiff testified that the bank account was a partnership account. Another controversy is presented by the record as to the amount of money invested in the property by the defendant from her separate funds. The defendant claims the amount to be \$5,300, but she testified that she did not know exactly what amount of her property was so invested. Consequently, it was not improper to accept the plaintiff's testimony as to the amount so invested, to wit, \$3,500, even if the defendant was entitled to full credit. This point presents merely a conflict in the evidence for the determination of the trial court.

[11] There was no error in the determination by the trial court that there was a copartnership. It was admitted that the parties jointly owned the proceeds of the medicine business; that each was entitled to one-half thereof, subject to the plaintiff's claim that the joint living expenses were to be paid therefrom, and the defendant's claim that the

living expenses were to be paid by the plaintiff.

In view of our conclusion, that there has been no miscarriage of justice we deem it unnecessary to enter into further detail.

[12, 13] In view of the fact that our conclusion is in full accord with the decision of the District Court of Appeal (First District, Second Division), we should add that appellant's application for a transfer to this court was granted because of the failure of the respondent either in her briefs or in her reply to the petition for a transfer, after the decision of the District Court of Appeal, to adequately meet the emphatic and reiterated and well-founded claim by appellant that an orderly procedure in an accounting case required at some stage of the proceeding a statement of the items of account allowed and disallowed, supported, as the claim was, by reason and authority. The respondent, moreover, claimed the benefit of the presumption that items not attacked in the appellant's brief would fully offset plaintiff's claim, and that the presumptions in favor of a judgment would require an affirmative, regardless of the correctness of the items attacked, thus presenting the very difficulty pointed out by the appellant as necessitating a complete reversal. This point of practice was not dealt with by the District Court of Appeal except by holding that no prejudice resulted to the appellant from such failure to find upon the specific contested items. With this view we are now able to fully concur after the more extended and detailed examination possible after transfer, for, as already pointed out, we find that each item protested by the appellant was properly allowed, and consequently the appellant was not prejudiced on her appeal by the general presumption in favor of a judgment, and, therefore, not injuriously affected by the method of the trial court, which might otherwise call for a reversal.

[14] In this connection the profession should bear in mind that our decisions upon application for a transfer must be made under our rules, and under the Constitution within a period of ten days (Const. art. 6, § 4; rule 30, 177 Cal. 57), no matter how much of the business of the court may demand attention during that period, and notwithstanding the constantly increasing volume of cases passed upon by the five divisions of the District Court of Appeal, and subject to review by us within the limited period allowed by the Constitution.

Judgment affirmed.

We concur: MYERS, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; WASTE, J.

In re GREEN.

BANKS v. FOOTMAN.

(S. F. 10339.)

(Supreme Court of California. Dec. 26, 1923.)

1. Guardian and ward ⇨13(7)—Parent's fitness at time of hearing determining factor.

In view of Code Civ. Proc. § 1751, which provides that parents of a minor child under age of 14 years, if found to be competent, are entitled to appointment as guardian, in preference to other person, in proceeding for appointment, findings as to fitness and competency in the past are surplusage; the determining factor being fitness at time of hearing.

2. Parent and child ⇨2(3)—Failure to contribute to child's support did not ipso facto forfeit mother's right to custody.

Though the mother of a minor child under age of 14 years for some years did not contribute any substantial sum to its support, she did not forfeit her right to its guardianship under Civ. Code, § 246, subd. 4, where, on account of poor health, frequent operations, and necessity of self-support, she at no time had ability to maintain it.

3. Parent and child ⇨2(3)—Failure to maintain as forfeiting right to custody must be coupled with ability; "forfeiture."

To constitute a "forfeiture" of a parent's right to custody of his child, within Civ. Code, § 246, subd. 4, relative to guardianship, failure to maintain it must be coupled with ability to do so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forfeit—Forfeiture.]

4. Parent and child ⇨2(3)—Acquiescence in voluntary support of child by relative not "failure to maintain" within statute.

Mere acquiescence of a parent in the voluntary maintenance of a child by relative, when the latter does not request compensation, does not in itself amount to a failure to maintain, within Civ. Code, § 246, subd. 4, regardless of parent's ability or disability.

5. Guardian and ward ⇨13(4)—Desertion by natural mother not shown; "abandonment."

In proceedings for appointment of guardian of a minor, evidence of the mother's previous inability to support it, owing to poor health, frequent operations, and necessity of self-support, and consequent placing of the child with a relative, did not show an actual desertion accompanied with intention to sever the parental relation and throw off its obligations, which would be "abandonment," within Civ. Code, § 246, subd. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abandon—Abandonment.]

6. Guardian and ward ⇨10—Parent, if fit, awarded guardianship.

In contest for guardianship between a parent and a stranger, the paramount question is whether the parent is competent to fulfill the

duties and obligations involved, and an affirmative finding compels the parent's appointment, notwithstanding the child's material welfare will be best subserved by giving it to another.

Myers, J., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

In the matter of the guardianship of the person and estate of Margretta Green, a minor. Petition for appointment by Gretta M. Banks, opposed by Beulah Green Footman. From an order appointing petitioner guardian, contestant appeals. Reversed.

Henry C. McPike, of Oakland, and Clarendon W. Anderson, of Santa Rosa, for appellant.

L. G. Scott, of Sebastopol, and J. T. Campbell, of Santa Rosa, for respondent.

LENNON, J. This proceeding for the appointment of a guardian of the person and estate of a minor child, Margretta Green, culminated in the court below in an order directing the issuance of letters of guardianship to the respondent, Gretta M. Banks, a half-sister of the mother of the child. The mother, Beulah Green Footman, resisted the petition for guardianship, and appeals from the order.

The facts brought forth at the hearing of the petition and pertinent to the point presented upon the appeal, succinctly stated, are these: Neither at the time of the birth of the child nor at any time thereafter did the mother and father live together, and in 1912 the mother obtained a final decree of divorce which awarded to her the custody of the child. The father makes no claim to its custody. Shortly after the birth of the child, in Oakland, appellant, being destitute, went with the child to a ranch in Sonoma county, where they lived for a time with her family, which consisted of her mother, Mrs. Peterson, a half-brother and three half-sisters. As soon as she felt her strength returning she and the child, her mother, and her half-brother went to Berkeley to live, where her mother, Mrs. Peterson, kept house and cared for the child while appellant worked to support the family. For a part of the time appellant worked in a cannery. The child was taken back to the ranch and cared for by respondent on two occasions, once when Mrs. Peterson was ill and asked respondent to come and get the child, and once when Mrs. Peterson and appellant went to Los Angeles. Upon their return from Los Angeles, Mrs. Peterson went to the ranch to get the child, and at that time respondent and her husband objected to the child being moved back and forth so often, and insisted that either they or appellant must keep her. Appellant's half-brother testified that when appellant was informed of this she—

"kind of objected in a way. She said it was pretty hard to give up the little one. * * * We used to talk it over quite a bit, what a nice little girl she was. And she was working, I think, at the Golden West Hotel, and she worked at various places, but she never had, you might say, a home, and under those circumstances she admitted lots of time that Margretta was better off where she was."

Mrs. Peterson, appellant's mother, testified that when she returned to Berkeley and told appellant of respondent's suggestion, "She studied awhile and said 'Maybe it would be the best thing to do.'" After that appellant went to Iowa to study nursing. Before leaving she went to the ranch where the child was. Evidently there was some conversation concerning the child. However, about the only evidence of this conversation is respondent's statement:

"I told her I must have her to raise in my own way. You see that has been ten years ago, * * * and I cannot recall the exact conversation, and it seems as though my sister answered, 'Of course'; that is, in my mind that she answered, 'Of course.'"

Leaving her child in her half-sister's care, appellant went to Iowa, where she studied nursing until forced to return to California in 1913 because of ill health. After her return to California, and until December, 1917, appellant underwent a series of serious operations for the purpose of removing a condition brought about by neglect at the time her child was born. The operation left her in a very weakened condition and unable to work during a great part of the time. Whenever her health would permit she obtained employment, chiefly as a nurse in a physician's office, but, due to the irregularity of these periods, she was scarcely able to earn money enough to support herself. Appellant was twice married, but neither marriage turned out successfully. During neither marriage did appellant have a permanent home, nor was she entirely relieved of the necessity of working to support herself. The operation performed in December, 1917, proved successful, and since that date appellant's health has vastly improved. In 1918 appellant was employed as a nurse for the state compensation fund. While in this position she met her present husband, who, in September, 1918, engaged her to care for his home and his two motherless children in the city of Oakland. In 1920 appellant and Mr. Footman were married, and appellant, having a permanent home for the first time since the birth of her child, wrote to respondent, stating that she and her husband would take Margretta into their home. Respondent thereupon filed the present petition for letters of guardianship. There is some conflict in the evidence as to the number of times that appellant sent gifts to the child. It is an admitted fact in the case

that appellant contributed nothing to the child's support, but it also appears that appellant was never requested to do so, and further, that, not only did appellant have no permanent home in which to receive the child until her present marriage, but that at no time did she have any funds with which to support the child, except that, shortly before the child was left with respondent, she received \$600 in a suit for alienation of affection against the father of her first husband. Part of this money was used to pay the expenses of respondent's wedding, part for a trip which appellant and her mother took to Los Angeles, and part to help pay appellant's expenses while studying at the hospital in Iowa. It appears also from respondent's testimony that from time to time appellant visited the ranch where the child was, and that "she has visited her more frequently the last three years (that is since March, 1918) than before." Appellant herself states that she went to see the child every chance she got, and as often as her illness and lack of funds would permit.

[1] This summary of the evidence leads to a consideration of the grounds upon which the court awarded the guardianship to the half-sister of the mother of the child. Section 1751 of the Code of Civil Procedure provides:

"The father or the mother of a minor child under the age of 14 years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. * * *

Upon the question of the competency of the mother, the court below found:

"That since contestant's marriage to her present husband, Henry E. Footman, in July, 1920, she has been and now is a fit and suitable person to become the guardian of said minor."

Thus there is removed from this appeal all question of the fitness and competency of appellant. In view of this finding, any findings concerning the fitness or unfitness in the past are mere surplusage, for the determining factor in cases of this character is the parent's fitness for guardianship at the time of the hearing of the petition. Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444. This proposition is not seriously questioned by respondent, who relies primarily for an affirmance of the order appealed from upon the finding that appellant—

"failed and neglected to contribute in any material extent to its [the child's] maintenance or care, she having the ability to do so; and that contestant at said time abandoned said child, and has thereby forfeited her rights to the custody or guardianship thereof."

[2] We may assume, without deciding, that the findings last quoted would, if supported by the evidence, be sufficient to bring the

case within subdivision 4 of section 246 of the Civil Code, which provides that—

"Any parent who knowingly or willfully abandons, or having the ability to do so, fails to maintain his minor child under the age of 14 years, forfeits the guardianship of such child. * * *

[3, 4] We are of the opinion that, even though the evidence affirmatively shows, without contradiction, that appellant did not contribute any substantial sum to the support of her child, nevertheless, she did not, for that reason alone, forfeit her right to its custody, because the evidence also shows that owing to her poor health, frequent operations, and necessity of self-support, she at no time until her last marriage had the ability to maintain the child. To constitute a forfeiture of a parent's right to the custody of his child, failure to maintain it must be coupled with ability to do so. Furthermore, respondent supported the child in the absence of any agreement for reimbursement, and without asking appellant to contribute thereto. The mere acquiescence of a parent in the voluntary maintenance of a child by a relative, when the latter does not request compensation from the parent, does not in itself amount to a failure to maintain, within the meaning of the Code section above quoted, and this is so, regardless of the ability or disability of the parent in the matter. Matter of Forrester, 162 Cal. 493, 123 Pac. 283; Civ. Code, § 208.

[5] Nor was there any showing of "an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same," which, under the settled rule in this state, is necessary to constitute an abandonment within the meaning of said Code section. Guardianship of Snowball, supra.

The legal principle involved in the case at bar is analogous to that involved and enunciated in the Estate of Akers, 184 Cal. 514, 521, 194 Pac. 706, 709, where the court said:

"The right of a parent to the custody of its child cannot be held to be forever forfeited by an act of relinquishment committed under circumstances of coercion, caprice, and discouragement."

So likewise in the case at bar, the practically involuntary placing of the appellant's child in the respondent's family during a time of physical and financial stress cannot be regarded as an attempt to sever the parental relation. As stated in Matter of Galleher, 2 Cal. App. 364, 367, 84 Pac. 352, 353:

"An agreement, especially if oral, whereby a parent gives his child to another to raise, is generally held to be revocable at any time."

[6] When appellant intrusted her child to respondent she had no other alternative

She herself was unable to care for the child. Appellant's own mother was dependent upon her children and stated to appellant at the time: "I am getting along in years, and I don't feel I could take the responsibility to raise it." It is true that there is evidence from which it might be inferred that appellant was not as attentive to the child, while it was in respondent's house, as some parents would have been. However, as previously stated, according to respondent's own testimony, when she took the child she distinctly stated that there was to be no interference of appellant in the matter of raising it. This would naturally act as a deterrent upon appellant's intimacy with the child. Also, appellant was hindered by her poverty and sickness. In addition to all this, it must be remembered that a parent, if competent, does not lose his right over his child merely because his conduct may at one time have fallen short of what may be described as "ideal." Guardianship of Snowball, supra; Matter of Galleher, supra. There is no question as to respondent's fitness to act as guardian. On the contrary, it is conceded that she has given the child a happy home, raised her as one of her own children, and that the child is fond of her. The evidence, the findings, and the statement of the court below indicate that the order was based fundamentally, not upon the theory of abandonment, but upon the theory that, notwithstanding appellant's fitness to receive the child, it would be for the best interest of the child, in respect to her temporal and her mental and moral welfare, for her to remain in her present home. It has, however, been repeatedly held that, if the parent is competent, and has not abandoned the child or failed to maintain it, having the ability to do so, the court has no choice but to award the child to the parent. *Campbell v. Wright*, 130 Cal. 380, 62 Pac. 613; *Guardianship of Salter*, 142 Cal. 412, 76 Pac. 51; *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283; *Estate of Akers*, 184 Cal. 514, 194 Pac. 706; *Guardianship of Mathews*, 169 Cal. 26, 145 Pac. 503. Subdivision 1 of section 246 of the Civil Code, providing that in awarding the custody of a minor the court is to be guided first by what appears to be for the best interest of the child in respect to its temporal, mental, and moral welfare, operates only where the court is vested with the exercise of discretion, and has no application as between a parent and more distant relative or stranger. *Campbell v. Wright*, supra.

We are not unmindful of the temptation to consider the fact that the child is likely to be happier if permitted to remain in the home she has known since babyhood. Such facts must be disregarded, however, where a parent is competent, and has not otherwise forfeited his rights. Otherwise a parent, who has been forced to temporarily relinquish

his child by adverse circumstances, will, through no fault on his part, be penalized by a decree of total forfeiture, and a situation would soon result wherein an affluent stranger or relative would be enabled to arbitrarily deprive a less materially fortunate parent of all right to his most cherished possession.

In this behalf it may not be amiss to emphasize the fact that both the common law and our statutes, as interpreted in the cases herein cited, declare that the care, custody, and control of a minor child, under the age of 14 years, must be committed to its parent, rather than to strangers, in the absence of a showing that the parent is unfit to perform the duties imposed by the relation, or, by abandonment, has forfeited the natural right to its custody. Accordingly it has come to be the settled rule of law in this jurisdiction that in a contest for guardianship, not between parent and parent, but, as here, between a parent and a stranger to the child, the paramount question presented for consideration is whether the parent is competent to fulfill the duties and obligations involved in the relationship, and a finding in the affirmative compels the appointment of the parent as guardian, notwithstanding the fact that apparently the child's material welfare will be best subserved by giving it to another. *Estate of Akers*, 184 Cal. 514, 522, 194 Pac. 706.

The order appealed from is reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

MYERS, J. I dissent. I think that the evidence is amply sufficient to sustain the finding of the trial court "that contestant [appellant herein] at said time abandoned said child. * * *". This finding is, in my opinion, sufficient to support the judgment appealed from.

The child, who is now nearly 14 years old, has been in the continuous custody and care of respondent since the age of 11 months. It is conceded that during all of that time the entire burden and responsibility of the custody, care, maintenance and education of the child has been borne by respondent. It clearly appears from the evidence that in 1911, when the child was a mere infant, a definite understanding and agreement was entered into between appellant and respondent, whereby appellant relinquished to respondent definitely and finally all of her parental rights over the child, and respondent in turn undertook and agreed to keep and maintain the child and raise it as her own. This agreement was entered into by appellant voluntarily and only after due deliberation. Respondent has kept and performed her part of the agreement faithfully and generously in all respects. This agreement was understood and acquiesced in, not only by the

immediate parties thereto, but also by respondent's husband, by the child's grandmother, and by other near relatives. It was acquiesced in by appellant, without hint or suggestion to the contrary for a period approximating 10 years. Then the child, having arrived at an age where it might be regarded as an asset instead of an incubance, appellant for the first time indicated a desire to repudiate her agreement and reclaim the child.

This presented a clear case of an actual physical transfer and relinquishment of the custody of the child "accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same." This, in my opinion, constituted an abandonment within the meaning of subdivision 4 of section 246 of the Civil Code.

The facts of this case are essentially different from those under consideration in *Estate of Akers*, 184 Cal. 514, 194 Pac. 706. In that case the mother never relinquished the child voluntarily. It was forcibly taken from her by the child's father, and she immediately set about its recapture and succeeded therein. It was again forcibly taken from her by the father, and as soon as she was able to do so thereafter, and within four years, and immediately following the death of the father, she again undertook its recapture. In the instant case the child was voluntarily relinquished by the mother, with the intention of severing the parental ties, and that intention was adhered to for 10 years.

The trial court also found that appellant failed and neglected to contribute to the child's maintenance or care, she having the ability to do so. The evidence upon this point is not satisfactory, but I think it is legally sufficient to support the finding. It is conceded that appellant did not in fact contribute to the child's support. It is claimed that she was unable to do so by reason of constant illness. But it is conceded that she was sufficiently well to enable her to acquire four successive husbands within a period of about 10 years. It is conceded that during this period she was continuously employed as a trained nurse in one household for a period of two years. It is claimed that she received no compensation for this service other than her "keep." Surely the trial judge was not compelled to believe this.

If this decision is to be rested upon the legal right of a parent to the custody and earnings of a minor child, then, by every consideration of the law of contract, and by every consideration of the equitable doctrine of estoppel, the appellant herein has transferred that right to the respondent herein.

I think that the judgment should be affirmed.

192 Cal. 754
PEOPLE v. WOLFGANG. (Cr. 2569.)

(Supreme Court of California. Dec. 28, 1923.
Rehearing Denied Jan. 24, 1924.)

1. Criminal law §823(6)—Modification of instruction as to right of self-defense held not error, in view of others given.

Modification of a requested instruction as to defendant's right to protect himself against an unwarranted attack, materially lessening its benefit to him, *held* not error, where other instructions fully protected defendant's rights.

2. Criminal law §823(6)—Instruction as to justifiable homicide held not erroneous.

An instruction that if the jury believed beyond all reasonable doubt that defendant killed deceased, without any overt act or physical demonstration on the part of deceased sufficient to warrant defendant, as a reasonable man, in believing that he was in great bodily danger, the killing was not justifiable *held* not error, in view of other instructions given.

3. Criminal law §829(9, 18)—Denial of requested instructions on matters covered by other instructions, though less comprehensive held not error.

Where the court has given instructions, sufficiently and concisely stating the presumption of innocence and defendant's right to an acquittal in case of reasonable doubt, the denial of more elaborate and comprehensive requested instructions on the same subjects is not error.

4. Criminal law §778(11), 1172(2)—Instruction on flight held erroneous, though not reversible error.

An instruction as to the weight to be given evidence of defendant's flight *held* erroneous, as omitting the qualification of knowledge on the part of defendant that he was charged with crime, though not reversible error, where no prejudice appeared.

5. Homicide §311—Instruction as to discretion of jury in fixing punishment held not erroneous.

An instruction as to the right of the jury to exercise the discretion vested in it by Pen. Code, § 190, and determine the punishment to be inflicted on one found guilty of murder, which stated that, unless the evidence showed "some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment," *held* not erroneous as interfering with the jury's discretion in the matter, particularly in view of further instructions given at its request after the jury had deliberated for a time.

6. Criminal law §829(9, 18)—Denial of requested instructions covered by others given not error.

Denial of requested instructions, as to the effect of mere probabilities and upon the doctrine of chances, which had been sufficiently covered in instructions on the presumption of innocence and reasonable doubt, *held* not error.

7. Homicide — 296—Denial of instructions as to authority of deceased to arrest defendant held not error.

In a prosecution for the killing of a policeman after his arrest of defendant, denial of requested instructions, affecting the right of deceased and his companion to arrest defendant, *held* not error, where defendant by his own testimony admitted that the killing took place after the arrest had been accomplished, and narrowed the issue to one of self-defense against an unwarranted assault, thus eliminating any issue as to his right to resist an illegal arrest.

8. Criminal law — 823 (17)—Denial of instruction as to manslaughter held not error in view of other instructions.

Denial of an instruction that a killing committed upon a sudden quarrel or in heat of passion was but manslaughter *held* not error, where the court in another instruction read Pen. Code, § 192, defining manslaughter, and further instructed that the intent to kill "must be formed upon a pre-existing reflection and not upon a sudden heat or passion sufficient to preclude the idea of deliberation."

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Isaac Wolfgang was convicted of murder in the first degree, and he appeals. Affirmed.

W. T. Aggeler and F. H. Vercoe, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and Thos. Lee Woolwine, both of Los Angeles, for the People.

WASTE, J. The defendant was charged with the murder of Oliver Vernon Densmore, a regular patrolman of the police department of the city of Los Angeles. He was convicted of murder in the first degree, and sentenced to suffer the death penalty. From the judgment of the court, and its order denying his motion for a new trial he prosecutes this appeal. He admits that the evidence is sufficient to sustain the verdict of the jury, but relies for a reversal upon alleged errors of the trial court in the giving and refusing of certain instructions, which errors, he claims, vitally prejudiced his substantial rights.

In order that the contentions of the appellant may be the better understood, it is necessary to state the material facts found in the record. The defendant, 54 years of age, and unmarried, resided alone at a rooming house in the city of Los Angeles. According to the testimony of A. H. Rude, a special watchman, at half-past 4 o'clock on the morning of November 24, 1922, defendant was seen to take two bottles of milk from a box in front of a building on the latter's beat. Rude called upon the defendant to halt, but he turned around and ran. He was followed by the special watchman, who was joined

by Policeman Densmore, to whom Rude pointed out the defendant and related what had occurred. Appellant ran into the hallway and started up the stairs of the rooming house. He was closely followed by Policeman Densmore, who was dressed in his regulation blue uniform, with the regular police cap, and wearing his badge. The policeman overhauled the defendant on the stairway leading to the second floor, and Densmore asked him where the milk was. Defendant produced the two bottles of milk and handed them to the policeman, who seized hold of the defendant's overcoat and said, "Come and go with me." The defendant said he would go if first taken to his room for the purpose of getting some money he had there. At first Policeman Densmore refused this request and a struggle ensued, during which the defendant was thrown to the floor, and during which he kicked the special officer. Officer Densmore then used his "sap" on the defendant, striking him on the head. Densmore then consented to the defendant getting his money, and the three went into the room occupied by him, which was dimly lighted by a weak electric light. Defendant walked to a dresser, pulled the drawer open a few inches, took from it an automatic pistol, and, throwing it quickly around, shot Policeman Densmore through the heart. Almost simultaneously with the shot the policeman struck the defendant on the head with his "sap," attempted to draw his own revolver, suddenly relaxed, and fell to the floor. There was a further struggle between the defendant and Rude in an attempt to get the policeman's revolver, which had fallen to the floor. Rude got the gun and, pointing it at the defendant, snapped it twice, but it failed to explode the cartridge. Rude then ran out of the room, returning a few minutes later with assistance summoned from the police station. The defendant had disappeared. Policeman Densmore was lying dead on the floor. The automatic pistol was found under some clothes near the dresser. Some hours later the defendant was arrested when he emerged from the river bed in the Santa Fé railroad yards and asked a switchman how long it would be before he could get a train to Pomona. He said his name was "Fred Edwards." He was carrying an overcoat that was bloodstained. When a policeman raised the defendant's hat there was a clot of blood on his forehead from which blood had run down his face. When asked to account for the blood on the coat and on his face he said he had just arrived in town and had been in a fight with two colored men, one of whom had struck him on the head. He was taken to the scene of the shooting, where he was identified by the landlady as a man who had rented a room from her nearly two months previously, and who registered as "Fred Edwards of Portland, Oregon." The defendant

made conflicting statements to the police officers on the day of his arrest. He first denied having an automatic gun, and then said he had bought it in a pawnshop in Los Angeles three weeks previously. Later he said he had bought it in a pawnshop in Fresno some 8 weeks before. In the midst of these conflicting statements there is the admission of appellant that he knew that the policeman he shot was going to take him to the police station for stealing milk, and that he shot the officer because he did not want to be arrested.

There is no material conflict as to any of the foregoing facts. There is a substantial variance in the evidence as to the manner in which the defendant received certain injuries to his head during the events connected with the shooting and as to the nature of the wounds. The defendant testified that the bumps and cuts on his head were inflicted by Officer Densmore beating him during the scuffle that has been mentioned, some of them having been inflicted while the appellant was lying on the floor; that his skull was fractured and his head split open by the blows from the policeman's "sap"; that after being struck he was "bleeding and dizzy * * * like I was drunk, didn't know anything"; that he was again struck by the officer as he opened the drawer of the dresser to reach for his money; that he turned around and saw the officer [Densmore] reaching for his gun; that he thought it was the intention of Officer Densmore to kill him; and that he thereupon killed the officer before he himself would be killed. The police nurse at the receiving hospital, immediately after the arrest, treated the defendant for injuries consisting of abrasions and swellings on his head. According to his testimony, there was no fracture of the skull and no evidence of any. There was no congestion of the brain, and the injuries were slight flesh wounds, which could have been caused by the appellant falling against some object. The witness Rude testified that during the struggle in the hallway Densmore tapped the defendant lightly on the head with the "sap." As to what occurred in the bedroom he could not say whether the policeman struck the defendant before or after the shot was fired.

"It was so close together, but he [appellant] wasn't struck until after he brought the gun out of the dresser drawer. * * * He brought it out very quick. * * * The shot was fired as soon as the gun come out and the officer struck at the same time."

The autopsy surgeon testified that the bullet that killed Officer Densmore penetrated the heart, and that such wounds usually cause instantaneous death, that a man of the type of Policeman Densmore, receiving a wound of such a nature, would have sufficient muscular power to voluntarily raise his arm after receiving the wound, and that there

are plenty of instances where a gunshot wound through the heart did not result in immediate death, and men have run short distances, raised their arms, and even fired guns after receiving such wounds.

[1] The defendant requested the following instruction:

"You are instructed that, even though the defendant was subject to arrest by the officer, he nevertheless had a right to protect himself from any unwarranted attack, if any made upon him by the officer, and, if the officer suddenly hit the defendant with a blackjack, the defendant had a right to take any course necessary to protect his own life or to defend himself from great bodily injury."

The instruction was modified and given as follows:

"Even though the defendant was subject to arrest by the officer, he nevertheless had a right to protect himself from any unwarranted attack, if any, made upon him by the officer."

Appellant complains that the action of the court so devitalized and emasculated his requested instruction as to render it of no assistance to his case. The court did instruct the jury, however, at the request of the defendant, that every person has a right to resist an unlawful attack upon his person, whether that unlawful attack is made by a private citizen or a police officer, and that the degree of force he may use in resisting such an attack is governed by the force and danger of the attack, and that one unlawfully attacked in such manner as to reasonably appear to endanger his life or limb may resist, even to taking the life of his assailant; and, further, that if the jury believed that Policeman Densmore was making an unlawful attack upon the defendant, and that the attack was such as to make it then appear to a reasonable person, placed in the position of the defendant, that he was in immediate and imminent danger of losing his life or receiving great bodily harm, or, if the jury had a reasonable doubt whether or not such a condition then confronted the defendant, it should give him the benefit of the doubt and return a verdict of not guilty. The jury was also instructed that in determining whether a man exercises his right of necessary self-defense, he must be understood to act on the facts as they appear to him as a reasonable person, and that if, without fault or carelessness, he is misled concerning them and defends himself correctly according to what he in good faith supposes the facts to be, he is justifiable, though the facts are in truth otherwise, and he really has no occasion for the extreme measure. It therefore appears that no harm was done to the defendant by the modification of the requested instruction.

[2] In view of all the instructions given, the court did not err in instructing the jury that if from the evidence it believed—

"beyond all reasonable doubt that, without any overt act or physical demonstration upon the part of the deceased, sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he (the defendant) fired the fatal shot at deceased and killed him, such killing under such circumstances was not justifiable."

[3] Appellant next complains that the court erred in refusing to give two instructions requested by him relating to the presumption of innocence that goes with the defendant through the trial of the case. The court, however, did instruct the jury that the defendant in a criminal action is presumed to be innocent until he is proved to be guilty, and that in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal. Explicit instructions defining reasonable doubt, and stating that the burden of proof is upon the prosecution, were also given. While the instructions given do not repeat and elaborate upon the subject as fully or as comprehensively as those requested by the appellant, they concisely cover the points stated, and were sufficient. *People v. Miles*, 143 Cal. 636, 640, 77 Pac. 686.

[4] The jury were instructed that—

"The flight of a person immediately after the commission of a crime, or after the crime has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case. Evidence of flight is received, not as a part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind; and if you believe from the evidence in this case that the defendant fled from the scene of the offense alleged to have been committed, that is, from the room and house in which the deceased, Densmore, was, it is a circumstance to be weighed by you as tending in some degree to prove a consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant, but the weight to which that circumstance is entitled is a matter for you to determine in connection with all the other facts and circumstances called out in this case."

This instruction omits the qualification that the defendant, at the time of his flight, knew he was charged with the murder of the police officer, and the giving of such an instruction without the qualification of knowledge on the part of the defendant has for a long time been discountenanced by this court. *People v. Jones*, 160 Cal. 358, 369, 117 Pac. 176; *People v. Sainz*, 162 Cal. 242, 246, 121 Pac. 922; *People v. Lee Nam Chin*, 166 Cal. 570, 137 Pac. 917. But, as was said in the latter case (166 Cal. 573, 137 Pac. 918):

"We will not reverse a case solely because such an instruction has been given, unless it appears that the defendant has been prejudiced thereby."

No such prejudice appears in this case.

[5] At the request of the people the jury was instructed that, if in this case they should find the defendant guilty of murder in the first degree, and they also should find the further fact that there was some extenuating fact or circumstance in the case, it was within their discretion to pronounce such a sentence as would relieve him from the extreme penalty of the law. Continuing, the court said:

"The Penal Code invests a jury in a criminal case for murder with the discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows beyond all reasonable doubt the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment."

Appellant asserts that this instruction is erroneous, in that it took away from the jury the right to exercise the discretion vested in it by section 190 of the Penal Code, which, in so far as is material here, provides that—

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same."

Appellant's contention is that, by giving the instruction, the court interfered with the jury's discretion, and in effect told the jury they must find mitigating facts or extenuating circumstances in the case; otherwise the death penalty should be inflicted. Instructions identical with the one given in this case, or so similar as to be the same in effect, have been considered by this court in a number of cases which are reviewed in *People v. Rogers*, 163 Cal. 476, 126 Pac. 143. In that case the court said (163 Cal. 484, 126 Pac. 146):

"The law of this state thus appears to be thoroughly settled to the effect that the instruction in question is not erroneous."

Furthermore, it appears from the record that after the jury retired to deliberate upon its verdict, it came into court and requested a further instruction as to the penalty to follow if in its opinion the evidence proved the crime of murder in the first degree. The trial court thereupon fully and at length explained the discretion resting with it in fixing the penalty at either life imprisonment or a judgment of death, and the manner in which the exercise of such discretion should be evidenced. The right of the jury to exercise the discretion vested in it by the Code section was therefore not invaded by the trial court.

[6] Appellant complains that the court erred in refusing to give certain instructions to the effect that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient, upon the doctrine of chances, that it is more probable that the defendant is guilty, and also that the defendant was not compelled to prove himself innocent. In its instructions concerning the presumption of innocence that attends a defendant in a criminal action, and in its definition and explanation of the term "reasonable doubt," and in explaining where lies the burden of proof, the trial court repeated in almost exact words parts of the requested instructions, and gave all of them in effect. Trial courts are not required to repeat over and over again instructions couched in varying language but embodying the same principle of law. *People v. Bickerstaff*, 46 Cal. App. 764, 775, 190 Pac. 656, opinion of the Supreme Court denying petition for hearing after judgment in the District Court of Appeal.

[7] Appellant contends that the court erred in refusing to give a number of instructions requested by him relating to the authority of Policeman Densmore to arrest the defendant, and under what circumstances arrests are illegal. The court did, however, embody in its charge the substance of the sections of the Penal Code relating to arrests, and by whom and how made. The ruling of the trial court refusing to give the requested instructions was correct. Assuming, without deciding, that the policeman may not have had actual authority, as defined by the Code, to arrest the defendant without a warrant (Pen. Code, § 836), the night watchman, Rude, specially employed to watch the premises from which the milk was stolen, did have such authority, either as a special police officer—provided he was one—or as a private citizen, for the public offense was one committed in his presence. Pen. Code, § 837. Rude also had authority to summon the policeman to aid him in apprehending the defendant, if he deemed it necessary; and it was not necessary to inform the defendant of the intention to arrest him, for

He was pursued and apprehended immediately after the commission of the offense. Pen. Code, §§ 839, 841. For another, and perhaps more cogent, reason the ruling of the trial court was correct. Whether or not either watchman Rude or the decedent, Densmore, had authority to arrest the defendant in the first instance became an unimportant question and an immaterial consideration in the light of subsequent events. By the defendant's own admission he was actually apprehended

and placed under arrest on the stairway of the lodging house. On the demand of the policeman he produced the bottles of milk he had stolen. Policeman Densmore thereupon said to him: "Consider yourself under arrest. You have to come along with me." The defendant replied: "Please let me go in my room and get my money first, and then I go along with you." The policeman at first refused to accede to defendant's request, but finally agreed to take him to the room. When there, the defendant testified, Densmore made an unprovoked assault upon him, and he feared he was about to be killed. He thereupon shot the policeman to save himself. By his own testimony the defendant narrowed the issue to one of self-defense against an alleged unwarranted assault, and entirely eliminated any issue or contention that he shot the policeman while resisting an illegal arrest. He committed the act after being arrested, and while in actual custody of the policeman. In justification of his act he relied upon a plea of self-defense against personal injury or death, and the jury was fully instructed as to his rights in that theory of the case. The requested instructions would have interjected a false quantity into the case, and would have been confusing to the jury.

[8] Appellant also urged that the court erred in refusing to give certain instructions to the effect that, if the jury found the homicide complained of was committed by defendant upon a sudden quarrel or heat of passion, the offense was but manslaughter, and the defendant could not be convicted of any higher crime. In an instruction, given by the court, it read section 192 of the Penal Code, defining manslaughter to be the unlawful killing of a human being without malice, and to be of two kinds, one of which is voluntary—upon a sudden quarrel or heat of passion. It also instructed the jury that intention to kill "must be formed upon a pre-existing reflection and not upon a sudden heat or passion sufficient to preclude the idea of deliberation."

The trial court, in its charge to the jury, taken as a whole, correctly and comprehensively instructed the jury upon all the principles of law applicable to this particular case. It was not required to do more.

The judgment and the order of the trial court denying the defendant's motion for a new trial are, and each is, affirmed.

We concur: MYERS, J.; LENNON, J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 740

DUNNE v. COLOMB et al. (S. F. 10403.)

(Supreme Court of California. Dec. 27, 1923.)

1. Brokers §86(3)—Cancellation of contract by mutual consent entitling broker to commission not shown.

Evidence that, after default of a purchaser of land, the vendor declared a forfeiture and retook possession for a short time, when a new contract was made between the same parties, held insufficient to establish a cancellation by mutual consent of the first contract and the substitution of the second for it, so as to entitle a broker to commission under the first contract, which was contingent on performance by the purchaser, notwithstanding interest under the first contract was paid to the date when the second took effect.

2. Brokers §64(2)—Mutual cancellation after purchaser's default does not entitle broker to commission.

A cancellation by mutual consent of a contract for the purchase of land, after default of the purchaser, does not entitle a broker to recover his commission, which was contingent on performance by the purchaser, on the theory that the vendor has put it beyond his power to perform, the vendor's obligation to carry out the contract in good faith being at an end upon default of the purchaser.

3. Brokers §64(2)—Vendor not required to sue on contract after default of purchaser for benefit of broker.

A vendor, after default of the purchaser, is not required to sue upon the contract in an attempt to recover the purchase price, though such act, if taken, would inure to the benefit of the broker, whose commission was contingent upon performance by the purchaser.

4. Brokers §57(1)—Broker entitled to commission though first contract between parties failed of performance.

Where, after default of the purchaser of land, the vendor declared a forfeiture, and retook possession for a short time, when a new contract was made between the parties, held, that, upon performance of the second contract, the broker whose commission was contingent upon payment by the purchaser would be entitled to recover, the fact that an abortive contract between the same parties preceded the contract actually performed being insufficient to defeat recovery.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. K. Dunne against J. N. Colomb and another. Judgment for plaintiff and defendants appeal. Reversed.

W. H. Spaulding, of San Francisco, for appellants.

Norman A. Eisner, of San Francisco, for respondent.

KERRIGAN, J. [1] This cause is before us after decision by the District Court of Appeal. The judgment of the superior court in favor of the plaintiff was by that court reversed. A further consideration of the questions involved satisfies us of the correctness of the conclusion reached by that court, and we adopt in large part its opinion as expressing our views, which part we quote:

"This appeal is by the defendants from a judgment against them for \$6,875 commission upon the sale of real property owned by defendants. The plaintiff recovered over \$4,000 of the amount of the judgment as a commission directly due to him for producing a purchaser for the property of defendants, and the balance upon an assignment to him of a commission alleged to have been due to Frank Mooradian upon the same transaction.

"By the terms of the written contract between the parties introduced in evidence, the commissions to Mooradian and Dunne were not to be payable until the purchaser paid in full the purchase price for the property. The evidence showed, without conflict, that the purchase price was never paid. Plaintiff contended at the trial and secured his judgment upon the theory that the contract for the purchase and sale of the property, upon which the commission was to be paid, was abandoned by mutual consent of the parties, and another contract substituted therefor; that with this second contract plaintiff is not concerned, but is entitled to his commission, because the defendant, by agreeing to abandon the first contract, was himself the cause of the purchaser's failure to perform the same.

"With all due deference to the rule invoked by respondent and applicable where a conclusion as to facts has been arrived at by a jury upon conflicting evidence, we are unable to find in the record evidence sustaining his theory of the case. The contract between the owners of the property and the brokers was introduced in evidence. It provided that certain commissions were to be paid to said brokers, if a contemplated purchaser, one Hagopian, should enter into a contract for the purchase of the land on conditions and terms satisfactory to the vendors, and if said Hagopian should pay in full the purchase price and considerations for said property. It was admitted by the vendors that Hagopian entered into a contract satisfactory and acceptable to them, by which he agreed to purchase the land for \$175,000. The defendant Colomb was called as a witness for the plaintiff, and testified that Hagopian paid \$10,000 as a first payment under such contract, and the unpaid balance was to bear interest at 7 per cent. This contract was signed on May 29, 1920. By its terms Hagopian was to pay the balance of the principal, \$165,000, on December 1, 1920. The witness Colomb stated that Hagopian was unable to do this, and was in default upon his contract; that thereupon the vendors notified Hagopian that his contract was forfeited. The vendors then went upon the property, and operated it throughout the month of December, 1920. About December 20, 1920, the vendors and Hagopian again negotiated for the purchase and sale of this property. The result of

these negotiations was that a contract was executed some time after the middle of January, 1921, and antedated January 1, 1921, by which Hagopian agreed to purchase the property for \$175,000, and to pay 8 per cent. upon the unpaid balance, and to give as security for the performance of his obligations thereunder a deed of trust upon another ranch owned by him.

"With the positive testimony in the record, standing uncontradicted, that Hagopian was in default under his contract on December 1, 1920, and that notice of cancellation was served upon him, and that the vendors thereupon entered into possession of the property, and later, together with Hagopian, served notice upon the bank that held the papers in escrow that the contract was forfeited by Hagopian and all rights thereunder were at an end, we do not see any basis for the argument of the respondent that the performance of the contract by the purchaser was prevented by the vendors. Apart from this positive testimony of the vendor, the inference from the written documents themselves seems to support appellants' contention. It is incredible that Hagopian would have agreed to abandon his contract of May 29, 1920, under which he had paid \$10,000, and under which he was obligated to pay only 7 per cent. interest upon the unpaid balance, and was obligated to deposit no collateral as security, and enter into another contract by which he was forced to pay \$175,000 with no credit for the \$10,000 already paid, and to pay 8 per cent. interest upon the unpaid balance, and also to give a deed of trust upon other property as security, unless he had forfeited his rights under the more advantageous contract. The positive evidence of Colomb, called as a witness by plaintiff, not only stands uncontradicted that Hagopian forfeited his contract by noncompliance with its terms, but such testimony is corroborated by the action of Hagopian in acceding to the terms of a new contract regarding the same property, much less advantageous to him than the contract of May 29, 1920. Why should not the first contract have been retained by Hagopian, if it had not been forfeited?

"We find no real conflict in the evidence upon this question of forfeiture of Hagopian's rights under the contract. Respondent admits that the testimony of his witness Colomb is that Hagopian forfeited his contract, but seeks to establish a conflict in the evidence so as to sustain the findings by pointing out that the testimony of Colomb was that, although the contract had been forfeited and canceled on December 1, 1920, for noncompliance with its terms, nevertheless Hagopian paid interest upon the balance due thereunder until January 1, 1921, and that the second contract was antedated January 1, 1921, so that the defendants did not lose any interest. Respondent infers from this that the first contract was in effect until the second contract became effective, and that one was merely substituted for the other. It is true the statement above recited regarding the payment of interest appears in the record, but it does not stand unexplained therein. It cannot be taken apart from the explanation which the witness had a right to make and which he did make. He stated that, after the forfeiture of the contract by Hagopian, the vendors took possession of the land, and work-

ed upon it until the time when the property was turned over to Hagopian under the second contract. As they received nothing for their time and labor during the period they were occupying the property, and as the property received the benefit of such labor, the vendors insisted as a condition of entering upon the second contract with Hagopian that he should pay a sum equivalent to interest on the value of the ranch to compensate them for their trouble and loss of time in looking after the property during the period when there was no contract in existence between the parties. This is a reasonable explanation; it stands uncontradicted in the record, and it must be taken in connection with the statement that interest was paid for the month of December. So taken, it creates no conflict, even by possible inference, with the positive evidence of the cancellation of the contract."

[2] But conceding, for the sake of argument merely, that there was some evidence in the case which would justify the jury in finding that the first contract was canceled by mutual consent, such finding, in view of the admitted default of Hagopian, the vendee, affords no foundation for the judgment in plaintiff's favor. The respondent's contention in support of the judgment is that, by consenting to the cancellation of the contract with Hagopian, the defendants voluntarily put it out of their power to perform their obligation to pay to the plaintiff his commission upon full payment by Hagopian of the price of the land, thereby preventing performance, and making absolute that obligation theretofore contingent.

We cannot agree with this contention. To render such cancellation an act of prevention entailing the consequence claimed by respondent it must be without legal justification. Where the vendee is in default, there is no longer any legal obligation on the vendor to proceed with the performance of the contract. The law gives him the right to regard the contract as at an end. The law prescribes no penalty for the exercise of this right. The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a contingency inherent in the contract, the risk of the occurrence of which was assumed by the broker.

The main case relied upon by the respondent in support of his contention, namely, *Ratzlaff v. Trainor-Desmond Co.*, 41 Cal. App. 586, 183 Pac. 269, recognizes this. It is stated in that opinion:

"Respondent [the broker] assumed the responsibility of losing his commission if said Stewart and Harrison [the vendees] defaulted. But he claimed, and still contends, that his commission became due by reason of the default of appellant [vendor], and, manifestly, to take advantage of that default, he must show that he had not already lost his right in consequence of the forfeiture of the said Stewart and Harrison contracts."

That case differs from the one at bar in the essential respect that the vendor there created the default of which the broker availed himself. Apart from this essential difference, there is some broad language used by Justice Burnett, the writer of the opinion, which we think has misled the respondent. It is said in the opinion:

"If appellant consented to such cancellation, it would, of course, by this voluntary act, in a legal sense prevent the payment of the purchase price. The commission contract necessarily implied that appellant would act in good faith and do nothing to prevent, or even discourage or embarrass the completed purchase of the property. Indeed, according to the plainest principles of honesty and fair dealing, appellant was required to do everything possible to promote the purchase of the land by Stewart and Harrison, and thereby to aid in securing the purchase price, to the end that respondent might receive compensation for the services which he had performed."

The authority cited by Justice Burnett for his broad statement of the rule is section 690 (1426) of Bishop on Contracts, and is as follows:

"If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived."

In *Ratzlaff v. Trainor-Desmond Co.*, supra, the vendor put it out of his power to perform by voluntarily assigning the contracts with the vendees, so that thereafter it was not entitled to receive further payments thereon, which payments were the source from which the broker's commission was to be paid. Those sums thereafter were paid to the assignee. The vendees were not in default; but the vendor assigned valid subsisting contracts, thus transferring to another the right to receive installment payments which were to be the source of the broker's compensation. This was correctly held to be a voluntary act, which put it out of the power of the vendor to comply with his contract, namely, to pay over to the broker his commission pro tanto as payments on the contracts were received.

The statement in that case that the vendor must do everything possible to aid in the performance of the contract so as to enable the broker to receive his commissions is not to be held to go so far as to forbid the vendor to exercise a right given him by law. It only purports to mean that the vendor must act in good faith in the carrying out of his own obligation to the vendee. He must loyally abide by his contract. This is apparent from the language of Justice Burnett in the same case, when he says:

"But, by this conveyance and the assignment to said company by appellant of all its in-

terest in said Stewart and Harrison contracts, it waived all interest in the payment of said purchase price, and violated its implied obligation to promote the purchase of the property by Stewart and Harrison. The commission contract clearly contemplated that appellant would not change its attitude toward the property to the detriment of the respondent."

[3] In the case at bar, the duty of the vendors to carry out the terms of their contract in good faith was at an end upon the default of the vendee. They were under no obligation to sue upon the contract in an attempt to recover the purchase price, although such action, if successful, would have inured to the benefit of the broker. *Prince v. Selby, etc., Co.*, 35 Cal. App. 684, 687, 170 Pac. 1075; *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 50 N. Y. Supp. 989; *McPhail v. Buell*, 87 Cal. 115, 25 Pac. 266.

[4] Finally—and still assuming that the respondent is correct in his contention that the evidence supports the conclusion that the cancellation of the contract between the defendants and Hagopian was by mutual consent of the parties—such cancellation under the circumstances of this case did not constitute an act of prevention by the vendors of the performance of their contract with the plaintiff to pay him his commission, since it was immediately followed by the execution of a second contract between them and Hagopian, which falls strictly within the agreement between the defendants and the plaintiff for the payment to the latter of a commission for his services. The fact that it was preceded by an abortive contract between the defendants and the purchaser produced by the plaintiff has no significance. The situation is not different from that which would have existed had the vendee, 24 hours after entering into the first contract, come to the vendors and said: "I find I shall not be able to perform the contract. Will you modify it by extending the time of payment?" and the vendors had agreed to such extension and executed a new contract. Would it then be contended that thereby the broker had lost his right to his commission, or that it was confined to the contingency of full performance of the first contract, or that by the modification the vendors' obligation to pay it became absolute and immediate? We think not. And the fact that six months intervened between the first and second contracts makes no difference in principle. If Hagopian should make full payment for the ranch in accordance with the terms of the second contract, the plaintiff will then be entitled to the commission stipulated for in his agreement with the defendants.

There being, as we have seen, no evidence that the performance of the contract between the plaintiff and the defendants was prevented by any act of the latter, the judg-

ment in favor of the plaintiff is unsupported, and must be reversed. It is so ordered.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; SEAWELL, J.

192 Cal. 704

WRIGHT, City Clerk, et al. v. JORDAN, Secretary of State. (S. F. 10940.)

(Supreme Court of California. Dec. 26, 1923.)

1. Municipal corporations — 34—Duty to file municipal consolidation election returns not affected by pendency of contests.

Pendency of proceedings, to which the secretary of state is not a party, to invalidate municipal consolidation elections, and compel a city clerk to file his certificate of the result, do not excuse the secretary of state's refusal to perform his ministerial duty, under Municipal Consolidation Act, §§ 4 and 5, to file official records of the canvass of the returns and the city clerk's statement of the result.

2. Injunction — 85(1)—Will not lie to restrain secretary of state from filing record of municipal consolidation elections.

In view of Code Civ. Proc. § 526, and Civ. Code, § 3423, prohibiting injunctions to prevent execution of public statutes by officers of the law for the public benefit, an injunction will not lie to restrain the secretary of state from filing records of municipal consolidation elections.

3. Constitutional law — 45—Wisdom of constitutional provision not for Supreme Court to declare.

Whether a limitation on the reserved power of the people, under Const. art. 4, § 1, as amended in 1911, to initiate constitutional amendments, by requiring that amendments submitted at the same election be presented separately as provided by article 18, § 1, in the case of amendments initiated in the Legislature, would have been wise or prudent is not for the Supreme Court to declare.

4. Constitutional law — 9(1)—Constitutional amendment held not void because changes in several provisions were not presented separately.

In view of Const. art. 4, § 1, as amended in 1911, reserving to the people the power to initiate constitutional amendments without any provision for separate presentation, as provided by article 18, § 1, article 11, § 8½ subd. 7, authorizing assumption of the bonded indebtedness of cities annexed or consolidated by majority vote, and Municipal Consolidation Act, as amended in 1915 and 1917 based thereon, are not invalid, because changes effected by such amendment in several constitutional provisions were not presented separately.

5. Constitutional law — 5—Statutes — 159—Provisions may be impliedly repealed by changes in other portions.

Provisions of a Constitution or statute may be impliedly repealed or abrogated by adoption of changes in other portions rendering provi-

sions not expressly repealed obnoxious or ineffective.

6. Municipal corporations — 34—Power to assume bonded indebtedness by majority vote in case of consolidation held not limited to cities formed under Constitution.

Const. art. 11, § 8½, subd. 7, held not intended to provide for assumption of the bonded indebtedness of cities annexed to or consolidated with others by majority vote in municipalities formed under section 8 only, in view of the provision that it shall apply to all annexations or consolidations "under this section or any other section of the Constitution."

7. Constitutional law — 42—Defects in submission of constitutional amendment not available to defeat mandamus proceedings thereunder.

A constitutional amendment submitted in its entirety to, and adopted by majority vote of, the people, who must be assumed to have duly considered and voted intelligently on it, cannot be collaterally attacked by the secretary of state in mandamus proceedings to compel him to file records of elections held thereunder, because of insufficient recitals in instructions to voters or arguments accompanying the text of the proposed amendment.

8. Mandamus — 153—Interveners held not entitled to urge claims being litigated elsewhere.

Interveners cannot broaden the scope or function of mandamus proceedings to compel the secretary of state to file certificate and records of the canvass of a municipal election by urging claims having their proper forum elsewhere and in litigation there.

In Bank.

Application by Allen H. Wright, City Clerk of the City of San Diego, and such City, for writ of mandate to compel Frank C. Jordan, Secretary of State, to file certain documents. Writ granted.

S. J. Higgins, of San Diego, for petitioners.

Jesse George, of San Diego, for intervener.

Leon French, of San Francisco, and Hugh A. Sanders, Sloane & Sloane and F. G. Blood, all of San Diego, for respondent.

RICHARDS, Justice pro tem. The petitioner herein, Allen H. Wright, alleging himself to be the city clerk of the city of San Diego, also petitioner herein, applies for a writ of mandate to compel the respondent herein, as secretary of state of the state of California to forthwith file in his office certain documents purporting to set forth the official record of the canvass of the returns of an election held in the city of San Diego upon the question of a proposed consolidation of the said city of San Diego with the city of East San Diego, together with the official record of the canvass of the returns of an election held in the city of East San Diego upon the same question, together with a statement prepared and duly certified by the said city clerk of the city of San Diego, and by him

transmitted and delivered to said respondent, setting forth the date of each such election and the time and result of the canvass of the returns thereof, and showing that each such election had resulted in a majority vote of the qualified electors of each such municipal corporation in favor of such consolidation. The petitioner further shows that the respondent has refused and still refuses to file such documents and statement in violation of his duty as a ministerial officer of the state of California so to do under the provisions of sections 4 and 5 of the Statutes of 1913, as amended in 1915 and 1917, known as the Municipal Consolidation Act.

The respondent, by his return to the alternative writ of mandate issued herein, admits the averments of said petition as to the official position of the petitioner and as to the due incorporation of the cities of San Diego and East San Diego, and also as to the fact that elections were held in the cities of San Diego and East San Diego, respectively, as set forth in said petition; but the respondent denies that said elections, or either of them, or any of the proceedings taken and had in relation thereto, are valid, for the alleged reason that the Municipal Consolidation Act of 1915, under which said elections were held, is violative of the Constitution of the state of California, in that it permits the assumption of a bonded indebtedness in an annexation proceeding by a mere majority vote, and for the further reason that the petition for said election was insufficient to confer jurisdiction for the calling of such election, in that it did not contain the signatures of one-fourth of the qualified electors residing within the said city of San Diego. The respondent further sets forth in his return to said writ certain legal proceedings, which have been commenced, and are still pending in the superior court of the state of California in and for the county of San Diego, and also certain legal proceedings which have been commenced and are still pending in the District Court of Appeal of the state of California in and for the second appellate district thereof, as additional reasons why he should not comply with the petitioners' demand; and in that behalf alleges that there has been commenced and is now pending in the said superior court in and for the county of San Diego in an action in quo warranto brought by the people of the state of California upon the relation of one Charles H. Harris against the said city of San Diego, wherein the plaintiff therein seeks to have the special elections described in the petition herein, and all proceedings taken and had in connection therewith declared illegal and void, and that the pendency of said action, involving as it is alleged to do, the exact issues raised in the petition herein, is a bar to this proceeding and to the issuance of a writ of mandate herein. The respondent

herein further avers that in said quo warranto proceeding an injunction pendente lite has been issued by said superior court, and is still in full force and effect restraining the city of San Diego and the city clerk thereof and each and every other agent of the said city of San Diego from assuming in any manner any jurisdiction over the city of East San Diego and from interfering with or obstructing in any manner the present or constituted officers and employees of said city of East San Diego in the discharge of their respective functions until the final determination of said quo warranto proceeding; and that by his petition herein the petitioner is seeking to compel the respondent herein to knowingly assist and co-operate with the said petitioners in a willful violation of said restraining order and of the respondent's official duty to regard injunctions issued by a court of competent jurisdiction, in this, that, if respondent accepts and files the certificate of the result of said election, such act by respondent will result ipso facto in conferring jurisdiction upon the officials of the city of San Diego to take over the said city of East San Diego, and deprive the present officers thereof of their offices and authority, and destroy the corporate existence of the said city of East San Diego; and that for this reason this writ should be denied. The respondent also sets forth the fact that there has been commenced and is now pending in the District Court of Appeal of the state of California, in and for the second district thereof, an application for a writ of mandate in a proceeding entitled *Drumhiller et al. v. City of San Diego*, which is an application for a writ of mandate directing the city clerk of the city of San Diego, petitioner herein, to file his certificate as set forth in his petition herein, which proceeding involves the same issues as those presented in this proceeding, and affords to the petitioner herein plain, speedy, and adequate relief; and that the pendency of said cause constitutes a bar to the maintenance of this proceeding and to the issuance of a writ of mandate herein. The respondent further avers that the issuance of said writ by the said District Court of Appeal has been restrained by an alternative writ of prohibition issued out of this court, returnable on the 8th day of January, 1924, and that, if upon said return day said alternative writ of prohibition is dismissed, the petitioners herein will have a sufficient, plain, speedy, and adequate remedy in the said proceeding already pending in the said District Court of Appeal. Wherefore the respondent prays that the petitioners take nothing by the application herein.

Upon the hearing upon the alternative writ of mandate issued herein, certain other parties, including certain electors, property owners, and taxpayers of the said city of East San Diego, and also including the people of the state of California, through the Attorney

General, as plaintiffs in the quo warranto proceedings above referred to, applied for leave to intervene in this proceeding, and to set forth in their respective complaints of intervention herein the matters set forth and alleged in the several proceedings above adverted to as pending in the superior court of the county of San Diego and in the District Court of Appeal. They were permitted so to do; and the matter in its several phases as thus presented was, upon the return day of said alternative writ, argued and submitted to this court for decision, at which time certain considerations were urged upon this court as reasons for a speedy determination of the main issues presented herein, which considerations the court deems adequate.

[1] As to the matters urged by the respondent herein, relating to the existence and pendency of certain proceedings in this court and in the District Court of Appeal and in the superior court of the county of San Diego, we are of the opinion that the existence and pendency of such proceedings, to none of which the respondent herein is a party, do not, and neither of them does, furnish to this respondent in themselves an adequate or legal excuse for his failure and refusal to perform his ministerial duty in the matter of the filing in his office as secretary of state the documents and statement officially presented to him for such filing by the petitioner Wright herein, as city clerk of the city of San Diego. It is admitted by the respondent herein that the documents and statement of the said city clerk conform to the requirements of sections 4 and 5 of the Municipal Consolidation Act, under which they are offered for filing. This being so, his ministerial duty to file the same cannot be affected or interfered with by the fact that other interested parties have seen fit to institute proceedings in the several courts of this state, calling into question the validity of the election in the two municipalities to which such documents and statement relate, since the matters which are presented for litigation in such proceedings are matters with which, in his strictly ministerial capacity, he is neither called upon nor qualified to deal. In the early case of Pacheco v. Beck, 52 Cal. 3, this precise question was determined, wherein it was held that when a board of supervisors has canvassed the returns of an election, and when a record thereof is made and entered upon its minutes and has been duly authenticated and transmitted by the clerk of the board to the secretary of state, it is the duty of that official, upon the face of such record, to estimate the votes given to members of Congress as shown thereby, and that he cannot go behind such certified record in making such estimate or issuing his certificates of election thereon, and that his duty to issue such certificates can be compelled by writ of mandate. This decision has been approved by this court, and fol-

lowed by the District Court of Appeal in the cases of *People v. Stewart*, 132 Cal. 283, 64 Pac. 285; *Napa Union High School District v. Board of Supervisors*, 54 Cal. App. 326, 201 Pac. 948. In the case of *O. & V. R. R. Co. v. Plumas County*, 37 Cal. 354, it was decided that the pendency of proceedings in quo warranto was no defense to a proceeding in mandamus to compel the performance of a ministerial act.

[2] As to the preliminary injunction issued by the superior court in said quo warranto proceeding, it appears from the record herein that said injunction does not purport by its terms or scope to enjoin or otherwise affect the action of the respondent herein in the matter of the filing of the record of said election, but, even if it did purport so to do, and if the said respondent had been a party to said proceeding, it is clear that as to him and his official action such injunction would have no force and effect, in view of the provisions of section 526 of the Code of Civil Procedure, which expressly declares that "an injunction cannot be granted * * * to prevent the execution of a public statute by officers of the law for the public benefit." Section 3423 of the Civil Code contains a similar provision. This court has given precise application to these provisions of the Codes in the cases of *People ex rel. v. Board of Supervisors*, 75 Cal. 179, 16 Pac. 776, wherein it was held that an injunction would not lie to restrain the board of supervisors of a county from giving notice as required by law of the result of an election, on the ground that the election was illegally ordered by the board by reason of their want of jurisdiction. A like application of these provisions of the Codes was given in *Reclamation District, etc., v. Superior Court, etc.*, 171 Cal. 672, 154 Pac. 845.

[3, 4] The respondent makes the final contention that he should not be required to comply with the demand of the petitioner herein, for the reason that the provision of the act of the Legislature of 1915 (Stats. 1915, p. 311) is unconstitutional. This contention has its foundation in the respondent's further contention that the provisions of subdivision 7 of section 8½ of article 11 of the Constitution, upon which the provisions of said statute are based, is itself unconstitutional, for the reason that it was not adopted with the formalities or in the manner required by the provisions of section 1 of article 18 of the Constitution and is therefore itself inoperative and void. Section 1 of article 18 of the Constitution relates to amendments to the Constitution, and is one of its original articles as adopted in 1879. At the time of its adoption, and for many years thereafter, it provided the only method for making amendments to the Constitution, viz. that of initiating such proposed amendments in the Legislature, and, when favorably acted upon by two-thirds of the members

elected to both houses, such proposed amendments were to be submitted to the vote of the people. The article provided that "should more amendments than one be submitted at the same election they shall be so prepared and distinguished by numbers or otherwise that each can be voted on separately." But the people of the state of California, in the year 1911, adopted an amendment to section 1 of article 4 of the Constitution, whereby they reserved to themselves the power to propose and adopt or reject amendments to the Constitution "independent of the Legislature," and by "initiative measure to be submitted directly to the electors." The amendment to article 4 of the Constitution provides an elaborate scheme for the formulation and presentation to the electors of initiative amendments to the Constitution, wherein no such limitation as is embodied in the provisions of section 1 of article 18 of the Constitution can be found. Whether such a limitation upon the reserved power of the people to formulate their own amendments to the Constitution, and to present the same to the electors separately, or in the form of a comprehensive measure effecting several independent changes in the Constitution as it then existed, would have been wise or prudent it is not for this court to declare. It is sufficient to show that no such limitation upon the method of exercising the power of amending the Constitution by initiative measures has been embodied in the provisions of the initiative amendment adopted in 1911, and that we cannot import into the same the provisions of article 18 of the Constitution relating to amendments to the Constitution through their initiation in the Legislature and submission by that method to popular vote.

In the light of this conclusion we approach the question as to the constitutionality of subdivision 7 of section 8½ of article 11 of the Constitution, adopted as an initiative measure by the people under their foregoing reserve of power embraced in the amendment to section 1 of article 4 thereof. Subdivision 7 of section 8½ of article 11 of the Constitution, as thus proposed and adopted by the initiative method, reads as follows:

"In all cases of annexation of unincorporated territory to an incorporated city, or the consolidation of two or more incorporated cities, assumption of an existing bonded indebtedness by such unincorporated territory or by either of the cities so consolidating may be made by a majority vote of the qualified electors voting thereon in the territory or city which shall assume an existing bonded indebtedness. This provision shall apply whether annexation or consolidation is effected under this section or any other section of this Constitution, and the provisions of section 18 of this article shall not be a prohibition thereof."

[5] It is to be noted that the foregoing subdivision of said section of said article 11

of the Constitution as proposed to be amended by this initiative measure is but part of a comprehensive and elaborate change to be made in the Constitution with regard to the organization, government, and enlargement of cities by the incorporation therein of additional territory, by the consolidation of adjacent municipalities, or by the formation of city and county governments. It is true that the amendment as thus presented does effectuate changes in several already existing articles, sections, and clauses of the Constitution, and that these are not presented in the form of separate amendments to be voted upon by the electors; but, as we have already seen, this is not required either by the language or intendments of section 1 of article 4 of the Constitution as amended in 1911. But, independent of this conclusion, we are not at all satisfied that, under a liberal interpretation of section 1 of article 18 of the Constitution, the Legislature might not itself have proposed and presented to the people for their adoption in the form of a single amendment to the Constitution the precise measure embodied in this initiative amendment, even though its effect might be to change or abrogate other portions of the Constitution not embodied in the particular article thereof thus sought to be amended. Such an interpretation of said article is in entire harmony with the well-established principle that certain provisions of a constitution or of a statute may be repealed or abrogated by implication arising out of the adoption of changes in other portions thereof, rendering obnoxious, or ineffective the provisions thereof not expressly repealed.

[6] The respondent further urges that subdivision 7 of section 8½ of article 11 of the Constitution, as the latter was amended in 1914, was not intended by the proponents thereof to provide generally for the annexation of unincorporated territory to cities or for the consolidation of contiguous municipalities, but only to provide for the inclusion of such powers in the charters of such municipalities as might be formed under the provisions of section 8 of article 11 of the Constitution, of which said section 8½ thereof is claimed to be an extension. We cannot adopt this narrow interpretation of said subdivision in said amendment to the Constitution in view of the particular language of said subdivision, by which its provision as to the assumption of bonded indebtedness by either of the cities so consolidated by a majority vote of the electors voting thereon is given application to all annexations or consolidations, whether effected "under this section or any other section of the Constitution."

[7] The criticism which the respondent makes as to the details of the method by which this amendment to the Constitution was adopted constitutes matter which cannot be taken advantage of by him in this pro-

ceeding, since it amounts merely to a collateral attack upon an amendment to the Constitution, which has been adopted by a majority vote of the people, who must be assumed to have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election, and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure. We are of the opinion, therefore, that the contentions of the respondent herein as to the unconstitutionality of the amendment to the Constitution, under which the act of the Legislature was adopted, providing for the election, as to which it is the petitioners' demand that he file the required documents and certificate, are without merit.

We have thus considered the merits of the respondent's said contention, without regard to the petitioners' insistence that the respondent is not entitled to urge the unconstitutionality of the constitutional amendment or of the particular statute under which he is required to act, in a mandamus proceeding, a point which we do not decide.

[8] As to the interveners herein it will suffice to say that, while they were permitted to intervene to the extent and for the purpose of sustaining or opposing the respective contentions of the petitioners and respondents herein, their rights as interveners herein go no further, since they cannot be heard to broaden the scope or function of this special proceeding by urging claims or contentions which have their proper forum elsewhere, and in which forum they are already embattled. *McNeil v. Morgan*, 157 Cal. 373-377, 108 Pac. 69.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

192 Cal. 724

STAFFORD v. MARTINONI (JEWETT, Intervener). (S. F. 10032.)

(Supreme Court of California. Dec. 27, 1923.)

1. Husband and wife ⚭262(1)—Presumptions in support of widow's claim to property as separate estate apply only to time before husband's death.

Presumptions of law in aid of a widow's claim to property acquired during coverture as her separate property apply only to the time before her husband's death, she being chargeable with community property at the time of his death as trustee for the benefit of his estate and heirs.

2. Husband and wife ⚭247—Act declaring property acquired during coverture community property held not modified as to personalty, "conveyed," "conveyance."

The opening clause of Civ. Code, § 164, providing that "all other property acquired after marriage by either husband or wife * * * is community property," was not modified, as relates to acquisition of personalty by succeeding clauses creating the presumption that property "conveyed" to a married woman is her separate property; "conveyed" and "conveyance" referring only to transfers of realty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance.]

3. Husband and wife ⚭249—Personalty acquired during coverture is community property at husband's death.

Under Civ. Code, § 164, personal property acquired during coverture is community property at the date of the husband's death, though standing in the name of the wife, who becomes trustee thereof for the benefit of the husband's estate and heirs, and she or her administrator should be held to an accounting for such property and the investment and proceeds thereof.

4. Husband and wife ⚭262(1)—Nature and effect of presumption that property conveyed to wife is separate property, stated.

The presumption raised by Civ. Code, § 164, that property conveyed to a married woman is her separate property, is binding (Code Civ. Proc. §§ 1961-2061), unless controverted by other evidence, the sufficiency of which is for the court or jury to determine; such presumption being a form of evidence (section 1957).

5. Husband and wife ⚭264—Finding that realty conveyed to wife was separate property held justified.

A finding that property conveyed to a wife during her husband's lifetime was her separate property, though purchased with community funds, *held* justified.

6. Husband and wife ⚭273(2)—Realty acquired by widow from community personalty held community property.

Real property acquired by a widow directly from personalty constituting part of the community estate at her husband's death, *held* community property, and hence the proper subject of an accounting in an action against her administrator.

7. Husband and wife ⚭276(7)—Husband's administrator held entitled to accounting as to community realty set apart to widow.

An administrator of a deceased husband's estate *held* entitled to an accounting as to confessedly community realty, set apart to the widow on her representation that it constituted his entire estate and was worth less than \$1,500.

8. Husband and wife ⚭276(7)—Widow's administrator held to accounting as to what property held by her was community property.

The administrator of a deceased widow *held* to such an accounting to her deceased hus-

band's estate as to realty held by her at his death, other than that conveyed to her during his lifetime, and personalty consisting mainly of notes and mortgages taken by her for loans made after his death, as would disclose what portion was derived from community property at the date of the husband's death.

In Bank.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by William M. Stafford, as administrator of the estate of Charles R. Brown, deceased, against E. Martinoni, as administrator with the will annexed of the estate of Caroline R. Brown, deceased, wherein E. B. Jewett intervened. Judgment for defendant, and plaintiff appeals. Reversed.

W. F. Stafford and Wm. M. Stafford, both of San Francisco, for appellant.

Morrison, Dunne & Brobeck and Herbert W. Clark, all of San Francisco, for respondent.

Clarence E. Todd and Vincent Surr, both of San Francisco, for intervener.

RICHARDS, Justice pro tem. In this action the plaintiff, as administrator of the estate of Charles R. Brown, deceased, brings suit against the defendant as administrator with the will annexed of the estate of Caroline R. Brown, deceased, and in his complaint herein alleges that Charles R. Brown and Caroline R. Brown were, in the lifetime of both, husband and wife; that Charles R. Brown died intestate in the city of Oakland, Cal., on the 8th day of April, 1910; that at the time of his death he was the owner of certain real estate, consisting of certain parcels of land specifically described in said complaint and was also the owner and possessed of a sum of money in excess of \$10,000, all of which real and personal property was the community property of himself and said wife, Caroline R. Brown; that upon his death said Caroline R. Brown took possession of all of the said real estate and personal property and dealt with, controlled, and administered the same thereafter and down to the time of her death on the 21st day of December, 1914, when she died testate; that on the 7th day of November, 1912, said Caroline R. Brown was appointed administratrix of the estate of her deceased husband and duly qualified as such; and that she thereafter filed an inventory and appraisal of the property of her deceased husband's said estate wherein she set forth and stated under oath that the only property belonging to the estate of Charles R. Brown, deceased, was a parcel of land in the county of Fresno, which was appraised in the sum of \$1,450 and which she petitioned the court to set apart to her absolutely, as his widow, under the provisions of section 1469 of the Code of Civil Procedure; that her petition in that regard

was granted by the court having jurisdiction over said estate; that said Caroline R. Brown never during her lifetime accounted otherwise for any other property belonging to the estate of the said Charles R. Brown, deceased, but, on the contrary, by her last will and testament, left all of her property to her own heirs; that upon her death the defendant, herein, E. Martinoni, was appointed administrator with the will annexed of the estate of Caroline R. Brown, deceased, and as such took and holds possession of all of said real estate and personal property for the heirs of said Caroline R. Brown, deceased, who claimed to be the owners thereof; that said Charles R. Brown upon his death left certain heirs whose names are set forth in said complaint; that on the 6th day of December, 1916, the plaintiff herein, Wm. M. Stafford, was duly appointed administrator of the estate of Charles R. Brown, deceased, duly qualified, and has since been acting as such administrator. Wherefore, the plaintiff prays for a judgment declaring that said Charles R. Brown was at the time of his death the owner of an undivided one-half of all of said real estate and personal property as his share of the community property of himself and of his said wife, Caroline R. Brown, and directing that the defendant as such administrator of the estate of Caroline R. Brown, deceased, account to said plaintiff for all of the rents, issues, and profits of said property from and after the date of the death of the said Charles R. Brown, deceased, and for such other and further relief as may be proper in the premises.

The defendant herein, by his answer, specifically denies the averments of the several paragraphs of plaintiff's said complaint in so far as these undertake to set forth the ownership by the said Charles R. Brown of any interest in the real or personal property described in said complaint, and then proceeds to affirmatively allege that all of the real and personal property set forth therein was at all times prior to her death the separate property of the said Caroline R. Brown, and that the same and the whole thereof consisted of property which was held by her before her marriage with said Charles R. Brown or was acquired by her after such marriage by gift, bequest, devise, or descent with the rents, issues, and profits thereof, and that, at the time of her death and for a long time prior thereto, said Caroline R. Brown was the owner in fee simple absolute, and was in the possession as such of all of said real and personal property. The defendant also pleads several sections of the Code of Civil Procedure as a bar to said action under the statute of limitations.

In addition to the foregoing answer of the defendant E. Martinoni, as administrator of the estate of Caroline R. Brown, deceased, one of his heirs appeared and filed, with

permission of the court, a complaint in intervention, wherein he sets forth substantially the same matters as were averred in the complaint of the said administrator.

Upon the trial of the cause, the plaintiff introduced in evidence certain documents and other evidentiary matter tending to show the origin, ownership, and condition of the real and personal properties of Charles R. Brown and Caroline R. Brown during the period between the date of their said marriage and the date of the death of said Charles R. Brown, and also tending to show the dealings of said Caroline R. Brown with respect to said real and personal property after the death of her said husband, and the present condition thereof or of the proceeds thereof. The plaintiff also offered, and there was admitted in evidence, certain statements, acts, and conduct of said Caroline R. Brown, both before and after the date of the death of her said husband, and which were in the nature of admissions against interest. When the plaintiff rested his case, the defendant offered no documentary or oral evidence in support of the denials and averments of their said pleadings, but rested his defense to said action solely upon certain asserted presumptions of law, to be hereafter adverted to, and also upon his plea of the statute of limitations. The trial court, in deciding said cause, upheld the contention of the defendant based upon said presumptions of law, holding that said Caroline R. Brown was, during her lifetime, the owner of the whole of said real and personal property as her sole and separate estate, with the exception of the said Fresno parcel of land, as property either acquired by her prior to her marriage with said Charles R. Brown, or acquired by her after her said marriage with said Charles R. Brown, by gift, devise, or descent; and that as to said Fresno parcel of land she had acquired the same and the ownership thereto under the provisions of section 1469 of the Code of Civil Procedure; and that the said plaintiff as administrator of the estate of said Charles R. Brown, deceased, had no right, title, or interest in said property. The court further found that the action was not barred by the statute of limitations. A judgment was accordingly rendered and entered in the defendant's favor and for his costs. It is from such judgment that this appeal has been taken.

It is the appellant's contention upon this appeal that the findings and decision of the trial court to the effect that said Caroline R. Brown was at the time of, or at any time prior to, the death of her said husband, Charles R. Brown, the owner of all or of any of the real and personal property set forth in said complaint as her sole and separate property, is not supported by the evidence in the case; that in so far as the said defendant's claim of such ownership is based upon an ownership by her of any portion

of said real or personal property prior to her marriage with said husband is concerned, said finding is contradicted by the undisputed evidence to the contrary, and that in so far as the said claim of ownership in said Caroline R. Brown is based upon the presumptions of law solely relied upon by them, said presumptions and the operation and effect thereof as evidence in the case were fully overthrown by the substantial and undisputed evidence educed by the plaintiff upon the trial, and hence were insufficient to furnish any foundation for the findings and judgment in the defendant's favor. The consideration of the appellant's contentions in the foregoing respects requires a brief recital of the practically undisputed facts of the case.

Charles R. Brown and Caroline R. Brown were married in Tombstone, Ariz., on March 17, 1880. At the time of his said marriage Charles R. Brown was conducting a restaurant at said place and was earning therein about a thousand dollars a month. Caroline R. Brown, prior to her marriage, was working for said Charles R. Brown in his said restaurant, and it is clearly shown from the undisputed evidence, including her own statements and admissions, that she had neither money nor property at the time of her marriage with Charles R. Brown. This disposes at the outset of the finding of the trial court that said Caroline R. Brown was the owner of any portion of said real or personal property as her separate property and estate by virtue of having acquired the same prior to her marriage with Charles R. Brown. Subsequent to their said marriage, Charles R. Brown and his wife continued to live for a time in Arizona, but later, and about the year 1886, appear to have removed to Hanford, then in Tulare county, Cal., where they lived between 1886 and 1902, and where for a time Charles R. Brown ran a hotel or boarding house and also purchased and sold real estate. During those years he purchased four separate parcels of real estate, paying therefor in the aggregate \$6,100 and taking the deeds therefor in his own name only. During the same period he sold two pieces of real estate for the sum in the aggregate of \$11,100. During this period also he opened a bank account with the First National Bank of Hanford, where the total amount of deposits between November 16, 1887, and February 4, 1904, amounted to the sum of \$17,224.42. He closed his account at said bank on November 7, 1904. During the period of his residence in Hanford, Charles R. Brown engaged in other transactions of a business character. He borrowed at one time certain money giving as security therefor a mortgage upon real property. This note and mortgage were executed by himself alone. He also granted to the county of Tulare certain rights of way across the lands owned by him, executing

the grant in his own name only. Whatever other transactions in the purchase and sale of real estate were engaged in by him during the period of his residence in Hanford, were all conducted in his own name alone, Mrs. Brown taking no active part in any of the foregoing transactions and having no bank account there in her own name.

In about the year 1902, Charles R. Brown and his wife removed to Elmhurst, Alameda county, where they continued to reside up to the time of his death. Prior to his said removal, certain bank accounts had been opened with the Union Trust Company of San Francisco. The first of these was opened on December 31, 1896, and closed on July 11, 1905. It stood in the name of Charles R. Brown and showed a total deposit in the sum of \$6,176.86. The second of these accounts was opened on June 26, 1899, in the name of Caroline R. Brown, and was also closed on July 11, 1905, showing a total deposit in the sum of \$3,002.73. The third of said accounts was opened May 22, 1903, in the name of C. R. Brown, and was closed on June 1, 1903, showing total deposits in the sum of \$3,800. The C. R. Brown referred to in this account was elsewhere shown to be Charles R. Brown. The fourth of said bank accounts stood in the name of Caroline R. Brown or Charles R. Brown, and was opened January 22, 1906, and closed January 2, 1908, and its total deposits aggregated \$8,308.05. The fifth of said bank accounts was opened November 18, 1905, in the names of Caroline R. Brown or Charles R. Brown, and was closed on January 1, 1906, with total deposits aggregating \$7,214.87. The sources of these several deposits have not been shown, with the exception of one item in the fourth of said accounts which stood in the name of both spouses, which item consisted in a deposit of \$3,000 and which was evidently in the form of a draft drawn in favor of the husband, and which had for its source a payment made by one W. R. Wiles upon a piece of land in Tulare county, owned by Charles R. Brown and sold by him to said Wiles. Some light is thrown upon these several bank accounts by the following facts disclosed by the undisputed evidence in the case. The removal of the Browns from Hanford to Elmhurst was apparently caused by the fact that the husband's health was failing. Whether this failure of health on his part had for its cause a kick on the head which he received from a cow, or was due to some other cause, does not very clearly appear; but it does appear, both from the direct evidence of friends of the family and from the express statements and admissions of Caroline R. Brown, that from a date not long after the removal to Alameda county, Charles R. Brown's failing health and mental powers incapacitated him more and more from attending to his business to a degree which seemed to require that Mrs. Brown

should increasingly take over the active management of their business affairs.

Upon this point there were statements and admissions by her, testified to by several persons who were intimate friends of the family and whose testimony stands unimpeached in the record, which are most significant. These several witnesses testified to conversations held with Mrs. Brown on various occasions with respect to her husband's mental and physical condition during the several years preceding his death, and they may be summarized as showing that Mrs. Brown, beginning not long after the removal to Elmhurst, undertook for the first time to handle actively the business affairs of the family on account of the failing health and incapacity of her husband, and before long assumed entire control thereof, engaging chiefly in the business of loaning money, and finally and for some time before his death conducting her various transactions without consulting her husband and dealing with respect to both her real estate and personal property transactions in her own name, and to the extent that at the time of his death on April 8, 1910, there was no money in any bank account standing in the name of Charles R. Brown, nor was there any real property standing in his name, with the single exception of the Fresno county parcel of land, which was inventoried as constituting the whole of his estate.

[1] In determining the question presented in this case as to how far the presumptions of law relied upon by the respondents herein in support of their claim that the whole of the property, both real and personal, in respect to which an accounting is sought in this action, was to be held the separate property and estate of Caroline R. Brown, it is important to note that the time and state of the properties of both classes to which said presumptions are to be given application, if at all, is that period of time which lies prior to and up to the time of the death of Charles R. Brown, since it is plain that if Caroline R. Brown, as the wife of Charles R. Brown, was not entitled, prior to his death, to the benefit of said legal presumptions investing her with the title to said properties, both real and personal, as her separate property, by reason of the fact that they had come to be placed in her own name, she could not thereafter become entitled thereto by any changes in the form of said properties or of the proceeds thereof so long as these could be identified as being derived from properties held by the community prior to her husband's death; since as to the whole amount of all such properties treated as community property at the time of the death of her said husband she would be chargeable as the trustee thereof for the benefit of his estate and heirs.

[2] Having this evident proposition in mind, it may be well before dealing with

these properties in detail to set forth the two presumptions of law upon which the respondents solely rely in support of their contention that the whole of said properties were separate properties of Caroline R. Brown. The first of these presumptions is that expressly set forth in section 164 of the Civil Code, and upon that clause therein which states:

"Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

The other of said presumptions is the asserted presumption that, when property is purchased with community funds and placed in the name of the wife, it will be presumed to have been a gift from her husband. In determining whether these presumptions can be given application to those properties which had come to be placed in the name of Caroline R. Brown prior to the death of Charles R. Brown, we will first deal with the personal property in the form in which it existed at and prior to the date of the death of Charles R. Brown. As has already been seen, Mrs. Brown had no property prior to her marriage with Charles R. Brown; neither did she acquire any property after her marriage with Charles R. Brown by devise or bequest from any person or by any express gift from Charles R. Brown. Whatever personal property she acquired or held in her own name after her marriage with Charles R. Brown and prior to the date of his death was personal property acquired during the existence of the marriage relation between herself and Charles R. Brown. It must therefore be held to be community property under the first clause of section 164 of the Civil Code, as it read prior to and at the date of the death of Charles R. Brown, unless that portion of said section of the Civil Code can be held to have been modified by the succeeding clauses of said section of the code. If not so modified, it would follow irresistibly that no presumption of any kind could be indulged in which would have the effect of defeating the express language of that portion of said section of the Civil Code. The opening clause of said section of the code reads as follows:

"All other property acquired after marriage by either husband or wife, * * * is community property."

To indulge the presumption that personal property thus acquired and standing in the name of the wife is a gift from the husband and is therefore her separate property, would obviously be to destroy the declared effect of this opening clause of said section 164 of the Civil Code, unless its effect can be held to have been modified as to personal property by the succeeding clauses of said section. It is the contention of the respond-

ents herein that this opening clause of said section 164 of the Civil Code has been modified as to all property, both real and personal, by the succeeding clause thereof, wherein it is stated that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." The scope to be given to this clause in said section of the Code in the way of modifying the preceding clause thereof turns upon the interpretation of the words "conveyed" and "conveyance," as employed in this and in the other clauses of said section which follow after it. It would seem to be obvious, reading these several clauses of said section together, that the terms "conveyed" and "conveyance," as employed therein, have reference only to transfers of real property. Such was the interpretation placed upon these terms as used in said section of the code by this court in the case of *Booker v. Castillo*, 154 Cal. 672, 98 Pac. 1067, wherein it was held that these terms as used therein had reference to real property only. A like interpretation was placed upon these terms as employed in said section in the case of *Peiser v. Bradbury*, 138 Cal. 570, 72 Pac. 165, wherein it was held that a mortgage did not come within the meaning to be given to the term "conveyance" in said section of the code.

It is our conclusion, therefore, that the opening clause of section 164 of the Civil Code, in so far as it relates to the acquisition of personal property by either spouse during coverture, other than by gift, devise, or bequest, has not been modified by the terms of the succeeding clauses of said section, the latter having reference solely to transfers of real estate. The authorities fully support this view. *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216; *Estate of Pepper*, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092; *Rowe v. Hibernia Savings & Loan Soc.*, 134 Cal. 405, 66 Pac. 569; *Fennell v. Drinkhouse*, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361; *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 Pac. 885; *Brenneke v. Smallman*, 2 Cal. App. 306, 83 Pac. 302.

[3] It follows from this conclusion and from the foregoing authorities in support thereof that, as to all of the personal property which was originally the community property of these spouses standing in the name of the husband, but which came during the years between 1902 and 1910 to stand in the name of the wife, said properties were community property at the date of the husband's death. They consisted of five promissory notes, each secured by mortgage, viz.: The note of Chas. Norling, dated February 24, 1909, for the sum of \$1,250; the note of Robert Norling, dated March 16, 1909, for the sum of \$1,000; the note of Hulda Mallett, dated June 6, 1909, for the

sum of \$800; the note of Wm. F. Courtney, dated July 7, 1909, for the sum of \$2,000; and the note of A. H. Illiohan, dated July 7, 1909, for the sum of \$2,200. These notes amount in the aggregate to the sum of \$7,250, and they and the mortgages which secured them were all outstanding on the 8th day of April, 1910, the date of the death of Charles R. Brown, and being community property they became a part of his estate, and standing as they did in the name of his widow, Caroline R. Brown, were held by her in trust for his estate; and they or the proceeds thereof are still so held, and hence should have been accounted for in this action by the administrator of her estate.

The evidence in the case also shows that, in addition to the sums of money which had been loaned by Caroline R. Brown upon the foregoing securities, there was a considerable sum of money which stood in the names of Caroline R. or Charles R. Brown upon the books of several banks during the years between 1905 and 1910, when Charles R. Brown by reason of his failing health and mental powers was retiring from the active management of the community properties and as to which moneys no accounting was ever made by Caroline R. Brown to the estate of her deceased husband. All such moneys were community property, and as to the whole thereof, existing in the form of money or personal property at the time of her husband's death, Caroline R. Brown, upon his death, became the trustee thereof for the benefit of his estate and heirs; and hence she or her administrator should have been held to an accounting therefor and for the investment and proceeds thereof in this action. It follows that, in so far at least as the personal property of the community in being prior to and at the date of the death of Charles R. Brown, the findings of the trial court were erroneous, and hence the judgment based thereon must be reversed as to such personal property.

The next question with which we are called upon to deal is as to the status of the real estate of the community prior to and at the date of the death of Charles R. Brown. Prior to the date of the removal of Charles R. and Caroline R. Brown, his wife, from Hanford to Elmhurst, no real estate stood in the latter's name, nor did it appear that she had any money or personal property in any considerable amount. She had a savings account with the Union Trust Company of San Francisco, opened while she was still residing in Hanford, and with reference to which accretions and withdrawals in sums less than \$50 were from time to time made down to July 11, 1905, when the then balance, amounting to \$3,002.73, was withdrawn and the account closed. She had, so far as the record discloses, no other account or money or personal property on hand prior to the year 1905. On June 9,

1903, the first piece of real estate to be purchased and taken in her name was the lot acquired from H. C. Morris, by deed of that date conveying lots 46 and 47 of the Warner tract, in the county of Alameda, which property, so far as the record discloses, she still held in ownership and possession at the date of the death of Charles R. Brown. The record shows that the purchase price of these lots was the sum of \$500 and that it does not appear to have been derived from any fund on hand in Caroline R. Brown, and it would therefore follow that the purchase price of this property must otherwise have been derived from the community funds which then, with the small exception noted, stood in the name of Charles R. Brown.

The next acquisition of real estate was that of lots 5, 6, 7, and 8 in block A of the Shepardson tract, in Alameda county, purchased from the West End Building Association on July 13, 1905, the deed being taken in the name of Caroline R. Brown and the property still standing in her name at the date of the death of Charles R. Brown in 1910, and also at the date of her death, in 1914, and being one of the tracts of land described in the complaint herein. The purchase price of this property appears to have been \$1,800, which must have been drawn from the community funds of that date. The next purchase of real estate was that from Charles Strum, evidenced by deed dated October 31, 1907, to Caroline R. Brown, conveying a lot 35x80 feet on the corner of Eighth street and Haight avenue, in said county, for a stated consideration of \$1,000. At this time all of the money of the community had been transferred in the bank accounts either to the name of Caroline R. Brown or of Charles R. and Caroline R. Brown, but since these moneys in either name were community property the amount of the purchase price of this property must be held to have been derived from these funds. The only other piece of real property acquired prior to the death of Charles R. Brown was that purchased from B. Alexander by deed dated January 6, 1910, taken in the name of Caroline R. Brown, describing a portion of lot 7 in block B of the Sloane tract, in said county, and which property was still held by Caroline R. Brown at the time of her death and is set forth and described in the complaint herein. The consideration paid for this property is stated to have been \$1,000, which also must have come from the community funds then in the hands of Caroline R. Brown, since there was apparently no other source from which it could have come. As to these four pieces of real estate, acquired during the lifetime of Charles R. Brown, but conveyed to and standing in the name of Caroline R. Brown, it is the contention of the respondents herein that they were and are entitled to the full benefit of the presumption ex-

pressly created by the clause in section 164 of the Civil Code reading:

"But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

The respondents further contend that, where it appears that the purchase price of such real estate was derived from community funds, it will be presumed that the property was intended as a gift to the wife from her husband in order to support the presumption that it was her separate property expressly created by section 164 of the Civil Code. The appellant herein does not dispute the existence of these two presumptions nor their applicability in a proper case to real estate conveyed to the wife during coverture; but the appellant insists that these presumptions are disputable presumptions, and that they are susceptible of application only to cases where there is no substantial evidence in the record to the contrary. *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308; *Holmes v. Holmes*, 27 Cal. App. 546, 150 Pac. 793. Conceding this contention to be correct, we are still confronted with the fact that the trial court has by its findings given full effect to the presumptions upon which the respondents rely and in so doing has treated the evidence in opposition to such presumptions as not sufficiently substantial to overthrow them; and that, therefore, as to the real estate conveyed to Caroline R. Brown in her own name during the lifetime of her husband, such findings of the trial court upon the evidence then before it may be correct, but should, we think, be subject to further consideration and review upon a retrial of the entire cause.

[4] The disputable presumption raised by section 164 of the Civil Code is a form of evidence under the express terms of section 1957 of the Code of Civil Procedure. It may be controverted by other evidence, direct or indirect, but unless so controverted the court or jury is bound to find according to the presumption. Code Civ. Proc. §§ 1961-2061. It is therefore for the court or jury to determine whether or not the evidence against the presumption is sufficient to overthrow it. *People v. Milner*, 122 Cal. 171-179, 54 Pac. 833; *Moore v. Gould*, 151 Cal. 723-726, 91 Pac. 616; *Hitchcock v. Rooney*, 171 Cal. 285-289, 152 Pac. 913.

[5] As to the real property conveyed to Caroline R. Brown during the lifetime of her husband, we are therefore disposed to hold that the finding of the trial court that the same was the separate property of Caroline R. Brown was justified by the existing state of the evidence in the case.

[6] As to so much of the real property described in the complaint herein as was acquired by Caroline R. Brown after the death of her husband, a different question is pre-

sented, since, as to such property, the presumptions relied upon by the respondent based upon the language of section 164 of the Civil Code, and of the cases construing the same, have no application. As to some of said real estate at least, there is positive and incontrovertible evidence going to show that title to it in Caroline R. Brown was derived directly from the personal property which we have found to be a portion of the community estate at the date of the death of Charles R. Brown. For example: The tract of land described in said complaint as lying on the southeasterly line of Grant avenue and consisting of a lot 50x118 feet, in the county of Alameda, was purchased by Caroline R. Brown on May 26, 1913, at foreclosure sale thereof on account of the mortgage given to her thereon by Charles Norling on February 24, 1909, and which mortgage and the note which it secured we have above held to have been a portion of the community assets of Charles R. and Caroline R. Brown. This piece of real estate, being thus identified as derived from that source, must, therefore, be held to have been the proper subject of an accounting herein.

[7] As to the piece of real estate in Fresno county which was set apart to Caroline R. Brown, deceased, upon her representation that it constituted the entire estate of Charles R. Brown and was of the value of less than \$1,500, it would seem that as to this piece of real estate, confessedly community property, and which was thus wrongfully set apart to her, the present administrator of the estate of her deceased husband would be entitled to an accounting in a court of equity.

[8] As to the remainder of the real estate held by Caroline R. Brown at the time of her death, other than that conveyed to her during the lifetime of her husband, and also as to the personal property, consisting in the main of notes and mortgages taken by her for loans made during the four years succeeding the date of her husband's death which she survived him, we think her administrator should be held to such an accounting as would disclose what portion of such real and personal estate, if any, was derived from the community property of Charles R. and Caroline R. Brown as it existed at the date of the death of Charles R. Brown. We think the undisputed evidence in the case sufficient to cast the burden of making such showing upon the administrator of Caroline R. Brown, deceased, since, at the death of her husband, she became the trustee of his portion of the community property for the benefit of his estate and heirs.

The judgment is reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 689

KLATT v. RAILROAD COMMISSION.
(L. A. 7587.)

(Supreme Court of California. Dec. 24, 1923.)

1. Waters and water courses ⇨249—Service charge for surplus water held not to prove well public utility.

Where landowner, who irrigated his own farm from a well, supplied his neighbors when there was a surplus, but such supply depended on whether the owner could spare water, that there was a monetary consideration for the service, when considered with the circumstance that it only paid for the electricity used to run the pump, did not prove that the water was not surplus or the plant a public utility.

2. Waters and water courses ⇨249—Intention to dedicate wells to public use held not proved.

In proceeding to declare water system and pumping plant on private land to be a public utility, notwithstanding agreement of owner to furnish surplus water to neighbors for monetary consideration, unequivocal intention of owner to dedicate it to public use, or conduct indicative of such intention, *held* not proved.

3. Waters and water courses ⇨249—Review limited to question whether dedication was made out.

Probative effect of evidence as to whether there was a dedication of a water system and pumping plant on private land as a public utility is for determination of the Railroad Commission, and an appellate survey is limited to the legal question of whether conceding the facts relied on by the commission to be true a case of dedication is made out.

In Bank.

Original application by C. J. Klatt for certiorari to review an order of the Railroad Commission of California, declaring the water system and pumping plant on petitioner's land to be a public utility. Order annulled.

Scarborough, Forgy & Reinhaus, of Santa Ana, for petitioner.

Hugh Gordon and Carl I. Wheat, both of San Francisco, for respondent.

LAWLOR, J. On January 23, 1923, petitioner, C. J. Klatt, brought this proceeding to review the action of the Railroad Commission in declaring the water system and a pumping plant on his land to be a public utility and subject to its jurisdiction. The complainants were Theodore W. Bose, Flake L. Smith, Robert Gerwing, and John Sebastian, and their application to have the water system declared a public utility was filed on December 31, 1921. At the hearing on January 26, 1922, petitioner made an oral objection that the Commission had no jurisdiction of either the person of petitioner or of the subject-matter, and this objection was based on the claim that no copy of the ap-

plication or summons was ever served upon him in conformity with section 60 of the Public Utilities Act. On March 27, 1922, the Commission filed an opinion and made an order declaring the water system and pumping plant to be a public utility and directing petitioner to resume the service of water for irrigation use to such persons as were formerly served by the pumping plant and that he file a schedule of rates. On April 17, 1922, petitioner applied for a rehearing upon the grounds that the Commission never acquired jurisdiction over his person; that the finding that the water system operated as a public utility subject to the jurisdiction of the Commission is contrary to the evidence; that the uncontradicted evidence conclusively shows "that C. J. Klatt is not a public utility"; that the water system or plant operated by petitioner is not and never had been dedicated to a public use, and that the Commission had no jurisdiction to decree that the pumping plant had ever been dedicated to a public use. An order for rehearing was made on October 5, 1922. On the hearing that followed it was stipulated that the evidence on the first hearing be considered as applying to the second. The only additional evidence on the second hearing related to the service furnished to two consumers under an oral agreement between petitioner and the two consumers, who are not complainants herein; such agreement having for its object the building of a new plant, hereinafter referred to as the "new well" the two consumers to become part owners thereof. In other respects the second opinion and order filed on December 29, 1922, were identical with the first.

It appears the petitioner is the owner of 22.55 acres of land near the city of Santa Ana, Orange county, Cal., which are devoted to the culture of walnuts, apricots, and citrus fruits. The original owner of the property, one H. S. Pankey, first improved the land and developed water thereon, although at the time he purchased it a closed well was on the place. In order to irrigate the property he began a series of experiments with pumps. After developing the water in what is known as the "old well," which was located on the northeast portion of the land, H. S. Pankey laid a main pipe line diagonally to the east; later one to the west. The old well was 10 inches in diameter, 60 feet in depth, and furnished from 35 to 40 inches of water per hour. There were periods when H. S. Pankey was not pumping water for his own use, so he granted permission to several of his neighbors, who were setting out fruit trees, to lay pipe lines to connect with his main pipe line. He testified that the understanding was that they could have the water when he did not

need it for his own purposes—in other words, they could have the surplus water. During the eight or ten years H. S. Pankey furnished his neighbors water from his plant for irrigation purposes, he only allowed them to pump it when he had no use for it himself; and, in order to get the water, the consumer had to apply for it in each instance, each consumer to wait his turn. Under this arrangement a charge of 50 cents per hour on an estimated basis of consumption was made for the service, and it is stated this was later raised to 60 or 65 cents. The price for water was fixed without regard to the depreciation of the plant, interest, cost of operation, and the like. However, H. S. Pankey stated that the amount he collected for water just about paid the electric power bill. It appeared he kept no record of the money collected from the consumers. In January, 1919, he deeded the property to his son, J. H. Pankey, and to his two daughters, Pearl Pankey and Dora Glines. During the year these grantees owned the property water was furnished through the pipe lines to the consumers upon the same conditions and at the same rate.

In January, 1920, these grantees sold the property to petitioner. Before he became the owner he knew of the service of water by his predecessors to the neighbors by means of the system of pipe lines, and was informed that a charge was made for such service. He was also informed that this helped pay the electric power bill. Petitioner furnished water from the old well to the complainants and others, at an increased rate of 85 cents per hour. He continued the service for approximately 18 months, that is, until the latter part of August, 1921. During that summer the old well was only pumping 10 or 15 inches of water per hour so petitioner started to drill the new well. The new well is 24½ feet distant from the old and attained a depth of 386 feet. It is 12 inches in diameter and furnishes 70 inches of water per hour. There is no connection in the source of supply of the water in the old and new well. None of the machinery or material, except a few boards from the old pump house, was used in the new plant. For the purpose of testing the capacity of the new well the pump from the old was temporarily installed therein and thereafter sold before the new well went into operation. Petitioner purchased new equipment and machinery for the new plant. After this well was drilled, but before the new pump was installed, petitioner proposed to the former consumers that they buy into the plant. The proposition was oral and was to the effect that those who wanted water must buy an interest on an acreage basis "in the pumping plant as it now exists" at actual cost, and pay a proportionate share of the expense of operation. Petitioner stated that the ap-

proximate cost of the installation of the plant "as it now stands" was about \$4,200 or \$4,300.

No water has been supplied from the new well to the complainants or to others with the exception of the two neighbors already referred to, who agreed to purchase an interest in the new plant. While no water was supplied from the new well, a stipulation was entered into between petitioner and complainants at the first hearing before the Commission to the effect that petitioner will furnish water to them at \$1.50 per hour, pending the determination of the matter by the Commission, "without waiving any rights he may have in the matter and without conceding the jurisdiction and without prejudicing his rights in any way whatsoever." It appeared on the second hearing that the service was rendered under the stipulation.

The claims of each of the parties are twofold—petitioner contending that the old well was not a public utility and would not have come under the jurisdiction of the Commission, and that the new well is not a public utility and subject to the jurisdiction of the Commission; and respondent insisting that the service from the old well is impressed with a public use, and therefore subject to regulation by the Commission, and that the sinking of a new well did not relieve petitioner from the duty of continuing the service.

The opinion of the Commission states that the original owner furnished water to other ranchers for compensation; that no applicants were ever refused service; that in one instance at least the owner of adjoining land was advised by H. S. Pankey to set out an orchard and assured him he could depend upon the "Pankey plant" for the water required for irrigation; that all water desired by consumers was supplied to them; that the relation of buyer and seller of water was entered into with an apparent understanding that such relations would continue; that the water was supplied upon application by consumers in the order in which the applications were received, and this method does not thereby differ from the usual practice followed in systems of this type; that it was not shown that any consumer was deprived of water or was subjected to undue delay because of the claim that only surplus water was sold or that the use of water by purchasers was though a right which was inferior or secondary to the right of the owner of the plant; that the claim that no profit was made through sales of water is not a material matter, and that the obligation to render service cannot be avoided through changes in location or equipment of the plant at the option of the owner, because, once assumed, the obligation to serve the public continues. The

opinion further states that the only written agreement of record in the matter is a contract, hereinafter detailed, between J. H. Pankey and Myra E. Holderman; that nothing contained therein can be construed to mean that water was furnished as an accommodation, or as a neighborly act, or that the right granted was for surplus water and was inferior or secondary to the right of the owner of the plant; that the possibility that another well might be required was distinctly recognized and it was provided that should the second well be developed the supply of water would be continued; that, if the intention was to sell only surplus water or to sell water only as an accommodation or as a neighborly act, such intention would have been clearly stated. It concludes by stating that:

"A careful consideration of the evidence leads to the conclusion that the proprietor of the original plant willingly assumed the obligation of serving the public; that this obligation was transferred to the respondent [petitioner?] herein when the property was purchased by him; and that service to applicants should be resumed."

The testimony is practically uniform in this case that the understanding throughout was that the consumers could have only the surplus water and take it in the order of their application when the owner was not using it. The witness John Sebastian, however, testified that in the spring of 1918, before he put out his trees and when he asked H. S. Pankey if he could get water, the latter answered: "You can get the water when you want it—that is about the substance of the conversation between Mr. Pankey and I." Sebastian testified later that the trees were planted in the spring of 1919, when the grantees of H. S. Pankey owned the property and furnished him with water. In January, 1920, after petitioner acquired the property the subject of the water was discussed between them. Petitioner was irrigating his own trees at the time, and he told Sebastian that he could have the water after he got through. John Sebastian testified: "That was the agreement all along, that each one go in rotation." He further said the agreement with petitioner was not made at any set time—"it had been handed down"—and that "the system of rotation was a kind of understanding." It is clear from the entire testimony of this witness that when he quoted H. S. Pankey, to the effect that he could have the water when he wanted it, was meant surplus water and that he could have it on the same terms and conditions as the other consumers, namely, when the owner was not using it, and this tallies with H. S. Pankey's testimony that he told Sebastian he could have the water when it was surplus. H. S. Pankey's version is clearly shown by the record:

"Q. You didn't consider the interest on your investment at all? A. Never thought anything about that. Q. Did your own time in caring for the plant—you cared for it yourself didn't you? A. Yes. I turned the water on and let it go. Q. Didn't consider your own time at all? A. Didn't consider my own time because there wasn't much time; only turned the water on when they asked for it. Q. Did you consider depreciation of the machinery or anything of that nature? A. No. Q. And it was understood that all they were to get was your surplus water? A. Yes, sir. Q. If there was no surplus, they would not get any? A. Well, I always told them like this: As long as I have any water to spare you can have it. Q. That was the understanding? A. But there might be another question coming in there. I always told them I expected to have water always. Q. You expected to have water? A. Yes, sir. Q. Now, Mr. Pankey, did you expect to dedicate this water to public use, to the public generally? A. No, sir. Q. Did you intend to serve any portion of the public generally? A. Only in the way I have stated. They could have the water any time I didn't need it."

This is supported by the testimony of Sebastian that he had to wait for the water if it was being used by petitioner for irrigation purposes. With the possible exception of Theodore W. Bose, whose testimony showing his attitude at the hearing we will presently consider, the testimony of the remaining consumers is that they were to have the water when it was surplus and in the order of their application when the owner was not using it. Theodore W. Bose testified he thought he had been furnished the service "through the way of being a public utility" because "there has been water furnished for a good many years to this property that I own." He testified that he produced a contract in response to a remark of petitioner that he (Bose) did not have a "scratch of paper of any kind to show that he must give this water." This discussion arose at the time the proposition to have the consumers purchase shares in the new well was under consideration. The contract, dated October 18, 1917, was executed by J. H. Pankey, party of the first part, and Myra E. Holderman, party of the second part. J. H. Pankey was not the owner of the water supply at the time, but H. S. Pankey, who was the owner, also signed the agreement. Subsequently, the party of the second part transferred the seven acres and assigned the contract to Burr Talbert the immediate grantor of Theodore W. Bose, using the name "Myra E. Coate, formerly Myra E. Holderman." The agreement was to the effect that the party of the first part grants the right to purchase water for the seven acres of land belonging to the party of the second part from the pumping plant which is now and has been supplying water to the same seven acres; that the second party pay for the use of water the same rate per hour

that is paid by the other parties in the same locality purchasing water from the said plant; *that said water be distributed among the various users in the same manner that it has heretofore been used*; and that, should the water in said well become insufficient to justify pumping, the first party shall not be required to furnish water for the seven acres until such time as the water in said well shall increase to a point where a reasonable amount can be pumped therefrom or said first party shall have developed another well on the same premises. The testimony that petitioner did not know of the existence of this contract until it was shown to him by Theodore W. Bose, in August, 1921, after the service had been discontinued, is not contradicted. The contract does not by its terms negative the proposition that the water was to be surplus, but, on the contrary, the clause we have italicized above indicates a continuance of the arrangement for surplus water and the manner of distribution which had been in force since approximately 1909 or 1910. It seems clear that under the contract the party of the second part was to receive surplus water only and that her rights and those of her assigns were the same as the other consumers as to surplus water and the distribution thereof. It follows that the rights of all consumers in these particulars were the same—secondary to those of the owner. This conclusion is strengthened by the fact that the contract did not obligate the owner to sink a new well when the supply of the first was insufficient to justify pumping. It simply provided that in the event a new well were established the party of the second part would be entitled to the water on the former basis. The contract does purport to bind J. H. Pankey, and possibly H. S. Pankey, to furnish water to the party of the second part or her assigns, provided the supply from the old well is sufficient or a new well takes its place. However, Theodore W. Bose testified that he is not relying on the contract but on the claim that the water supply from the new well is a public utility. It does not appear that he ever claimed the plant was a public utility before he testified at the hearing, and he did not claim when the proposal for joint ownership of the new well was broached or at any other time before the hearing that it was a public utility, and he said he never talked with any one about it. He simply "thought" it was a public utility. This is hardly the equivalent of a statement that the plant had been dedicated to a public use. The only claim he made in the conversation with petitioner when the contract was mentioned was "that he [petitioner] didn't have no right to make those changes," meaning the discontinuance of the service.

It appears from the record that before this proceeding none of the consumers ever claimed that the water was furnished from the public utility. Nor was it ever claimed they had a right to demand the service or that the conduct of the owners indicated an intention to dedicate the plant to a public use. The time to have voiced the demand was when petitioner declined to furnish the water to the consumers from the new well, and made the proposal that they all buy shares on an acreage basis. All of them, with the exception of Theodore W. Bose, whose attitude we have already discussed, expressed themselves in favor of the proposition. Later, when it became apparent that they must either accept petitioner's proposal or get no water, they attempted to persuade him to furnish the water in the old manner, even offering an increased rate. In a letter to petitioner, dated November 1, 1921, Theodore W. Bose stated:

"I must say in regard of this water proposition, I haven't absolutely got the money to put in. I would like to, and would surely do it, if I could. I would have told you the other day, when I talked to you, but I didn't have no chance. I have been to a lot of expense moving out here, I wanted to sell my eastern property, but couldn't under the conditions things are, and that put me so short of money. Isn't it possible Mr. Klatt, that you could let me have the water, I would be willing to pay you \$1.25 per hour. I hate to do this, but this is exactly the condition I am in."

Flake L. Smith said he would make arrangements to get the money for his share, and John Sebastian suggested that they try to induce a neighbor of his who owned 20 acres of land to join with them so as to reduce the proportionate cost and expense. John Sebastian testified that he "endeavored to, in a friendly way, show him [petitioner] why he shouldn't cut me or any of us from water; tried to figure and reason with him; that it was all out of the question and really it would be to his advantage to let us have water; I argued along that line, but he continually refused to let me have water. * * *" As already stated, there is no suggestion anywhere in the record that the consumers before the hearing ever claimed the plant to be a public utility, entitling them to demand water as a matter of right.

We quote from the order of the Commission:

"It is hereby found as a fact that the water system operated by C. J. Klatt * * * is a public utility, and that the said C. J. Klatt has been rendering public utility service therefrom, and that such system and service are subject to the jurisdiction of the Railroad Commission of the state of California; and basing its order upon the foregoing findings of fact and upon the other statements of fact contained in the preceding opinion, and upon the evidence adduced

at the original hearing and rehearing herein: It is hereby ordered that C. J. Klatt be and he is hereby directed to resume service of water for irrigation use to such persons as were formerly served by the pumping plant located upon the property of said C. J. Klatt, under such reasonable rates, rules and regulations as may be filed with and approved by this Commission; and it is hereby further ordered that the said C. J. Klatt be and he is hereby directed to file with this Commission, within twenty (20) days after the date of this order, a schedule, setting forth such rates, rules and regulations."

The recent case of *Richardson v. Railroad Commission* (Cal. Sup.) 218 Pac. 418, wherein the order of the Commission was annulled, is very similar in its facts. In that case, in response to the request of neighbors that the owner sell water to them, he stated in each case that he could only supply them out of his own surplus and when the water was not being used elsewhere. Each consumer was to apply to the owner in each instance and get the water in his turn. The service covered the period from 1913 to 1922. As here, each consumer was to lay his own pipe line. The rate for the service was first 75 cents and then \$1 and finally \$1.25 per hour. The owner kept no regular accounts. The net income from the service during the entire period varied, being less in some years and in other years slightly more than his outlay in operating expenses without taking into account the depreciation of his plant by use. It was said in that case:

"It is conceded by both the petitioner and the respondent herein that if, upon the undisputed facts as presented before the Railroad Commission, it appears that the individual or corporation complained of is not a public utility, any decision or order of the Commission declaring him or it to be a public utility is void as beyond the jurisdiction of the Commission and may be assailed and vacated by means of a writ of review. The rule, however, is that if there is any substantial evidence before the Commission in the proceeding thus sought to be annulled, which would justify its findings to the above effect, its order must stand. * * * "That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (*Eminent Domain*, § 164 et seq.), but is the definition repeatedly announced by this court. * * * "The court also and in the quite recent case of *Van Hoosear v. Railroad Commission*, supra [184 Cal. 553, 194 Pac. 1003], quoted with approval the further statement in the *Allen* case that "To hold that property has been dedicated to a public use is no trivial thing," * * * and such dedication is never presumed 'without evidence of unequivocal intention.'"

[1] Referring to the reasons advanced in the opinion of the Commission for holding that the service was of a public utility character this may be said. It is true that no applicant for water had ever been refused it by the successive owners, for it appears there was always a supply of surplus water. In other words, the fact that the water was never refused is entirely consistent with petitioner's theory that the consumers were to have surplus water only. It is a fact that water was not supplied as an accommodation or as a neighborly act, if by those terms is meant that there was no consideration for the water. The water was paid for, and we have seen that the amount received just about paid the cost of electricity used in the operation of the pump and that it did not constitute a return on the investment. The fact that there was a monetary consideration for the service, especially when considered with the circumstance that the receipts only paid for the electricity, does not prove that the water was not surplus or that the plant was a public utility. *Allen v. Railroad Commission*, 179 Cal. 68, 83, 84, 175 Pac. 466, 3 A. L. R. 249. The statement that in one instance H. S. Pankey advised a neighbor to set out an orchard refers to John Sebastian. John Sebastian testified that before he put in his trees he went to H. S. Pankey and "I asked if I could get water, asked him how much it would take for the trees; how far I should furr out; how I should put my trees, because Mr. Pankey had put in an orchard and was a good authority on putting in trees." He also stated that he would not have put money into the orchard except upon the promise of a supply of water; that he could not afford it, and that he would have allowed his land to remain idle but for such promise. H. S. Pankey's version is thus given:

"Q. Did you ever talk to any of them about their setting out their land in trees, Mr. Pankey? A. Why, yes; I talked to Mr. Sebastian. He wanted to know if I could furnish him water if he had orange trees on his ground, and I told him he could have the water when it was surplus."

Assuming John Sebastian was "advised" to plant his orchard by H. S. Pankey, the evidence does not negative the proposition that the water was to be surplus, nor prove, under the circumstances here shown, that H. S. Pankey intended to dedicate the water supply to a public use. Concerning a similar conversation in *Richardson v. Railroad Commission*, supra, the court said:

"The mere recital of this interview should suffice to show its insufficiency as any basis for a finding that the petitioner was thereby intending to declare that his water plant was a public utility, or to dedicate it to the * * * public use as such."

It is idle to hold that the intent was clear on the part of H. S. Pankey to render a continuous and permanent service to the consumers, regardless of whether the supply was more than he needed for his own use or whether the supply gave out entirely, or that it was necessary in order to prevent the plant from becoming a public utility that he notify the consumers the service was but temporary or as a mere accommodation. Nor is the claim of surplus water only disposed of by the argument that there always was in fact such a surplus. It is a sufficient answer to the argument that as the plant was at all times handled as a business proposition it must have been a public utility, to point out that it was a business proposition only in the limited sense that approximately the charge for service was sufficient to defray the cost of electricity. We do not assume that in every case the method of service by rotation would negative dedication; but, when considered with the other circumstances, that conclusion is more consistent than one of dedication based on the testimony of John Sebastian that H. S. Pankey told him he could get the water when he wanted it. It is a fact, as already stated, that the service was not rendered as a mere accommodation or as a neighborly act; but the service did depend on whether the owner could spare the water.

[2] We have thus far considered the matter from the standpoint that surplus water only was to be supplied to the consumers. But under the evidence it would make no difference if the element of surplus water did not enter. For if the engagement comprehended the entire supply of water it would be necessary to prove an unequivocal intention on the part of the owners to dedicate it to a public use, or conduct indicative of such intention. No such proof is shown by the record. There is no evidence upon which a finding that the first well had been operated as a public utility could be based, and, there being no independent dedication of the new well, respondent's contention cannot be sustained.

[3] The law requires that there shall be clear proof of an unequivocal intention to dedicate property to a public use before it can be taken from the owner. In the examination of the evidence we have kept in view the rule that its probative effect is left to the determination of the Commission and that our survey is limited to the legal question whether, conceding the facts relied upon by the Commission to be true, a case of dedication is made out. Giving to such facts their full import (there is no finding of unequivocal intention), we think no more is shown than that for a number of years petitioner and his predecessors in interest furnished water to the consumers under private contracts, and that the record is desti-

tute of any evidence which even tends to show an unequivocal intention or conduct on the part of the owners from which a dedication of the water to a public use can be inferred.

The authorities cited by respondent were considered in the Richardson Case, and no useful purpose will now be served by discussing them. The facts in those authorities showed either an unequivocal intention to dedicate or a dedication by conduct, including dedication evidenced by incorporation under a water act (*Traber v. Railroad Commission*, 183 Cal. 304, 191 Pac. 366), by the invocation of eminent domain (*Producers' Transportation Co. v. Railroad Commission*, 176 Cal. 499, 169 Pac. 59), by application to the Commission for discontinuance of the service (*Van Hoosear v. Railroad Commission*, 184 Cal. 553, 194 Pac. 1003), by application of a private water corporation to the board of supervisors to fix the rates (*Francioni v. Soledad L. & W. Co.*, 170 Cal. 221, 149 Pac. 161), by contract that the rate for water shall be "the rates fixed by law" (*Palermo L. & W. Co. v. Railroad Commission*, 173 Cal. 380, 160 Pac. 228), and where a corporation whose articles of incorporation declare its purposes to be that of utilizing the water of a river for sale for use generally in cities and towns within a certain zone is established; and its contracts expressly provide that the water furnished be subject to "legal rates," and sells water to the general public thereunder; and that contract consumers accepted and paid the rates established by the Commission, the water company as to all of its water users was a public utility, and that such consumers as complained are estopped to deny it (*Brewer v. Railroad Commission*, [Cal. Sup.] 210 Pac. 511). H. S. Pankey developed water on his property in the old well. The neighbors were owners of small tracts of land, and they were allowed to lay pipes and use the water when it was surplus. Each consumer was required to apply for the water, was allowed to take it in his turn, and was never seriously inconvenienced by occasional delays in securing permission to use the water. The service was thus uniformly furnished under these conditions for about ten years. During this period there was no deviation in the arrangement, and there never was any lack of surplus water. The money collected for the service was merely sufficient to pay for the electricity used. No consumer ever questioned the arrangement or claimed that the owner had dedicated the water to the public. When the supply of water from the old well was diminished and the owner proposed that the consumers become part owners in the new well which had been sunk, none of the consumers claimed he was entitled to the service as from a public utility. To de-

clare that the water has been dedicated to a public use is to take the property of petitioner in the absence of intent or act on his part to relinquish his right thereto.

This conclusion renders it unnecessary to consider the scope of the order in connection with the finding—whether it comprehends the entire water supply or the portion thereof which may be surplus.

While it is important that consumers entitled to the service of water shall not be deprived thereof, it is also important that the property of the citizen shall not be taken from him except in the presence of a clear legal necessity.

The points presented call for no further discussion.

Order annulled.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; MYERS, J.; SEAWELL, J.; WASTE, J.

192 Cal. 572

FRANZEN v. SHENK. (L. A. 7243.)

(Supreme Court of California. Dec. 18, 1923.
Rehearing Denied Jan. 17, 1924.)

1. Malicious prosecution §71(2)—Probable cause for jury on conflicting evidence.

Whenever defendant's good faith or his knowledge or belief in a state of facts is an element of probable cause, the court should submit such question to the jury, unless there is no dispute as to the facts.

2. Malicious prosecution §20—Actual and honest belief in guilt of accused element of probable cause.

Good faith, which includes actual and honest belief in plaintiff's guilt, is an element of probable cause, irrespective of advice of counsel, and absence of such belief is a matter to be considered whether appearing in plaintiff's prima facie case, or in the presentation of the defense of probable cause.

3. Malicious prosecution §56—Burden of proving want of probable cause on plaintiff.

Under Code Civ. Proc. § 1981, requiring that evidence in support of an issue be adduced by the party holding the affirmative, the burden is on plaintiff, in an action for malicious prosecution, to show want of probable cause, and defendant may interpose the affirmative defense of probable cause at the conclusion of plaintiff's case.

4. Malicious prosecution §71(2)—Honesty of belief in plaintiff's insanity held for jury.

In an action for malicious prosecution of insanity proceedings, evidence held sufficient to take to the jury the question whether defendant honestly believed that plaintiff was insane when he preferred the charge.

5. Malicious prosecution §64(2)—Evidence of malice may tend to prove want of probable cause.

In an action for malicious prosecution, evidence tending to prove malice may also tend to prove want of probable cause, if it indicates lack of belief by defendant in plaintiff's guilt.

6. Trial §349(1)—Jury's opinion as to probable cause may be obtained by special verdict or hypothetical instructions.

In an action for malicious prosecution, the jury's opinion as to the existence of facts involved in determining probable cause may be obtained by special verdict, which is in many respects the better practice, or by submission of the question with hypothetical instructions as to what facts do or do not amount to probable cause.

7. Witnesses §205—Testimony of attorney as to statements to him by plaintiff to be communicated to defendant held not incompetent as confidential communications.

In an action for malicious prosecution, testimony of attorney as to statements made to him by plaintiff held not incompetent as disclosing confidential communications, where her statements were to be communicated to defendant, and, moreover, it did not appear that plaintiff sought his advice as attorney.

Wilbur, C. J., and Myers, J., dissenting.

On Application for Rehearing.

8. Malicious prosecution §20—Honest belief in guilt not always element of probable cause.

Good faith and an actual honest belief in the guilt of one charged with crime is not always an integral and independent element of probable cause for his prosecution.

Myers and Waste, JJ., dissenting.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Mabel Franzen against A. M. Shenk. Judgment for defendant, and plaintiff appeals. Reversed.

Rehearing denied; MYERS and WASTE, JJ., dissenting.

J. W. Hocker, of Los Angeles, and C. B. Conlin, of El Centro, for appellant.

Ault & Anderson, of Calexico, and K. A. Miller, of Los Angeles, for respondent.

LENNON, J. This case came here on rehearing after decision by the District Court of Appeal, Second District, First Division, the opinion being written in the first instance by Mr. Presiding Justice Conrey. After much consideration of the principal point presented in support of the appeal, we are constrained to hold that the reasoning and the conclusion of Mr. Presiding Justice Conrey clearly and correctly states the law of the case, and therefore we shall adopt his opinion as the opinion of this court. It is as follows:

"This is an action to recover damages for the malicious prosecution of a proceeding wherein, by affidavit filed by the defendant before a justice of the peace, the plaintiff was charged with being an insane person. Upon hearing of said charge after plaintiff's arrest, the proceeding was dismissed. At the trial of the present action the court instructed the jury to render its verdict in favor of the defendant. From the judgment upon verdict in accordance with that instruction the plaintiff appeals.

"The motion for a directed verdict was sustained by the court upon the stated ground that there were sufficient facts uncontroverted to establish that there was probable cause at the time of the filing of the affidavit to warrant any reasonable person in filing an insanity complaint; and that, in filing the affidavit, the defendant was acting upon the advice of counsel after said counsel had been fully informed of all the material facts. Respondent contends that the court was right upon both of these propositions.

"It is admitted that certain business relations had existed between plaintiff and defendant for two or three years prior to November 30, 1920, the date of said affidavit. The plaintiff further claims, and the defendant denies, that there had been illicit relations between them. The defendant is married and has two children. It appears that several months before November, 1920, the defendant canceled a mortgage indebtedness then owing to him by the plaintiff, and gave her \$900, without receiving any consideration therefor. Whether this was a gift, as the plaintiff contends, or whether it was, as the defendant contends, a forced contribution of a blackmailing nature, it is not for us to decide. It does appear that in November there existed some kind of very serious trouble between these parties. The defendant testified that on the night of November 29th the plaintiff had demanded money from him and told him that if he did not comply with this demand 'she would get my children and mutilate them so I would never want to look at them again in my life, and she would get my wife.' Being asked if he considered that she was insane at that time, defendant replied: 'She made these repeated threats, and I could not see how a person—I would say she was insane or unbalanced at times.' Being asked if he ever knew her to have any insane delusions, he replied: 'Only her threats to damage my children.' Mr. Ault, who was the defendant's attorney, testified that on the 30th day of November the plaintiff came to his office and appeared to be very much excited and wrought up; that, among other things, she said that on the night before the defendant had thrown her out of his office and beat her up, and that she was going to get even with him; that she was going to disfigure the defendant's children's faces until he could point to them until his dying day and know that Mabel Franzen put it there; that she would moan and cry and walk the floor, cursing the defendant and making these threats. Mr. Ault testified that he then went down to Mr. Shenk's office, where Mr. Shenk made to him a statement of the events of the night before, and of numerous other circumstances concerning defendant's relations with the plaintiff; that the witness Ault told the defendant what the plaintiff had said to him, and the threats

which she had made. Mr. Bitler, a deputy district attorney, held conversations during the same day both with Mr. Ault and with the defendant. They both advised the defendant that there was reason to believe the plaintiff insane, and advised him to make the affidavit charging her with being an insane person. The justice of the peace, after discussion of the matter with the defendant, gave him the same advice.

"The plaintiff testified that she did not state to the defendant that she would mar or mutilate his children in any way, or do any violence to them, or make in substance any statement of that kind, either to him or to any one else. She testified that she never asked the defendant for money, and that what money he gave her he gave voluntarily.

"Without repeating the testimony in further detail, enough has been stated to show the nature of the situation existing between the plaintiff and the defendant at that time on the plaintiff's theory of the case and, alternatively, on the defendant's theory of the case. There is manifestly a conflict in the evidence relating to the facts from which the existence or want of probable cause for the prosecution of the insanity proceeding must be determined. If in truth the plaintiff had not said to the defendant that she would disfigure the defendant's children and injure his wife, his testimony that she had made such threats to him would be false, and this would have a tendency to destroy the effect of the evidence of his good faith in making the affidavit charging insanity of the plaintiff. From this it would follow that the testimony of Mr. Ault that the plaintiff had made the stated threats in his office, and that he had repeated them to the defendant (when taken in connection with the other testimony to which we have referred, including the plaintiff's testimony), was not sufficient to justify the court in determining for itself the truth concerning that testimony without submitting the issue to the jury for decision. And if the 'advice of counsel,' or of the justice of the peace, was in part based upon a false statement of fact by the defendant, then the advice so given, and followed by the action taken by him pursuant to that advice, does not constitute a defense to this action.

"In an action for malicious prosecution of a criminal charge the rule concerning the determination of the question of probable cause has been stated as follows: 'While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime. Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury, as well as the other facts which, in its opinion, bear upon that issue.' Ball v. Rawles, 93 Cal. 222, 234, 28 Pac. 937, 940 (27 Am. St. Rep. 174).

"The principle thus disclosed is equally applicable to an action to recover damages for malicious prosecution of an insanity charge. It may be that in this case the jury would have believed the defendant's testimony, and would have disbelieved the plaintiff's denial that she had threatened to mar or disfigure the faces of the defendant's children, or to injure his wife. And for the purposes of the present question we assume, without deciding, that the making of such threats would have a tendency to justify belief that the person making such threats was of unsound mind. But it was for the jury, and not for the judge, to determine these facts, which upon the evidence were not admitted and were not undisputed. The defendant testified that when he gave her money and canceled the mortgage of plaintiff in May, 1920, he did it 'to get rid of the annoyance and worry.' If that motive, rather than a genuine belief in the plaintiff's insanity, was the sole cause of his action in filing the affidavit and causing her to be arrested on a charge of insanity, then he was not legally justified in so proceeding. We are not intimating any opinion that he was so influenced. Neither are we concerned with the fact that upon her own showing the plaintiff had been sustaining illicit relations with the defendant, or that, according to some of defendant's witnesses, she had been guilty of such relations with other men. These facts, such as they may be, might affect the amount of a just award of damages for her loss of reputation, or on account of the 'humiliation, shame and mortification' suffered by her if she was wronged by the defendant in the matter of this insanity charge. But in any event, she was entitled to have the facts determined by the jury, to which, by law, the issue should have been submitted."

[1] It will be noted that Mr. Presiding Justices Conrey declares the rule in malicious prosecution cases to be that—

"Although the question of probable cause * * * is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration. Whenever the good faith of the defendant or his knowledge or belief in an existing state of facts in an element of probable cause in determining whether there was probable cause, the court should submit that question to the jury as well as the other facts which, in its opinion, bear upon that issue."

This rule emanates from and is supported by the following cases: *Potter v. Seale*, 8 Cal. 217; *Harkrader v. Moore*, 44 Cal. 144; *Eastin v. Stockton Bank*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 Pac. 65; *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082; *Fleischhauer v. Fabens*, 3 Cal. App. 30, 96 Pac. 17; *Montz v. Nevins*, 40 Cal. App. 202, 180 Pac. 537; *Burke v. Watts*, 188 Cal. 118, 204 Pac. 578; *Stein v. Lacassie*, 189 Cal. 118, 207 Pac. 886.

The rule recited by Mr. Presiding Justice Conrey is, however, subject to the qualification which the foregoing authorities declare and generally agree, in substance and effect, to be that if there is no dispute concerning the existence of the facts relied upon to show probable cause, the trial court must then determine as a matter of law whether such undisputed facts do or do not warrant an inference of probable cause. On the other hand, it is undoubtedly the rule that when the evidence bearing upon the question of probable cause is in conflict in any essential particular, it is the province of the jury to determine whether or not facts exist which will warrant or reject an inference of probable cause. In short, to the extent that there is any dispute as to the existence of facts which may constitute the basis of a finding for or against probable cause such dispute must be submitted to the jury for its determination. *Newell on Malicious Prosecution*, § 9, p. 14.

[2] Good faith is undoubtedly an element of probable cause in malicious prosecution cases, and an actual and honest belief in the guilt of the plaintiff is obviously an integral part of good faith. The actual belief of the defendant in the instant case in the insanity of the plaintiff, based upon all of the facts within his knowledge, must therefore of necessity have been an element of probable cause. In other words, "the belief of the defendant in the guilt of the plaintiff, or, which is the same thing, in the truth of the charge made against that person in the prosecution complained of, is a material element in probable cause," and when "that belief is in issue what such belief was is a question of fact for the jury to determine." This is declared to be the rule in a very carefully prepared note to *Simmons v. Gardner*, L. R. A. 1915D, 79, which reviews all of the authorities on the subject, including many of those cited and referred to herein.

But even if the proposition that the honest belief of a prosecutor in the guilt of the defendant were not declared by numerous authorities, both ancient and modern, to be an element of probable cause, it would seem to be so upon principle, for, as was said in the reasoned and seasoned case of *Broad v. Ham*, decided in 1839 and reported in 132 English Reprints, 1278:

"It would be a monstrous proposition that a party who did not believe the guilt of the accused, should be said to have a reasonable and probable cause for making the charge."

The rule in this behalf is stated in *Fleischhauer v. Fabens*, supra, where it is held, in effect, that the good faith of the defendant is an essential element in the defense of probable cause; and that even though a defendant shows reasonable grounds of suspicion, sufficiently strong in themselves as to warrant a cautious man in the belief that

there was probable cause for the prosecution, nevertheless, if it be apparent that he did not himself believe in the guilt of the accused, then the circumstances upon which he relied will not suffice to shield and vindicate him.

Good faith is an independent element of probable cause which is not limited solely to a defendant's defense that he had probable cause. "The law requires," says Newell, in his work on Malicious Prosecution (page 325, § 11), "that one in instituting a criminal prosecution shall act in good faith or under an honest belief of the guilt of the party arrested and this notwithstanding he has taken legal advice." That this declaration of the rule was not intended by the author to be limited solely to the question of good faith as an element of the affirmative defense of "advice of counsel" is manifested by the very language in which the rule stated is embodied which declares the necessity of "honest belief in the guilt of the party arrested," notwithstanding that the prosecutor may have taken legal advice. This conclusion is fortified by the fact that the caption of the text which deals with the rule declares that there shall be "good faith independent of legal advice." In *Roy v. Goings*, 112 Ill. 656, which was cited to support the rule enunciated in Newell, there was involved the correctness of an instruction which. it was contended, "required too much in saying that appellant must have acted in good faith in starting the prosecution, after having obtained the opinion of the state's attorney—that his advice should protect a party commencing such a proceeding, without reference to good faith." The court held the instruction to be correct, saying, in the course of its opinion:

"The law in all cases requires good faith, or, rather, a belief that the accused is guilty of the crime charged. The person claiming the accused is guilty, may know or believe he is not, although the attorney may suppose he is."

To the same effect is the case of *Vann v. McCreary*, 77 Cal. 434, 19 Pac. 826, wherein it was held that the advice of counsel for the commencement of a prosecution is no defense to an action for malicious prosecution if it appears that the defendant did not believe that the accused was guilty. The case last quoted from was cited with approval in the comparatively recent case of *Murphy v. Davids*, 181 Cal. 706, 186 Pac. 143, where it was said, in effect, that the defendants therein did not have probable cause for the prosecution there complained of because, "knowing as they did that no crime had really been committed," they could not have depended upon the advice of counsel. The court then proceeded to hold that—

"Whether or not defendants acted bona fide upon counsel's advice is a question [of fact] for the jury. (*Potter v. Seale*, 8 Cal. 217.)

Advice of counsel is no defense if the person who pretends that he acted upon it did not believe the accused was guilty."

So, therefore, it would seem to be the settled rule that if it appears anywhere during the trial of the case, whether in the prima facie case made by the plaintiff or in the course of the presentation of the defendant's affirmative defense of probable cause, that the defendant did not actually believe in the guilt of the person charged with crime, then that fact is an essential element to be considered in the determination of the question of whether or not the defendant had probable cause.

Conceding that the quotation from Newell was directed to the question of good faith as an element in the affirmative defense of advice of counsel, nevertheless, the rule declared therein has application to the situation presented in the case at bar for the reason that, as the record before us shows, the trial of the case had proceeded to a point where the plaintiff and defendant had completed their respective cases upon all the issues, including that of probable cause, raised and expressly tendered by the answer of the defendant, which pleaded as well the "honest belief by the defendant" that the plaintiff was insane.

[3] Incidentally it should be noted that in keeping with the Code rule that evidence in support of an issue must be adduced by a party holding the affirmative and that, therefore, the burden of proof rests upon the party who would be denied relief if no evidence were given on either side (*Code Civ. Proc.* § 1981; *Carpenter v. Ashley*, 15 Cal. App. 461, 115 Pac. 268), it was incumbent upon the plaintiff in this case to assume the burden of showing affirmatively the negative fact of want of probable cause in the defendant at the time he caused her arrest. At the conclusion of the plaintiff's case, it was then the privilege of the defendant to interpose the affirmative defense of probable cause, if he deemed it necessary to do so. The instant case had proceeded beyond the point of a nonsuit, and presumably, therefore, the plaintiff had made out a prima facie case. The defendant was sworn and testified as a witness for the plaintiff in her case in chief, and he also took the witness stand and testified in his own behalf, and in so doing evidently supplied whatever deficiency may have been in the plaintiff's case concerning his belief in the insanity of the plaintiff at the time he instituted the prosecution of her upon the charge of insanity. It will thus be noted that in the case at bar no question arises as to where the burden of proof rests in the first instance, and the only question involved is as to when the issue as to the existence of facts bearing upon the question of probable cause must be submitted to the jury for its determination.

Of course, in keeping with the rule above stated, if there had been no evidence whatever from which the jury might have inferred that the defendant did not in fact believe that the plaintiff was insane, the question of his belief should have been determined by the court on the basis of what, under the circumstances, was sufficient to cause a reasonable man to entertain a suspicion of the insanity of the plaintiff.

[4] There is, however, in the record before us sufficient evidence to have justified the jury in finding, had the question been submitted to it, that the defendant did not in fact believe that the plaintiff was insane when he swore to the affidavit charging her with insanity. Thus there is the denial of the plaintiff, which for the moment must be accepted as true, that she did not threaten to mutilate the defendant's children and his family. This denial created an important conflict in the evidence bearing upon the question of defendant's belief in the insanity of the plaintiff. These threats, so the defendant testified, were the only foundation for his belief that the plaintiff was subject to "insane delusions and hallucinations." In addition, there is abundant evidence in the record which tends to impugn the belief of the defendant in the insanity of the plaintiff at the time of the institution of the proceedings which are stated as the basis of the cause of action of malicious prosecution. Thus there is evidence that the plaintiff went to the defendant's office on a certain day at his invitation, and that the defendant then and there said to her:

"Mabel, dear, you remember that you are in business and have a good thing here. Remember what I am telling you. You had better keep still or I will put you where the bowwows won't bark at you."

Certainly this last bit of evidence is some evidence of the fact that the defendant did not in fact believe in the truth of the charge which he had lodged against the plaintiff. Furthermore, there is the testimony of the defendant that when he gave money and canceled the mortgage of the plaintiff in May, 1920, he did it to get rid of the "annoyance and worry." This testimony, when viewed in the light of the meretricious relations, which, it is claimed by the plaintiff, existed, and which, for the purpose of testing the correctness of the trial court's ruling directing a verdict, must be assumed to have existed, might well have justified the jury in finding that the defendant was actuated by a desire to get rid of the plaintiff and to permanently escape "the annoyance and worry" attendant upon her continued attentions, rather than by a genuine belief in the plaintiff's insanity. It cannot, we think, be gainsaid that this evidence, while it may, perchance, have been evidence of malice, was also some proof of the fact

that defendant did not honestly believe in the insanity of the plaintiff when he preferred the charge against her.

[5] There is nothing in the cases of *Potter v. Seale*, *Dawson v. Schloss*, and *Stein v. Lacassie*, supra, holding that both malice and want of probable cause must concur and that want of probable cause cannot be inferred from malice, which runs counter to the conclusion expressed herein. We are not holding that want of probable cause may be inferred from malice, but we are holding that the same evidence which tends to prove malice may also, if it indicates a lack of belief on the part of the defendant in the guilt of the plaintiff, tend to prove want of probable cause. The instruction in the case of *Stein v. Lacassie*, supra, which upon appeal was held erroneous, declared that in the absence of proof of advice of counsel with a fair and full statement of the facts, that a malicious determination of the defendant constituted lack of probable cause. The instruction was clearly erroneous for it, in effect, declared that in the absence of proof of advice of counsel, want of probable cause must be inferred from malice. The criticism made of the instruction was that the defendant may have acted in good faith even though she was acting upon a fixed and malicious determination of her own. This is undoubtedly a just criticism, for malice and lack of belief in the guilt of the accused are not one and the same thing. For example, the defendant, honestly believing in the guilt of the plaintiff, may, with a vindictive motive, prosecute the plaintiff. In such a situation, if, in addition to the honest belief of the defendant in the guilt of the plaintiff, there was the added fact of reasonable grounds for the belief, then there would be probable cause, despite the presence of malice. If, on the other hand, in addition to malice, there was a lack of belief by the defendant in the guilt of the plaintiff, there was want of probable cause, despite the existence of facts which would justify the suspicions of a reasonable man in the guilt of the accused.

[6] The opinion of the jury as to the existence of the facts involved in the determination of probable cause may be obtained in either of two alternative ways. One mode is the use of the special verdict. While this is apparently the less frequent, it is in many respects the better practice. The trial court by this method gets the opinion of the jury as to what facts exist without giving any intimation as to what facts must exist to entitle either party to a judgment. From the facts thus obtained the trial court determines the existence or nonexistence of probable cause as a matter of law.

The prevailing practice, however, seems to be for the trial court to submit the question of probable cause to the jury with hypothetical instructions as to what facts in

the particular case under consideration do or do not amount to probable cause. That is to say, the jury are instructed that if they find certain enumerated facts to exist, there was probable cause, and their verdict must be for the defendant; but, if they find certain other enumerated facts to exist, there was want of probable cause, and their verdict must be for the plaintiff. *Ball v. Rawles*, and other cases supra.

[7] The plaintiff contends that the trial court erred in admitting over her objection the testimony of a Mr. Ault concerning what she said to him. The ground of the objection was that Ault was the attorney for the plaintiff and that whatever she may have said to him was a privileged communication. It is clear that the testimony complained of and objected to does not fall within the category of confidential communications made between attorney and client. This is so because the record shows that whatever was said by the plaintiff to the attorney in question was said with the express understanding that it was to be communicated to the defendant, and, moreover, it does not appear that the plaintiff went to the attorney in question seeking his advice in his capacity as an attorney.

The judgment is reversed.

We concur: **LAWLOR, J.**; **SEAWELL, J.**; **KERRIGAN, J.**

WILBUR, C. J. I dissent. As the case involves an important question concerning the relative functions of court and jury in cases of malicious prosecution, the grounds of my dissent will be somewhat fully stated, and such statement will involve some repetition of the facts as stated in the main opinion.

The trial court instructed the jury to bring in a verdict in favor of the defendant and the plaintiff appeals from that judgment. The defendant had sworn to an affidavit charging the plaintiff with being insane; that is to say, so far disordered in her mind as to endanger health, person, or property. *Pol. Code, § 2168*. Upon the hearing of the insanity charge the commission came to the conclusion that the plaintiff was not insane and the charge was dismissed by the court.

If the testimony of the defendant is believed, there can be no question about the propriety of the instructed verdict. He testified that the plaintiff, without cause, had threatened to mutilate defendant's daughters; that he had stated all the facts in the matter to his attorney and was advised by his attorney and also by a deputy district attorney, a justice of the peace, and a constable that in their opinion the plaintiff was insane and that he should institute a proceeding for her detention as an insane person. The question of whether or not there

is want of probable cause is conceded by the plaintiff to be a question of law to be determined by the court. *Davis v. Pacific Telephone Co.*, 127 Cal. 313, 319, 57 Pac. 764, 59 Pac. 698; *McKenna v. Heinlen*, 128 Cal. 97, 60 Pac. 668; *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 Pac. 611; and cases hereinafter referred to. Where, however, the question of whether or not there was a want of probable cause turns upon disputed testimony, it was for the jury to determine the facts. The burden of proving want of probable cause rests upon the plaintiff. *Potter v. Seale*, 8 Cal. 217, 221; *Grant v. Moore*, 29 Cal. 644; *Levy v. Brannan*, 39 Cal. 485; *Anderson v. Coleman*, 53 Cal. 188; *Jones v. Jones*, 71 Cal. 89, 11 Pac. 817; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Davis v. Pacific Telephone Co.*, 127 Cal. 313, 57 Pac. 764, 59 Pac. 698; *McKenna v. Heinlen*, 128 Cal. 97, 60 Pac. 668; *Lee v. Levison*, 173 Cal. 166, 159 Pac. 498; *Jirku v. Brod*, 42 Cal. App. 796, 184 Pac. 413; *Squires v. Southern Pacific Co.*, 42 Cal. App. 459, 183 Pac. 695.

In the case at bar, as the matter was not submitted to the jury, we must assume that they would have resolved all disputed questions of fact in favor of the plaintiff and upon this assumption determine whether or not the instruction to the jury to return a verdict in favor of the defendant was justified. The most important conflict in the evidence is that between the testimony of the plaintiff and defendant concerning the threats against the defendant's children, to which he testified. The plaintiff denied that she had made such threats to the defendant. The plaintiff testified that she had been maintaining meretricious relations with the defendant for 3½ years; that the defendant during all that time assured her that he loved her and no longer loved his wife and that he wished to get rid of his wife so that he could continue his relations with the plaintiff. The defendant flatly denied such relationship. We must, however, assume the plaintiff's testimony to be true. These assumptions cut two ways. They tend to show malice on the part of the defendant, that is, a desire to get rid of her for reasons wholly personal to himself; on the other hand, these assumed facts tend to show that the plaintiff was in a dangerous frame of mind.

These assumed facts also have another very significant result, in this, that they deprive the defendant of the defense based upon the advice of his attorney, of the justice of the peace and of the district attorney, for, in each instance, he stated to them that the plaintiff had threatened to mutilate his children. Assuming, as we must, that this statement was untrue, he was not entitled to rely implicitly upon their advice to him to institute proceedings and such advice is not a protection to him in instituting that prosecution.

Before stating in greater detail the various undisputed facts and circumstances relied upon by the defendant as constituting probable cause, it is well to state the rule controlling in the determination of whether or not probable cause exists. The test for the determination of the question in the case at bar is whether or not a reasonable man having the information that the defendant had would be justified in entertaining a suspicion that the plaintiff was so far disordered in her mind as to endanger person or property. The conduct of the defendant must be considered in the light of what a reasonable person would be justified in believing or doing, and if a reasonable person having the information which had been brought to the defendant would have been justified in a suspicion that the plaintiff was insane, then his action was justified in law unless the defendant had information or knowledge derived from other sources which would so far offset the suspicious circumstances and facts brought to his attention as to indicate that a reasonable man having all the information which the defendant possessed would not have entertained the suspicion that the plaintiff was insane. See *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 Pac. 611. The trial judge must place himself in the position of the defendant, knowing what he knew and having the information conveyed to him which was presented to the defendant, and ask the question: Would a reasonable man, knowing what the defendant knew and receiving the information that the defendant received, be justified in entertaining a suspicion that the plaintiff was so far disordered in her mind as to endanger her own person or her own health or her own property or the person or health or property of any other person? This must be the rule if the question of probable cause is one of law for the court and not one of fact for the jury. The standard for comparison must be the reasonable man and not the particular person whose conduct is under investigation if the question is one of law.

Defendant's Belief.

There are, however, statements in some of the decisions in this and in other states in apparent conflict with this view, to the effect that the knowledge or belief or the good faith of the defendant is involved in the question of probable cause, as well as in the question of malice. See *Harkrader v. Moore*, 44 Cal. 144, 149, 150; *Runo v. Williams*, 162 Cal. 444, 451, 122 Pac. 1082. These statements, however, must be construed in the light of the fundamental proposition acknowledged and enforced by all the decisions, including the very decisions in which these statements occur, that probable cause upon a given state of facts is a question of law to be determined by the court

(*Harkrader v. Moore*, supra, 44 Cal. 152), and consequently, it follows, to be determined by the standard of the ordinary man, and not by the characteristics or belief of the particular person involved in the controversy. The good faith, the belief, and the knowledge of the defendant are questions of fact and as such necessarily questions to be determined by a jury unless established by uncontroverted testimony or admitted by the defendant or his counsel. There may be cases, however, in which the actual knowledge or belief of the defendant is shown by the evidence. For instance, if the defendant admits that notwithstanding the appearance of guilt on the part of the person prosecuted, he nevertheless was certain that the appearances were deceptive and that the person was innocent, he would not be justified in inaugurating the prosecution, although a reasonable man without such belief would be so justified. Here, however, we encounter another difficulty, namely, that a person of ordinary prudence is not bound to believe in the guilt of a person before he can act, but is justified in causing his arrest, or in instituting the prosecution if upon reasonable grounds he suspects that the person is guilty. If therefore the defendant admits that he had no fixed or definite belief in the guilt of the person prosecuted and was uncertain as to such guilt, but also testifies that he suspected him of the offense, such testimony, if credited, must be sufficient to exculpate him if he had reasonable grounds for his suspicion. For illustration, in the case at bar, if the defendant had admitted that he did not have a definite belief in the insanity of the plaintiff because he did not know enough about insanity to judge of that matter, but also testified that he suspected her of being insane, it follows that if such suspicion was founded on sufficient facts, he would be clearly acting with probable cause, notwithstanding his admission.

Perhaps no better illustration of the inaccuracy of the statement that the defendant must believe in the insanity of the person prosecuted can be presented than is shown in this case, where the defendant was compelled to take some action to protect his children from threatened injury, assuming, for purposes of illustration, that his testimony as to plaintiff's threats against his children is true. If she was insane she could not well be prosecuted criminally, and if the defendant suspected her of insanity it was certainly more reasonable to cause her detention as an insane person than to kill or injure her in defending his wife and children from the threatened injury. His suspicion of her insanity would make action on his part the more necessary, for he could not assume, with such a belief or suspicion, that the threats were the result of anger which would speedily pass away.

The rule established by the authorities upon the subject of belief as an element of probable cause would seem to be this: While the question of probable cause is always a question of law for the court and is to be determined by the standard of the ordinary man, yet if there is affirmative evidence of the actual belief of the defendant sufficient to justify a conclusion that he did not in fact suspect the plaintiff of being guilty of the crime with which she was charged, then the question of probable cause to that extent involves a question of fact to be submitted to the jury. The authorities are reviewed in a recent note to the case of *Simmons v. Gardner*, L. R. A. 1915D, 16, 78, as follows:

"There are some reported cases which appear at first sight to have somewhat relaxed the application of the rule that it is a question for the jury whether the facts brought forward in the evidence be true or not, but that what is reasonable and probable cause is matter of law, by seeming to leave more than the mere question of the facts to be proved to the jury; but upon further examination it is found that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases the reasonableness and probability of the ground for prosecution has depended not merely upon the proof of certain facts, but upon the question whether other facts, which furnished an answer to the prosecution, were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are really so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury whilst at the same time they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse. *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. (N. S.) 545; *Hess v. Oregon German Baking Co.*, 31 Ore. 503, 49 Pac. 803.

"And in *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937, the court said: 'Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that

question to the jury, as well as the other facts, which in its opinion bear upon that issue.' * * *

The author of the note also states:

"C. Belief of Defendant.

"That the belief of the defendant in the guilt of the plaintiff, or, which is the same thing, in the truth of the charge made against that person in the prosecution complained of, is a material element in probable cause, seems to be clearly recognized, either expressly or impliedly, by all the definitions of that defense.

"And the rule is well established that where that belief is in issue, what such belief was is a question of fact for the determination of the jury. * * *

The view I have expressed is not exactly in accord with that stated by the author of this note in the last paragraph quoted above, but is in substantial agreement with his conclusion in the first paragraph quoted, that it is only when there is proof upon the question of the actual belief of the defendant that such question is involved, and that when so involved it is a question of fact for the jury.

The rule is so stated in a recent English case in the Court of Appeal, King's Bench Division (*Bradshaw v. Waterlow & Sons, Ltd.* [1915] L. R. 3 K. B. 527), as follows:

"* * * The question of the honest belief of the defendants should not be left to the jury unless there is evidence of the absence of such belief. * * *

The case of *Blachford v. Dod*, 2 Barn. & Adol. 179, 186, decided in 1831, is quoted from in support of this rule as follows:

"It was not a question of fact for them whether the defendants believed that they had good ground for indicting the plaintiff, but all the material facts being ascertained, it was for the Judge to say whether the defendants had reasonable or probable cause for so doing. * * *

I will presently examine the decisions in this state to show that this rule harmonizes all the decisions, and most of the dicta upon that subject; but, before doing so, for greater clarity, I will consider what sort of evidence would raise the question of fact now under consideration. Evidence of actual ill will, of hostility, of malice, would not alone be sufficient to raise the question of fact as to the defendant's belief, for these elements are always involved in and essential to the other branch of a case of malicious prosecution, namely, malice, and if evidence of malice alone, actual or implied, is sufficient to raise the question of fact as to the defendant's actual belief, then the question of probable cause in every case must be submitted to the jury, and such a conclusion is, of course, in conflict with every decision on the subject. See cases hereinafter cited.

The authorities go no further than this:

That affirmative evidence that the defendant did not in fact believe that the plaintiff was guilty, such as defendant's own testimony or admissions, declarations, or conduct, may require the submission of the question of probable cause to the jury. Let us see if the authorities in this state are in harmony with the rule we have just stated. The rule is in conflict with some of the statements made by the court in the decision of the case of *Ball v. Rawles*, 93 Cal. 222, 234, 28 Pac. 937, 940 (27 Am. St. Rep. 174). It is there said:

"As a principle of law, this instruction was erroneous in omitting to include therein the further element that the defendant did in fact believe that a crime had been committed by the plaintiff. * * * While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime. Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury, as well as the other facts which, in its opinion, bear upon that issue." (Italics ours.)

There is no doubt that these expressions by the court in that case, taken at face value, declare that unless the defendant in fact believed that the person charged was guilty, there was a want of probable cause, and that he must show that he so believed, but, as already seen, the burden of proving want of probable cause is upon the plaintiff. It is equally clear that the question of whether or not the particular individual who instituted the prosecution in fact believed that the crime had been committed is a question of fact, as is stated in the above excerpt from *Ball v. Rawles*, and that if the test in every case is the actual belief of the defendant as distinguished from the belief of a reasonable man, every case would have to be submitted to the jury upon the question of whether or not there was a want of probable cause. This conclusion, however, is directly in the teeth of the principle decided in *Ball v. Rawles*, supra, which was that the question of a want of probable cause was always a question for the judge, and not for the jury; that is, a question of law, and not a question of fact. It was declared there that the question should never be submitted to the jury. The discussion which we have quoted from that decision was provoked by the consideration of an instruction set out on page 233 of 93 Cal., on page 940 of 28 Pac. (27 Am. St. Rep. 174), of the opinion, and the discussion is premised with the following:

"Inasmuch as the question of probable cause is always to be determined by the court from the facts in each particular case, it would seem unnecessary to give to the jury any definition of the term, or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered." (Italics ours.)

The instruction under consideration in *Ball v. Rawles*, supra, so far as related to the point now under discussion, is as follows:

"If the facts which come to a person's knowledge are such as to create a belief that a crime has been committed by the person charged, in the mind of an impartial, reasonable man, this would be sufficient to constitute probable cause for making an arrest, although no crime had in fact been committed." (Italics ours.)

The point that the court is there trying to emphasize in pointing out the vice in this instruction is that it ignores the person's own knowledge of the facts as distinguished from "facts which come to a person's knowledge." This is emphasized by a sentence in the paragraph from which we have heretofore quoted and which we omitted in order to emphasize its importance:

"The circumstances in themselves might be such as ordinarily to create such belief in the mind of a person, yet the defendant might not have that belief, for the reason that he had knowledge of other facts or circumstances which would destroy such belief." (Italics ours.)

The court in *Ball v. Rawles*, supra, again and again declared that the question of a want of probable cause is one for the trial judge as a question of law and not one for the jury, and reversed the case because the trial court had submitted that question to the jury under general instructions defining want of probable cause. In discussing that question the court set out an instruction (93 Cal. 226, 28 Pac. 937, 27 Am. St. Rep. 174), given at the request of the plaintiff, to the effect that if the defendant "did not believe that plaintiff was guilty of any crime, and that he did not have sufficient knowledge, as a cautious and prudent man, acting conscientiously and impartially, to believe the plaintiff guilty of any crime, then, as a matter of law, there was no probable cause for the arrest and prosecution of plaintiff." In commenting upon that instruction the court said:

"These were not the only facts of which evidence regarding probable cause had been given to the jury, and the above instructions given at the request of the defendant left to the jury the function of determining this question. The court should have told the jury, either that the

evidence which was introduced was or was not sufficient to establish a probable cause, or that, as from the evidence they should find the facts which, in the opinion of the court, would or would not be sufficient to show a probable cause, their verdict should be for or against the defendant."

The effect of the decision in *Ball v. Rawles*, supra, is that the question of probable cause is always one for the court, even though it involves the belief of the defendant, thus overlooking the fact that the actual belief of the particular defendant is a question of fact. There was, however, no affirmative proof as to defendant's belief in the evidence. The rule upon the matter of the defendant's belief is thus stated in the later case of *Griswold v. Griswold*, 143 Cal. 617, 620, 77 Pac. 672, in which plaintiff sued the defendant for malicious prosecution in the institution of insanity proceedings. It was there said:

"It was incumbent upon plaintiff to prove both want of probable cause and malice. 2 Greenleaf on Evidence (16th Ed.) § 449. On the other hand, the defendant had the right to prove that he acted in good faith, without malice, and upon probable cause; that is, upon such facts and information as would induce a reasonably prudent man to believe that the plaintiff was insane. *Probable cause has reference to the common standard of human judgment and conduct, and malice refers to the mind and judgment of the defendant in the particular act charged as a malicious prosecution. Malice need not indicate anger or vindictiveness, but it imports bad faith in a malicious prosecution, or the want of sincere belief that the facts and circumstances justify the prosecution.* As said by Chief Justice Redfield in *Barron v. Mason*, 31 Vt. 197: 'For it is found in almost every book upon the subject, that if defendant, however causelessly, did really act in good faith and without malice in preferring the charge, he cannot be made liable for a malicious prosecution.'" (Italics ours.)

The court also said in that case (*Griswold v. Griswold*, supra):

"And so in case a party is insane and dangerous to be at large. It would not do to hold honest parties in heavy damages for an error of judgment. If so it would be difficult to get responsible parties to make complaints. All that the law requires as a defense to this kind of an action is the existence of such facts and circumstances as would induce the belief in the mind of a reasonably cautious man that the party was insane at the time the charge was made. If such facts and circumstances existed, the plaintiff ought not to recover." (Italics ours.)

It was said in *Lee v. Levison*, 173 Cal. 166, 159 Pac. 438:

"This court from the earliest history of the state has adopted the definition for 'probable cause' derived from the discussion in Greenleaf's treatise on Evidence: 'Probable cause is a suspicion founded upon circumstances suf-

ficiently strong to warrant a reasonable man in the belief that the charge is true.'"

This definition was approved in *Potter v. Seale*, 8 Cal. 217, 221, where it was held to be well settled to be a question of law for the court.

Harkrader v. Moore, 44 Cal. 144:

The case of *Harkrader v. Moore*, supra, was an action for malicious prosecution based upon a charge of theft made by the defendant against the plaintiff. Upon the trial of the action for malicious prosecution the defendant "requested an instruction that if the jury should find certain enumerated facts, these would, of themselves, amount to probable cause, and would entitle the defendant to a verdict. These facts were, 'that the defendant had the possession and control of the rails as the agent of the owner, and that plaintiff took said rails and converted them to his own use without the knowledge or consent of the owners or of said defendant, and that plaintiff afterwards denied to defendant that he had taken said rails and endeavored to conceal his act of taking said rails.'" 44 Cal. 149. " * * * The instruction as requested, ignoring, as it did, the actual belief of the defendant at the time he caused the arrest of the plaintiff, and having no reference to the circumstances, or to the appearances of guilt of the plaintiff, then known to the defendant, and under which he laid the charge against the plaintiff, was properly refused." 44 Cal. 151.

The court, in *Harkrader v. Moore*, supra, also discussed another instruction requested by the defendant and refused, to the effect that if they believed from the evidence "that at the time of the alleged prosecution, the facts of which the defendant, Moore, then had knowledge, were sufficient to warrant a reasonable man in the belief that the alleged charge was true, the plaintiff cannot recover in this action." The court criticized and justified its refusal of this instruction because " * * * the defendant may not, in fact, have believed the charge to be true; and if he did not so believe, there could, as to him, be no probable cause for setting the prosecution on foot." See, also, discussion on pages 150, 151, of 44 Cal., supra.

We have quoted the decision thus far somewhat at length because it seems to hold, and it is declared in the syllabus to hold, and is relied upon in the main opinion as holding, that the defendant must, in fact, believe as well as have reasonable grounds for believing at the time that the accusation was made that the charge was well founded. As has been already stated, the actual belief of a particular defendant as to the guilt or innocence of a person is always a question of fact, and can never be a question of law. The logical conclusion to be deduced from the above quoted and cited portions of the opinion in *Harkrader v. Moore* would seem

always to require the submission to a jury of the question of probable cause, because an essential element therein is the actual belief of the actual defendant. But that this was not the view of the court which rendered the decision in *Harkrader v. Moore*, supra, is clear, for, after criticizing the instruction in the manner hereinbefore stated, it is declared that the instruction was erroneous because it submitted to the jury the question of probable cause. The court thereupon proceeded to enunciate the rule that the question of probable cause was a question for the court and not for the jury. Upon that subject the court stated as follows:

"But the proposed instruction is in another respect objectionable. It sought to submit to the jury the question of the existence of probable cause. * * * The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and, therefore, one to be determined by the court. When the facts in reference to the alleged probable cause are admitted, or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause. But in neither case are the jury to determine whether or not the established facts do or do not amount to probable cause."

We thus have in this case two entirely inconsistent declarations, one that the question of probable cause is always a question of law, and the other that probable cause involves the belief of the defendant in the truth of the charge made by him. The difficulty arises in part from the fact that the instruction under consideration instead of reciting the facts which, if known to the defendant, would have justified him as a reasonable man in acting in the belief that the charge was true, left them to determine, first what facts the defendant knew, and, second, whether or not they justified him as a reasonable man in believing the charge to be true. This is pointed out in the decision now under consideration in the following language:

"To inquire whether or not such facts as were known to the defendant were sufficient to warrant him as a reasonable man in the belief that the plaintiff was guilty, is to inquire not only what particular facts were known to him, but also, and at the same time, to determine their legal sufficiency * * * as constituting probable cause."

The basic questions under consideration in that case, then, were whether or not the defendant at the time he instituted the prosecution of the plaintiff had knowledge of the facts, which were relied upon by him on the

trial as a justification for the prosecution, and, if so, whether the jury should be permitted to first determine what the defendant knew about the matter, and then, whether or not such knowledge so found by them justified him as a reasonable man in believing such facts not stated by the court, but to be found by the jury, to be a true charge. It was held that this could not be done.

This case, then, construed as a whole, in effect, declares that the element of the belief of the defendant in the guilt of the person he was prosecuting, in so far as it entered into the question of probable cause, in that case was a question to be determined by the court. We think this case is not in conflict with the true rule to be as we have heretofore stated in this opinion, that the question of the belief of the defendant should be submitted to the jury only where there is evidence concerning the condition of the mind of the defendant which tends to show that he did not in fact believe in the truth of the charge.

Runo v. Williams, 162 Cal. 444, 122 Pac. 1082:

In the case of *Runo v. Williams*, supra, the judgment of the trial court in a case of malicious prosecution was reversed "For the error in refusing to permit defendant to testify directly on the subject of his belief, good faith, and motive in making the criminal charge as bearing on the issues of both probable cause and malice. * * *"

The questions referred to are as follows:

"What was your motive and reason for instituting the criminal prosecution against Mr. Runo?" "Whether in instituting the criminal prosecution you were actuated by malice, hatred, or ill feeling or whether you were actuated by an honest belief that he was guilty of the offense that you charged against him?" "When you instituted the criminal prosecution you honestly believed in good faith that he was guilty of the offense as charged against him?"

In discussing and determining the admissibility of this evidence the court said:

"It is not sufficient that the facts and circumstances were such as would lead a reasonable and prudent man to believe that the offense charged was committed, but it must also appear that he acted upon them in an honest and reasonable belief that the plaintiff was guilty. Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief (*Harkrader v. Moore*, 44 Cal. 144; *Dawson v. Schloss*, 93 Cal. 194 [29 Pac. 31]).

"It is apparent, therefore, that a belief in the guilt of the plaintiff as to the offense charged was one of the relevant and pertinent facts to be shown by the defendant in support of his claim of probable cause in making the accusation.

"Nor can it be claimed that in addition to proof of his honest belief in the guilt of the plaintiff, it is not equally pertinent on the distinct issue of malice for the defendant to show

such belief and his reason, motive, and good faith in making the criminal charge."

In determining the effect of this decision it should be noted that the only question passed upon by the court was the admissibility of the testimony of the defendant's belief when offered by himself for the purpose of defeating the plaintiff's case and of showing that there was no malice in the prosecution but that it was based upon an honest belief of the defendant in the plaintiff's guilt.

The Supreme Court in that decision was not considering the question of the relative functions of the court and jury. It is clear that the answer of the defendant to the questions propounded to him upon the witness stand would have been relevant upon the question of probable cause or malice and favorable to himself if he testified affirmatively in response to the questions, and, on the other hand, if he should testify negatively and thus establish that he acted without belief in the guilt of the plaintiff and with malice, the evidence would be equally competent.

So far, then, as the discussion of the court in that case relates to the belief of the defendant as an element in the question of probable cause, it must be interpreted in the light of the question under consideration. The court does not attempt to decide how the jury in that case should be instructed upon a new trial, but states upon that subject:

"The law is clearly and definitely settled how a jury shall be instructed in the cases of this character," citing in support of that statement the cases of *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Smith v. Liverpool Ins. Co.*, 107 Cal. 433, 40 Pac. 540; and *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463.

There is another line of cases that should be considered in arriving at a conclusion in this case. The rule as to a want of probable cause for a prosecution in this case is the same rule invoked in cases of false imprisonment where the arrest is made without a warrant. See 3 Cal. Jur. 120, § 65; 12 Cal. Jur. 432, § 4; *People v. Kilvington*, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73; *People v. Melendrez*, 129 Cal. 549, 62 Pac. 109. In the case of *People v. Kilvington*, supra, it was held to be the duty of the trial court to determine the question of probable cause for an arrest in a criminal action for false imprisonment. In that decision there is no suggestion that the actual belief of the defendant was material, but the question for determination as there stated is whether or not he had reasonable grounds to believe that the offense had been committed, or, to quote the language of the decision:

"Did the defendant, in view of the facts as presented to him at the time, have reasonable or probable cause to believe that the deceased had committed a felony?" 104 Cal. 92, 37 Pac. 800, 43 Am. St. 73.

In view of the fact that it was held to be error to submit to the jury the question of probable cause in that case, we quote at length from the decision:

"But the court erred in the manner in which it submitted the question of probable cause to the jury. Upon this point the court gave the following instruction: 'It is for the jury to determine from all the facts and circumstances of the case whether the defendant had reasonable cause to believe that a felony had been committed by the deceased. If you find from the evidence that he had such cause for belief, you will then determine whether, in the attempt to arrest the deceased, he used only such means as were necessary to prevent the escape of the deceased, and to effect his arrest.'

"This instruction submitted to the jury the entire question in reference to the existence of probable cause upon the part of the defendant to arrest the deceased, and that body was called upon not only to find whether the facts relied upon by the defendant to show such probable cause were true, but also, if true, to determine whether or not they were legally sufficient for that purpose. The instruction was erroneous, as it is not the province of the jury to decide in any case whether the facts and circumstances which they may find established by the evidence are sufficient to constitute probable cause. This principle of law is now settled beyond doubt or controversy, as a reference to a few of many cases which might be cited on that point will show. 'This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts.' (*Burns v. Erben*, 40 N. Y. 463; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Masten v. Deyo*, 2 Wend. 425; *Pangburn v. Bull*, 1 Wend. 345; *Driggs v. Burton*, 44 Vt. 124; *Panton v. Williams*, 2 Ad. & E. N. S. 169; *Sutton v. Johnstone*, 1 Term Rept. 493, 545.) And our predecessors in passing upon the same question in *Harkrader v. Moore*, 44 Cal. 152, said: 'The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and therefore one to be determined by the court. When the facts in reference to the alleged probable cause are admitted or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause.' The same rule is also announced in *Grant v. Moore*, 29 Cal. 644; *Fulton v. Onesti*, 66 Cal. 575:

and in the late case of *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, where the whole question is elaborately discussed.

"As already stated, the facts in this case were undisputed, and the court ought, therefore, to have instructed the jury as to their sufficiency in law to justify the defendant in attempting to arrest the deceased; that is, *whether they were legally sufficient to induce a reasonable belief in the mind of the defendant that the deceased had committed a felony*. The defendant requested the following charges upon this point: * * * Did the defendant, in view of the facts as presented to him at the time, have reasonable or probable cause to believe that the deceased had committed a felony?"

"There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in *Bacon v. Towne*, 4 Cush. 217: 'There must be such a state of facts,' said he, 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.' Applying this rule to the facts of this case, we think it must be held that the defendant had reasonable cause to believe that the deceased may have committed a felony. * * *" (Italics ours.)

In that later case of *People v. Melendrez*, supra, it was held that the question as to whether or not the defendant in a criminal prosecution for false imprisonment had reasonable ground for belief in the guilt of the person arrested could not be taken from the jury where the court was of the opinion that no such ground existed, but could only be invoked in his favor. The court there referred to *People v. Kilvington*, supra, as follows:

"The court simply applied in favor of the defendant the rule established in civil cases for malicious prosecution or false imprisonment; which is, that to establish probable cause 'there must be such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty.' But this rule has never been applied, as against the defendant in a criminal case, to establish a want of probable cause for a mistaken belief, nor should it be. For in such cases the degree of intelligence evinced by the defendant must always be an important element in determining his guilt. Nor is it reasonable that the same rule should be applied to all of a class, including individuals of all grades of intelligence, from the least to the highest." (Italics ours.)

This case holds there that in civil actions the defendant's conduct is to be judged by the standard of an ordinary man to be determined by the court, but in a criminal action while this rule cannot be invoked against him, it can be invoked in his favor. In a recent civil case for false imprisonment the rule is again stated in *Michel v. Smith*, 188 Cal. 199, 205 Pac. 113, decided by this court in

bank; all justices concurring. The plaintiff had been arrested by the defendants as a deserter. In that case a judgment had been rendered upon a verdict in favor of the plaintiff. This judgment was reversed by us upon the ground that the defendants were justified as a matter of law in making the arrest. It was there stated:

"The question to be decided, then, is this: Did the defendants, under the circumstances related, *have reasonable ground to believe* that the plaintiff was a deserter? Probable cause may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. (*Potter v. Seale*, 8 Cal. 217, 221.) The court must determine, as matter of law, whether the facts and circumstances as they appear, or are found to exist, constitute probable cause. (*McKenna v. Heinlen*, 128 Cal. 97, 100 [60 Pac. 668]; *McCarthy v. De Armit*, 99 Pa. St. 63.)" (Italics ours.)

In that case the plaintiff testified that at the time of the arrest he told the officers that he had notified the local board of his new post office address. This statement, if true, showed that the plaintiff was not a deserter. The officers disputed this testimony. It was held by us that the question of probable cause under the circumstances was one for the court to determine as a matter of law. It seems to me that it might be argued with equal force in that case, as in this, that the question of whether or not the particular officers believed the plaintiff guilty turned upon the question of whether or not they believed the plaintiff's statement to them, in effect, that he was not a deserter. This question of their belief would be a question of fact, but the court held that as reasonable men they were not required to accept the statement of the party about to be placed under arrest, and determined the case upon a consideration of what, under the circumstances, a reasonable man was justified in believing and doing. If the defendant officers were not only required to act upon reasonable grounds for a belief, but also upon an actual belief, the decision in that case was wrong. If the rule in *Michel v. Smith*, supra, conflicts with the earlier cases relied upon in the main opinion, it should control us as the latest decision of this court. If, however, it is consistent with the actual decisions in those cases, as I believe it is, it certainly should be followed, rather than to follow the dicta in our decisions that the belief of the defendant is in all civil cases for malicious prosecution an element of probable cause, and as such must be submitted to the jury. In my opinion the question of the defendant's actual belief should be submitted to the jury only where there is evidence upon the subject of the defendant's actual belief sufficient to support the conclusion that there the defendant did not in fact suspect the plaintiff of guilt, although he had reasonable grounds to do so.

In the case at bar, it seems clear that the defendant was, under all the circumstances of this case, warranted as a reasonable man in suspecting the plaintiff of being insane.

Defendant's Knowledge.

We will next consider the question of the defendant's knowledge as affecting the question of probable cause. Upon the question of the knowledge of the defendant as distinguished from the belief of the defendant, it is clear that the burden of proving what the defendant knew is upon the plaintiff in a case of malicious prosecution, if such knowledge is relied upon to show a want of probable cause. Such proof having been made, the question is whether or not, with the knowledge and information possessed by the defendant, a reasonable man would be justified in instituting the proceedings; that is, would such a man be acting with probable cause? In the case at bar the defendant alone knew of his meretricious relations with the plaintiff. The facts of which they had knowledge persuaded the constable, the district attorney, the justice of the peace, and the defendant's own attorney, all reasonable men, no doubt, that the plaintiff was insane, and they told these facts to the defendant and informed him of their belief, nevertheless, as he alone knew of his meretricious relations with the plaintiff, the question for the consideration of the court is not "did the defendant in fact believe that the plaintiff was or was not insane," but, "would a reasonable man knowing all the facts which were known to the defendant by reason of having them brought to his attention by others and also knowing in addition the facts which he alone knew, namely, that such meretricious relations existed, have reason to suspect as a reasonable man that the plaintiff was insane?"

Good Faith.

The question of good faith is always involved in a case of malicious prosecution, as an element in the question of malice, and when it is shown that the defendant in fact disbelieved the appearances of guilt, it is also an element in the question of probable cause, as heretofore stated.

Public Policy.

The rule that probable cause is a question for the court is based upon consideration of public policy requiring that criminals be prosecuted without the hazard of claim for damages for malicious prosecution where the prosecutor acts upon reasonable grounds. This rule was stated by this court in a case of malicious prosecution growing out of a charge of insanity. *Griswold v. Griswold*, supra, hereinbefore quoted; see, also, note to *L. R. A. 1915D*, p. 89.

The cases all hold that where the facts are disputed, the question of probable cause is

one for the jury to determine upon proper instructions; but this rule, of course, does not apply where, upon the undisputed facts, and a view of the disputed facts most favorable to the plaintiff, the court can say as a matter of law upon such facts that there was probable cause, and in such case a nonsuit or instructed verdict is proper. We are called upon in this case to determine whether upon the most favorable view of evidence, and of the inference to be drawn therefrom to sustain plaintiff's case, it appears that there was probable cause, and in determining that question we will leave the discussion as to the evidence of defendant's belief until the last.

We must thus assume in this case that the defendant testified falsely when he testified that the plaintiff made threats to him to disfigure his children, that he misrepresented the facts when he made a similar statement to his attorney, and that he was influenced by malice in his proceeding against the plaintiff; yet the question still remains as to whether or not a person of ordinary intelligence, that is, a reasonable man, was justified in believing or suspecting from the facts which were known to the defendant and the information given to him that the plaintiff was sufficiently deranged in her mind to be dangerous to herself or others. See *Stein v. Lacassie*, 189 Cal. 118, 207 Pac. 886.

In this connection the undisputed evidence tending to create such a suspicion in the mind of a reasonable man may be stated as follows: The plaintiff at the time was under arrest upon a charge of threatening breach of the peace by reason of having made threats to kill a man named Erskine because Erskine had attached her automobile. This charge arose out of the fact when the constable attempted to make the attachment the plaintiff informed him that she intended to kill the attaching creditor and rushed into her apartment and secured a revolver with which she threatened to commit the murder, but the revolver was taken from her by the constable.

The justice of the peace, after conferring with the deputy district attorney, agreed with the latter that there was no doubt that an insanity charge should be made against the plaintiff and he so informed the defendant. The justice of the peace testified concerning this interview with the deputy district attorney, Mr. Bitler, as follows:

"He had seen her there at the courthouse that day and had observed her actions very closely, and he asked me if I had, and I said 'yes' at various times and particularly that day. He said in his opinion that there was no doubt but what a warrant should be issued or affidavit should be filed and a citation into court for an examination should be issued. Q. On the insanity charge? A. Yes, sir; on an insanity charge. Q. What did you say to him? A. I told him from what had occurred that day, I agreed with him."

With reference to the defendant this witness testified:

"Q. Did you not tell him what your views were and advice was? A. Yes, sir. * * * Q. And that was the same you had given Mr. Bitler? A. Just the same."

This witness also testified that before he had seen the defendant he had formed the opinion that the plaintiff was insane—

"Q. She accused Shenk of being the instigator of the bondsmen going off? A. Yes, sir; she said it was his work. Q. And, now, did you ever have any dealings with insane people? A. Quite a number of cases have come up down here; yes, sir. Q. What would you say, you considered the defendant here insane, didn't you, on that afternoon of that day? A. Yes; I thought she was at that time."

When asked to give the reason for believing she was insane, he testified as follows:

"Q. Tell the jury what you saw her do, the exact things you saw her do and the exact words you heard her say that led you to believe she was insane. A. Well; after she was taken over to the city jail, I passed over that way, and, at some distance, I heard her there singing and hollering and making a disturbance over there; but I could not repeat the exact words she used, because I didn't pay enough attention to them. Q. Do you know whether or not it was her that was hollering there? A. Yes, sir; I knew her voice. * * * Q. So you decided she was insane, did you? A. I don't know that I came to any decision at that time. Yes, sir; I thought to myself she must be off. Q. She must be off; was she off or insane? A. Mentally unbalanced. Q. And what did you consider—you gave it quite a little consideration? A. Naturally, at the time; yes. She was in court at that time. Q. What did you consider was the cause of this insanity? A. I don't know. Q. Trouble with Mr. Shenk? A. I didn't know what was the cause of it. I didn't attempt to learn at that time any cause. I didn't know enough to know what the trouble was that she was having with Shenk."

The witness in giving his reason for discharging her on the charge of threats to kill:

"I found that in my opinion there was no danger of her killing Dad Erskine and of carrying out her threat to kill."

He further testified:

"My recollection of it (the evidence) is that she said she didn't mean what she said when she said, 'I will kill him.' She was just excited and hysterical, and picked up the revolver and said, 'If that old devil don't quit hounding me, I will kill him,' or something to that effect. But she didn't mean it."

It thus appears that the justice of the peace concluded from his observation of the plaintiff's conduct, and without reference to the threats defendant claims plaintiff made to him and without knowledge of their illicit relations, that the plaintiff was insane. This information was communicated to the de-

fendant. The plaintiff denies that she so conducted herself, but as the justice of the peace so reported to the defendant, the defendant's conduct must be judged by the information given him and not by the fact, if it be a fact, that plaintiff did not create such a disturbance.

The witness Ault, an attorney who represented the defendant on the trial of this action, testified as follows with relation to the conduct of the plaintiff:

"Q. Now, Mr. Ault, start in and state in detail what you observed from the time of the filing of the—from the time you observed the plaintiff and the wind-up of your conversation with Mr. Shenk? A. I cannot give the exact date of this. It was either the 29th or 30th, or along in there; but it was in the morning of the day that the insanity charge was filed, the complaint. In my office, over the White Cross Drug Store, I was in my private room, and the door opened. Miss Franzen came into my room. The moment she came in, she slammed the door after her, and I noticed she had been crying. Her hair was disheveled; she was very much excited and very much wrought up. She said to me, 'I am going to kill Dolph, the son of a —; and I said, 'Who do you mean?' She said, 'I mean Dolph Shenk.' I said, 'Why, now listen, Mabel, I want you to understand I am Mr. Shenk's attorney, and I am his friend, and any statements of that sort you make to me, I am going to convey them back to Mr. Shenk.' She says: 'I don't care if you tell him. I want you to tell him, because I am going to publish it in the newspapers. I will publish it to the whole world. I am going to take it up with his wife.' I said, 'With that understanding, go ahead and tell your story.' I told her to sit down, and she wouldn't. She kept walking back and forth in my office, wringing her hands. She would cry awhile, and I said to her, 'What do you mean by all this, Mabel?' She said that—I don't remember what terms she used then, but she says—'He threw me out of the office last night, and beat me up, and I am going to get even with him.' I said, 'Why don't you get even with him, then?' She says: 'I am not going to take that means of getting even with him; I have another.' I said, 'What is that?' She says, 'I am going to disfigure his children's faces until he can point to them until his dying day and know that Mabel Franzen put it there.' I said, 'Mabel, do you realize what you are saying?' and she says, 'I certainly do.' I said, 'Do you know you are making threats against innocent children that have nothing to do with their father's relations, conceding that you and Dolph Shenk were intimate, and that all you say is true, and that he did kick you out of the office, why pick on his children?' I said: 'Mabel, one of two things is wrong with you; you are either crazy or you are a fool, to make such a statement as that.' She says: 'It doesn't make any difference. That is what I am going to do, and when I get through with these children, I will finish up Mrs. Shenk.' I said: 'Mabel, there is another thing. Why should you make a threat against Mrs. Shenk, conceding this is all true. She isn't to blame for his actions.' She says: 'It doesn't make any difference. She is trying to come between us. Dolph has lived with me and supported me and

he has brought me presents and taken me riding, and now he is trying to throw me down.' I said: 'Suppose all of that is true; you wouldn't carry out your threats against his children.' She says, 'I certainly would.' She kept walking up and down in my office, and walking into my library room, and I have a big Morris chair sitting by the desk. She reclined in it. It is a reclining chair, and she would lean over the arm of the chair while she would moan and cry, and then she would get up and start to walk the floor again, cursing him and making these threats, and I would repeatedly ask her not to do that, and try to show her where it was foolish to do such a thing. She must have stayed in my office an hour, all the time making these same threats that she was going to mutilate his children, and then get Mrs. Shenk, and she would break up his relations with Mr. Vosburg. She says, 'Dolph Shenk knows damn well I will do it, because I have already carried out other threats.' She went back into my library again and sat down in the chair, and had a spell of crying. All the time of her abuse of him I was considerably worried about her. She was wringing her hands and twisting her handkerchief, and I sat there and must have talked to her 15 minutes. She finally consented that she would not do anything; that she loved him so much that she would forget this; and that she would not harm a hair of his head. Immediately upon her leaving the place, I went down to Mr. Shenk's office. I don't know whether it was immediately, but it was very shortly afterwards. * * * I believe Mabel made this statement in my office before I went down there; that Shenk thinks he is smart. He is going to try and get his wife out of town, but they are leaving to-night on the train, and I will be Johnny on the spot, and I will do what I have threatened to do. I tried to argue her and discourage her about doing a thing like that, and then when I went down there I told him this, and I think that was when I advised it, or we discussed the advisability of putting an officer on her trail."

Thus, Mr. Ault, defendant's attorney, after an hour's interview with the plaintiff, reported to the defendant that he had had this interview, and, in effect, that after hearing her statement concerning the alleged illicit relations between the plaintiff and defendant and the defendant's denial of such relations, he advised the defendant that in his opinion the woman was dangerous and was insane, advised him to secure a guard to protect his wife and children. The plaintiff denies making these threats to Mr. Ault, but the defendant's conduct is to be judged by the information he had, namely, that the plaintiff had threatened to kill him, disfigure his children, and wreak revenge upon his wife, and that her conduct and conversation had caused Mr. Ault to conclude that the plaintiff was insane.

It is unnecessary to recite other testimony on the subject, because it is clear from what has been said that the defendant as a reasonable man did not act without probable cause in filing the insanity complaint, even when we consider his own knowledge as well

as the information and advice given him, unless he in fact did not entertain a bona fide suspicion of her insanity. Upon that subject the defendant testified that as early as May, 1920, the plaintiff secured money from him by threats of making him trouble by "telling his wife" and his principal, Mr. Vosberg, and that from these unwarranted threats he thought she was insane or unbalanced at times, and here it should be said that defendant paid the plaintiff \$900 cash, and a mortgage of \$2,300, in pursuance of such threats. Defendant testified he knew of no insane delusions on her part except "her threats to damage my children," on November 29, 1920, the day before defendant swore to the complaint charging the plaintiff with being insane. The defendant also testified as to his belief as follows:

"A. He (Mr. Ault) told me that she was going to tell the party that I had had relations with her, and she was going, by reason of that statement, she was going to make me come through, and break up my family and my financial standing. Q. Did she state in what particular way she was going to, how she was going to arrive at that point? A. Yes, sir. Q. State what else you remember, if anything? A. He said she would—he said I would have to come through, and if I didn't she would get my children and mar them for life so I would never want to look at them again, and also get the wife, as he put it. Q. Did you believe from what you had seen, and what had been told you, that your children and family were in danger? A. I most certainly did, sir. Q. Was that belief present when you signed that affidavit? A. Positively so, sir."

The defendant was also asked by his counsel when on the stand, "Did you, when you signed this affidavit, do it in good faith?" but the plaintiff objected to the question on the ground that the question called for a conclusion and that the defendant must be judged by his acts and not from his conclusions stated on the stand. The objection was sustained. The only direct evidence as to the actual belief of the defendant was thus favorable to the defendant. There was no evidence of his belief which contradicted this direct evidence. In no instance was he shown to have declared or admitted that he did not believe in fact that the plaintiff was insane.

Plaintiff, however, did testify that the day before Thanksgiving in response to her threat to meet his wife, defendant said, "You had better keep still, or I will put you where the bowwows won't bite you." The conversation was related by her, in part, as follows:

"A. So, I told him I was going over. I said, 'Dolph, I am going over to the train, and my car will be up next to yours, and I am going to tell your wife the truth. You are lying to one of us. You have kept this up for 3½ years, and I am going to tell her the truth.' Q. What did you mean by that? A. He told me he and his wife were separated. Q. When did he first

tell you that? A. When I first met him. Q. How long had he continued telling you the same thing. A. All the time. Q. Go ahead. A. He said: 'Mabel, dear, remember you are in business and have got a good thing here. Remember what I am telling you. You had better keep still, or I will put you where the bowwows won't bark at you.' Q. Tell all you said and what he said. A. I said, 'I didn't give a damn.' Q. Was that all that was said? A. So he said, 'Remember I am warning you.'"

In connection with that conversation she also denied any threats or statements concerning his children, except the following:

"Q. Tell what you said and what he said? A. Well, I said I hoped to God somebody would do his daughters the way he did me, and that is when he turned wrathly. He got mad. Q. Was that all you said about his family? A. Yes, sir. Q. That was what was said that night? A. Yes, and then he struck me when I said that."

These declarations and threats by the defendant, while tending to show malice against the plaintiff and a purpose on his part to prevent the plaintiff from coming into contact with his wife and children, are insufficient, directly or inferentially, to raise a conflict upon the question of the defendant's actual belief in the insanity of the plaintiff, as distinguished from the belief to be attributed to him as a reasonable man from the facts and circumstances known by him and called to his attention at and before the time he filed the insanity charge. The most that can be said of this evidence is that it shows a private motive for his prosecution, and this alone is not sufficient to overcome the other evidence of probable cause. A want of probable cause cannot be inferred from malice (see cases cited 33 Century Digest, Malicious Prosecution, § 39; 12 First Decennial Digest, § 23, p. 1970; Malicious Prosecution, vol. 14; Second Decennial Digest, § 23, p. 1761; *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 141 Pac. 1191; *Potter v. Seale*, 8 Cal. 217, 220, supra), although malice may be inferred from a want of probable cause (12 First Decennial Digest, § 32, p. 1982; *Griswold v. Griswold*, 143 Cal. 617, 77 Pac. 672, supra).

I think the judgment should be affirmed.

MYERS, J. I dissent upon the grounds and for the reasons stated in the dissenting opinion of the CHIEF JUSTICE herein. In addition thereto, I dissent in toto from the conclusion of the main opinion herein that "good faith is undoubtedly an element of probable cause in malicious prosecution cases." I do not think that the question of good faith bears any relation to the issue of probable cause. It is in my opinion relevant solely to the issue of malice. To say that the defendant acted in bad faith in filing the charge against the plaintiff is but to say that he acted maliciously in so doing. When a wrongful act is done from a wrongful mo-

tive, it is done maliciously in the eyes of the law, and it matters not whether that wrongful motive be an express desire to injure the plaintiff, or whether it be a wish to gain an undue advantage to the defendant, or whether it spring from sheer wantonness. In either event it is equally wrongful, and in either event it constitutes malice in fact as the same is known to the law. Malice consists in the evil motive, the "malus animus," which inspired the act. *Davis v. Hearst*, 160 Cal. 143, 164, 116 Pac. 530; *Griswold v. Griswold*, 143 Cal. 617, 620, 77 Pac. 672; *Vesper v. Crane Co.*, 165 Cal. 36, 43, 130 Pac. 876, L. R. A. 1915A, 541; *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 584, 141 Pac. 1191. If this be conceded, as I think it must, it seems to me to follow that the conclusion of the main opinion is in conflict with the rule concurred in by substantially all of the American cases and substantially all of the English cases during the past hundred years. There is much confusion and apparent conflict in the decided cases upon malicious prosecution, but there are three points upon which they are substantially all in perfect accord. These are: (1) That to justify recovery of damages for a malicious prosecution there must be a concurrence of two elements, namely, malice and want of probable cause; (2) that the burden is upon the plaintiff to allege and prove the existence of both of these elements; (3) that proof of malice is no evidence whatever of the want of probable cause (or, as it is sometimes stated, that want of probable cause cannot be inferred from malice). These three rules have been regarded as fundamental for more than a hundred years. But if the main opinion herein is to stand, it will have the effect, as it seems to me, of utterly destroying the third rule above stated, and of rendering the first entirely inconsequential. If good faith is an essential element of probable cause, then proof of bad faith is proof of the want of probable cause. But bad faith is nothing else than malice, from which it must follow that proof of malice is evidence of the want of probable cause, and suffices to prove both of the essential elements above mentioned, notwithstanding that practically all of the decisions are to the contrary.

I have found no reasoned decision rendered within the last hundred years which decides that good faith is an essential element of probable cause. There are statements to that effect in numerous decisions, but those statements will be found, I think, in each case to have been the product of an unreasoned reliance directly or indirectly upon ancient precedents which have been rendered entirely valueless by the important and substantial changes which took place in the law of malicious prosecution during the eighteenth century. Under the ancient common law, malicious prosecution was an action on the case in the nature of a conspiracy for falsely and

maliciously procuring the plaintiff to be indicted and imprisoned. The want of probable cause was not then an element of plaintiff's cause of action. He was required to allege and prove only that the defendant had maliciously instigated a prosecution against him, that the same had terminated in his favor, and that he was damaged thereby. It was for the defendant to plead as an affirmative defense in the nature of justification that he had probable cause for the prosecution, and the burden of proving the existence of probable cause was upon the defendant. This rule was found to be subversive of the public welfare, in that it resulted in criminals going unpunished because responsible citizens would not incur the risk incident to filing complaints against them. The rule was accordingly changed at some time prior to 1797 (*Savil v. Roberts*, 1 Salk. 13, 1 Ld. Raym. 374; *Panton v. Williams*, 2 Q. B. 169, 1 G. & D. 504, 10 L. J. Ex. 545), so as to require the plaintiff to allege and prove the want of probable cause as an essential element of his cause of action, to which declaration the plaintiff could enter a general plea of not guilty. This change had the effect, of course, of shifting the burden of proof upon the issue of probable cause from the defendant to the plaintiff, and such has been the rule ever since. The occurrence of this fundamental change in the law is adverted to in *Ball v. Rawles*, supra (93 Cal. at page 229, 28 Pac. 937, 27 Am. St. Rep. 174), and in *Panton v. Williams*, supra (2 Q. B. at page 193). It has happened not infrequently that long since that change occurred courts have continued to rely upon the authority of precedents established prior to the change, without realizing that the change in the law had rendered these precedents valueless. This is illustrated by the passage relied upon in the majority opinion herein from *Ball v. Rawles*, supra, wherein this court said:

"While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed and that the plaintiff had committed the crime."

That statement assumes that the burden rests upon the defendant to show probable cause, and it evidently grew out of a consideration of the old English cases prior to 1797. Of course, it is not necessary for the defendant to show anything whatever, unless and until the plaintiff shall have produced prima facie evidence of both malice and a want of probable cause, and it is then necessary for the defendant only to rebut the showing made by the plaintiff. Statements are to be found in *Harkrader v. Moore*, 44 Cal. 144, *Ball v. Rawles*, supra, *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082, and *Fleischhauer v. Fabens*, 8 Cal. App. 30, 96 Pac. 17, each of which

does, when considered alone and taken at its face value, give support to the conclusion of the main opinion herein. But each of the decisions in *Harkrader v. Moore* and *Ball v. Rawles* is in conflict with itself, as is pointed out in the dissenting opinion of the Chief Justice herein. The same thing is true in *Runo v. Williams*, and for like reasons. When it is said, in effect, in one paragraph of an opinion, that proof of malice is no evidence of want of probable cause, and in another paragraph thereof it is said in effect that proof of malice is proof of want of probable cause, one of these two statements must be wrong. In *Fleischhauer v. Fabens* the District Court of Appeal merely followed, without questioning it, the rule as stated in *Harkrader v. Moore* and *Ball v. Rawles*.

The passage in *Newell on Malicious Prosecution* (section 11, p. 325) to the effect that "the law requires that one in instituting a criminal prosecution shall act in good faith or under an honest belief of the guilt of the party arrested; and this notwithstanding that the party prosecuting has received legal advice and proceeded in accordance therewith," is directed to the question of good faith as an element in the affirmative defense of "advice of counsel." This is apparent not only from the context but from a consideration of the case of *Roy v. Goings*, 112 Ill. 656, which is the sole authority cited by the author in support of this passage. The question of good faith as an element of the defense of "advice of counsel" has no relevance to the question of bad faith as an essential element of plaintiff's cause of action. Advice of counsel is an affirmative defense by way of confession and avoidance. By pleading it the defendant, in effect, confesses plaintiff's allegation of want of probable cause and seeks to avoid the same by showing that, notwithstanding the absence in fact of probable cause, he was advised by counsel that it did exist and that he acted in reliance upon such advice. Good faith is therefore an essential element of his claim that he relied upon the advice of counsel. It is not in this respect an element of probable cause, but is rather an element of that which the defendant offers as a substitute therefor.

The definition of "probable cause" given by *Newell* as the accepted definition thereof, by its very terms, negatives the contention that good faith is an element hereof. It is as follows:

"Reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." *Newell on Malicious Prosecution*, § 1, at page 252.

It is true that the author adds thereto the explanation that—

"It does not depend on the actual state of the case in point of fact, but upon the honest and

reasonable belief of the party commencing the prosecution."

It is apparent from the context that the "honest and reasonable belief" there referred to is not a belief in the guilt of the plaintiff, but is rather a belief in the actual existence of the facts and circumstances which go to make up probable cause. Good faith and bad faith are purely subjective and relate solely to a state of mind. It seems to me equally clear that probable cause is wholly objective and must consist in those external facts and circumstances which are known to the defendant or which are believed by him to exist.

The cases of *Potter v. Seale*, 8 Cal. 217; *Eastin v. Stockton Bank*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 Pac. 65; *Montz v. Nevins*, 40 Cal. App. 202, 180 Pac. 537; *Burke v. Watts*, 188 Cal. 118, 204 Pac. 578; *Stein v. Lacassie*, 189 Cal. 118, 207 Pac. 886; and *Murphy v. Davids*, 181 Cal. 706, 186 Pac. 143—do not, as I read them, lend any support to the conclusion of the main opinion upon the point here under consideration. The cases of *Potter v. Seale*, *Dawson v. Schloss*, and *Stein v. Lacassie* seem to me to be in such irreconcilable conflict with the main opinion herein that they must be considered as overruled thereby. In *Potter v. Seale*, it was said that—

"Public policy and public security alike require that prosecutors should be protected by the law from civil liabilities; except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, *both concur*."

"Though malice be proved, yet if there was probable cause, the action must fail. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. As to the question of *malice*, it is one solely for the jury, and to sustain this averment the charge must be shown to have been *wilfully false*." (The italics are the court's.)

In *Dawson v. Schloss* it was held that the following instruction, "If you find in this case that malice existed upon his (defendant's) part, then the plaintiff would be entitled to recover," was clearly erroneous; but that inasmuch as it appeared upon the record to have been given at defendant's request, defendant could not complain thereof upon appeal. In *Stein v. Lacassie* the following instruction had been given by the trial court:

"You are instructed that if you find from the evidence in this case that the criminal proceedings against plaintiff were instituted by defendant over a fixed and malicious determination of her own, and not from the advice of coun-

sel, or that she did not communicate a full, fair and true statement of all the facts known to her to the sheriff and the district attorney, and that the district attorney did not advise her there was probable cause for the arrest, then such would constitute lack of probable cause."

And this court said:

"It would seem to require no argument to show that this instruction is erroneous, and is prejudicially so, since it might well be that the defendant herself might have had abundant cause for insisting upon and procuring the plaintiff's arrest upon the charge of having poisoned her horse, even though, in so doing, she was acting upon a fixed and malicious determination of her own and without the advice of counsel; and even though she had not communicated all of the facts known to her to the sheriff and district attorney, or made a full, fair and true statement of the facts to these officials; and even though the district attorney had not advised her that there was probable cause for the plaintiff's arrest."

If, as is held in the main opinion herein, "good faith is undoubtedly an element of probable cause in malicious prosecution cases," it seems to me to follow inevitably that the instruction last quoted was correct and that the decision in *Stein v. Lacassie* is now overruled.

Turning now to the evidence in the instant case, I concede that there is some evidence tending to prove that defendant acted in bad faith in filing the insanity complaint. In other words, there is some evidence of malice. I concede also that there is substantial conflict in the evidence directed to the defense of advice of counsel, and that defense is therefore properly eliminated from further consideration upon this appeal. But I find no evidence whatever tending to prove a want of probable cause. There is an abundance of evidence to prove the existence of probable cause, but that also may be eliminated from our consideration because the burden did not rest upon the defendant to prove the existence of probable cause. It rested upon the plaintiff to prove the absence of probable cause, and even though there were no evidence whatever tending to prove the existence of probable cause, it would still be the duty of the trial court to direct a verdict in favor of the defendant unless the plaintiff produced some substantial evidence tending to prove a want of probable cause. The circumstance that defendant's testimony was contradicted by the plaintiff and, to that extent, impeached, has no tendency whatever to prove a want of probable cause. The fact that a witness lied in 1923 is no evidence that he stole a pig in 1920. By the same token, proof that the defendant testified falsely in 1923 would be no evidence that he acted without probable cause in 1920. (It is not intended to suggest hereby that the defendant did in fact testify falsely, but merely

that the jury might have so inferred from the conflict in the evidence.)

It is not necessary to here review the evidence upon the question of probable cause. The main opinion herein concedes, in effect, that there is no evidence of a want of probable cause except that which tends to prove only that the defendant acted in bad faith; in other words, that which tends solely to prove malice. But proof of malice is no evidence of a want of probable cause unless we are prepared to overrule practically all of the decided cases upon that subject, including our own decisions above referred to, as well as the following: *Grant v. Moore*, 29 Cal. 644, 698; *Anderson v. Coleman*, 53 Cal. 188; *Jones v. Jones*, 71 Cal. 89, 91, 11 Pac. 817; *Smith v. Liverpool Ins. Co.*, 107 Cal. 432, 436, 40 Pac. 540; *McKenna v. Heinlen*, 128 Cal. 97, 102, 60 Pac. 668; *Lee v. Levison*, 173 Cal. 166, 159 Pac. 438; *Burke v. Watts*, 188 Cal. 118, 204 Pac. 578; *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 584, 141 Pac. 1191; *Jirku v. Brod*, 42 Cal. App. 796, 798, 184 Pac. 413.

I am convinced that it was the duty of the trial court to grant the motion for the directed verdict and that the judgment thereon should be affirmed.

On Application for Rehearing.

PER CURIAM. In denying a petition for rehearing we wish it to be understood that we are in agreement upon the rule of law invoked in a decision of this case, stated in the main opinion as follows:

"* * * If there had been no evidence whatever from which the jury might have inferred that the defendant did not in fact believe that the plaintiff was insane, the question of his belief should have been determined by the court on the basis of what, under the circumstances, was sufficient to cause a reasonable man to entertain a suspicion of the insanity of the plaintiff."

And otherwise, but to the same effect, stated in the dissenting opinion of the Chief Justice as follows:

"The rule established by the authorities upon the subject of belief as an element of probable cause would seem to be this: While the question of probable cause is always a question of law for the court and is to be determined by the standard of the ordinary man, yet if there is affirmative evidence of the *actual belief* of the defendant sufficient to justify a conclusion that he did not in fact suspect the plaintiff of being guilty of the crime with which she was charged, then the question of probable cause to that extent involves a question of fact to be submitted to the jury."

[8] It may not be amiss to say further that we do not wish to be understood as holding that good faith and an actual and honest belief in the guilt of the party charged with crime is *always* an integral and an independent element of probable cause. The point

upon which we disagree is as to whether there was sufficient affirmative proof, direct or circumstantial, to be submitted to the jury upon the question of whether or not the defendant actually suspected the plaintiff of being insane. Upon that question the members of the court adhere to the respective views stated in the original and dissenting opinions heretofore filed.

WILBUR, C. J., and LAWLOR, LENNON, KERRIGAN, and SEAWELL, JJ., concur.

MYERS, J. I dissent from the order denying a rehearing and adhere to the conclusions expressed in my dissenting opinion, *supra*. Respondent in his petition for rehearing has cited two recent decisions not theretofore cited herein, each of which gives full support to those conclusions. The case of *Director General of Railroads v. Kastenbaum* (decided November 12, 1923, by the Supreme Court of the United States), 44 Sup. Ct. 52, 68 L. Ed. —, was an action for false imprisonment. In the opinion by Mr. Chief Justice Taft that court said:

"The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of the defendant's knowledge, not by his intent. It means the absence of probable cause known to the defendant when he instituted the suit. *But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did.*" (Italics added.)

The case of *Barton v. Woodward*, 32 Idaho, 375, 182 Pac. 916, 5 A. L. R. 1093, is so strikingly similar to the case at bar both in its facts and in the questions of law presented upon the appeal as to be substantially identical therewith. It was an action for malicious prosecution in the institution of lunacy proceedings against the plaintiff by the defendants. In that case, as in this, there was evidence of malice, evidence that the prosecution was instituted in bad faith, and evidence that the defendants did not actually believe that the charge was true. Thus the question there presented was identical with the one upon which this case must turn, namely, whether or not evidence that the defendant acted in bad faith, or from an improper motive, or without an actual belief in the truth of the charge, can be regarded as evidence tending to prove a want of probable cause. Upon this question that court said:

"It is true there is evidence which would justify a finding of malice, but it is too well established to admit of argument that want of probable cause cannot be inferred from malice. It has been said in some cases that the fact a criminal case is prosecuted from some private or personal motive, other than a public motive, is of itself evidence of want of probable cause. This is not a logical statement. *Probable cause depends upon what the prosecuting wit-*

ness knew, or ought, as a reasonably prudent man, to have known, when he instituted the proceeding. If he had no sufficient information to justify a reasonably prudent man in believing the defendant was guilty, then the inference may be drawn he was acting from improper motive. However, improper motive is proof of malice, but not, of itself, proof of want of probable cause. * * * We conclude the evidence is insufficient to establish want of probable cause." (Italics added.)

I concur: WASTE, J.

64 Cal. App. 300

Ex parte CAMPBELL et al. (Cr. 736.)

(District Court of Appeal, Third District, California. Oct. 31, 1923.)

1. Constitutional law ☞90—Insurrection and sedition ☞2 — City ordinance prohibiting publication of I. W. W. literature invalid.

Ordinance No. 813, § 4, city of Eureka, prohibiting printing or distribution of membership cards or literature of I. W. W., held to violate Const. art. 1, § 9, guaranteeing freedom of speech.

2. Insurrection and sedition ☞2—City ordinance prohibiting publication of I. W. W. literature invidious discrimination.

Ordinance No. 813, § 4, city of Eureka, prohibiting printing or distribution of membership cards or literature of I. W. W., held a discrimination as against a particular organization or society.

3. Insurrection and sedition ☞2—City ordinance prohibiting publication of I. W. W. literature held invalid as unreasonable exercise of legislative power.

Ordinance No. 813, § 4, city of Eureka, prohibiting printing or distribution of membership cards or literature of I. W. W., held invalid as an unreasonable exercise of legislative power.

4. Criminal law ☞304(2)—No judicial knowledge of specific nature of principles of I. W. W.

Judicial knowledge cannot be taken of what the specific nature of the principles or doctrines or propaganda of the I. W. W. organization is.

5. Criminal law ☞315—No presumption that I. W. W. doctrines, if pernicious, will always remain so.

If it may be assumed that principles of the I. W. W. have been pernicious, there is no presumption that they will always remain so, or that the organization has not so changed as to make the principles accord with rights guaranteed by Constitutions to all citizens.

Original application by Jack Campbell and others for a writ of habeas corpus, against the Sheriff of Humboldt County. Writ granted.

T. F. Allen, of Bakersfield, and R. W. Henderson, of San Francisco, for petitioners.

James W. Henderson, City Atty., and Hans C. Nelson, both of Eureka, for respondent.

HART, J. Petitioners, claiming that they are illegally restrained of their liberty by the sheriff of Humboldt county, ask this court for an order discharging them from such restraint through the writ of habeas corpus.

The return of the sheriff discloses that his authority for holding and restraining the petitioners is derived from an order, made by the police judge in and for the city of Eureka, Humboldt county, committing the petitioners to his custody pending their trial for the alleged violation of the provisions of section 4 of Ordinance No. 813 of said city, or until a bail bond in the sum of \$500 each was furnished and duly filed by them.

The question presented here is whether section 4 of the ordinance, under which the petitioners are being held, represents the exercise of valid legislative power. So much of said section as is pertinent to the present consideration reads as follows:

"It shall be unlawful for any person within the city of Eureka to print, publish, edit, issue, distribute, circulate, sell or offer for sale or give away, or to have in his or her possession, any membership card in, or any book, paper, pamphlet, document, handbill, poster, or any written or printed matter in any form whatever, containing or carrying any written or printed matter advocating, advising, teaching, containing or claiming to contain, set forth, explain or narrate the doctrines, precepts, principles, teachings, dogma, songs or sentiments, work, acts or activities of the organization, body or group of individuals known as the Industrial Workers of the World, or the I. W. W., or any branch, subdivision, section or local organization affiliated with or a part of or in any way connected with said Industrial Workers, or the I. W. W., by whatever name the same may be known or called."

Section 8 of the ordinance makes the violation of any of its provisions a misdemeanor and the offender subject to a fine of \$500, or to imprisonment for not exceeding six months, or to both such fine and imprisonment.

The complaint filed against the petitioners in the police court and upon which they are being held in the custody of the sheriff is substantially in the language of section 4 of said ordinance.

Manifestly, if section 4 of the ordinance is invalid, or defines no public offense, the complaint, which is based thereon, is likewise invalid, or, in other words, fails to state a public offense.

The contention of the petitioners is that said section involves such special legislation as is inhibited by our Constitution, is wanting in uniformity of operation, and is therefore discriminatory, in that it is specifically di-

rected against a single organization, and, furthermore, that it is opposed to section 9 of article 1 of the state Constitution, in that, in its enforcement, its effect would be to abridge the freedom of speech. As to the last-stated proposition, the respondent declares that the ordinance, or the particular section thereof involved herein, does not in any manner or form attempt to impinge upon or destroy or impair the right of free speech, as guaranteed by our Constitution.

[1-3] There can be no doubt that the section in question is violative of section 9 of article 1 of the Constitution, guaranteeing to every citizen the right freely to speak, write, and publish his sentiments on all subjects.

Furthermore, it clearly involves an invidious discrimination as against a particular organization or society of people. But, however this all may be, the section is so far afield of any reasonable conception of the exercise of the legislative power of this country, as it is defined, qualified, and limited by our Constitutions, that the specific ground upon which or reason for which its invalidity is to be declared is of no material consequence. It requires but passing reflection to note that the language of the section is so far-reaching in its scope that its effect would be to penalize the action of a citizen in circulating, distributing, or by other means publishing, or having in his possession, any of the literature or publications issued by and under the authority of a particular organization, setting forth and advocating the principles thereof, howsoever innocent or legitimate such literature or principles and teachings may be. In short, the legislative body of the city of Eureka, in incorporating section 4 in the ordinance in question, seems to have proceeded upon the presumption or presupposition that the organization known as the "Industrial Workers of the World" is a combination of persons organized or associated together for the purpose of teaching and advocating the commission of unlawful acts or lawful acts by unlawful methods. The legislative department clearly transcends its constitutional powers, when in the enactment of penal statutes, as in this case, it proceeds upon the theory that an essential element of a crime, whether falling within the category of crimes mala in se or that of crimes mala prohibita, may be assumed to exist without proof of its existence, save, perhaps, in a few exceptional cases coming within or peculiarly subject to the control of the power of police. If section 4 of the ordinance before us could upon any possible theory be upheld as a valid enactment, the question whether the Industrial Workers of the World constitute a society of persons organized for unlawful or criminal purposes, or the publications or printed documents mentioned in said section set forth and advocated principles which, when executed, would

result in the commission of some unlawful act or crime, would not be an issue in the case in the trial of petitioners. In other words, to justify a conviction under the complaint, framed as it is according to the provisions of said section, all that the people would be required to prove would be that the documents or publications set forth the principles of the I. W. W. organization, that the publications were issued by or under the authority of that organization as the teachings and precepts thereof, and that the petitioners had them in their possession or were engaged in selling or otherwise distributing the same. As above suggested, it would not be material whether the principles so advocated and taught were in perfect accord with the right of any citizen or set of citizens to stand for, advocate, and teach any lawful doctrines or rules or platform of principles relating to any subject with which either the temporal or spiritual welfare of mankind is concerned. The trial court could, under said section, instruct the jury called to try those proceeded against under said section to the following effect:

"If you find from the evidence, beyond all reasonable doubt, that the defendants did, at the time mentioned in the complaint, 'sell, deliver, and possess certain papers and literature published and printed for and by the Industrial Workers of the World, * * * which said papers did then and there contain and carry written and printed matter, setting forth, explaining, and narrating the doctrines, teachings, acts, and activities of the Industrial Workers of the World,' it will be your sworn duty to find the defendants guilty."

[4, 5] Such a situation in the trial of a person upon a criminal charge in an American court would be abhorrent to every conception of fair play and justice. We do not judicially know, nor is it within the province of any judicial tribunal, whether of trial or appellate jurisdiction, so to know, what the specific nature of the principles or doctrines or propaganda of the I. W. W. organization is; but if it may be assumed that those principles or doctrines or propaganda in and of themselves have at some time been pernicious in their effect or opposed to the well-being of society or of mankind, still there is no presumption that they will always remain so, or that the said organization has not so changed, modified, or amended them as to make them accord with a proper understanding of the rights guaranteed by our Constitutions to every citizen of this country. This court, however, in the past has had occasion to review and learn something of the alleged principles of the I. W. W. organization in cases involving the prosecution and conviction of certain members of said organization under the State Syndicalism Act, St. 1919, p. 281 (People v. Roe, 58 Cal. App. 690, 209 Pac. 381; People v. Wismer, 58 Cal. App. 679, 209 Pac. 259; People v. La

Rue et al. [Cal. App.] 216 Pac. 627); and, while it is true that those principles disclosed that said organization and the members thereof entertained and stood for a paradoxical and singularly drastic notion of what a system for the government of the peoples of the earth should be—a notion which there is every reason to believe is far beyond any hope of practical attainment—we cannot say that the mere teaching or advocacy of that system is beyond the pale of the constitutional right of any citizen guaranteed to all citizens or organization of citizens to advocate any change in our system of government or any principles antagonistic to our present system of government by peaceable methods. Thus it is to be observed that, even if the system proposed to be substituted for our present system of government by the said organization is the same now as it was at the time of the trial and hearing of the cases above referred to, there is nothing in the scheme itself which is inherently wrong or indicative of any criminal purpose in the organization or its members in advocating and teaching the same. But in the Roe and other like cases there was evidence which showed, or sufficiently tended to show to support the conviction, that the members of said organization habitually taught and advocated the carrying out of its principles by criminal means of the most atrocious character, and, as said in that case, this was the fundamental vice of the system advocated by said organization, and which justly subjected its members to prosecution and punishment. But there is no necessity for further abstract discussion of the question which is to be determined in this case. The Supreme Court and this court have held, as obviously it could not otherwise justly be held, that the alleged or claimed criminal or illegal purpose of the I. W. W. organization is an essential element of the crime either of selling or distributing or circulating its literature, containing a statement of the principles of the organization, or of being a member thereof, and that that question is one to be determined by the jury. See *People v. Taylor*, 187 Cal. 378, 385, 203 Pac. 85; *People v. Wismer*, 58 Cal. App. 679, 209 Pac. 259; *People v. Steelik*, 187 Cal. 361, 203 Pac. 78; *People v. Thornton* (Cal. App.) 219 Pac. 1020. The theory of those cases was, as the theory must always be, to support a criminal prosecution under the Syndicalism Act, or any valid local ordinance whose general object is the same as that of said act, that the organization in its nature "is a criminal conspiracy to change industrial control and

government by unlawful and criminal methods." *People v. Steelik*, supra.

The case here is no different in principle from that of the case of *In re Hartman*, 182 Cal. 447, 188 Pac. 548, wherein the petitioners were convicted of, and sentenced to, serve a term of 120 days' imprisonment for the violation of the provisions of an ordinance of the city of Los Angeles, which provided that any person who displayed or caused or permitted to be displayed, publicly or privately, or had in his possession, within the limits of said city, "any flag, insignia, emblem or device of any nature whatsoever representative of any nation, sovereignty, society, association or organized or unorganized effort of any nature whatsoever which in its purposes, practices, official declarations, or by its constitution, by-laws or regulations, espouses for the government of the people of the United States of America * * * principles or theories of government antagonistic to the Constitutions and laws of the United States of America or to the form of the government thereof as now constituted, * * *" shall be guilty of a misdemeanor, punishable by fine or imprisonment or by both. The specific charge against the petitioners in that case was that they unlawfully displayed and had in their possession a flag or an emblem and device representative of "an organized effort antagonistic to the Constitution of the United States of America and the form of government thereof." Holding that there was nothing inherently wrong in advocating a principle or theory which is antagonistic to our present Constitution and form of government, the Supreme Court said:

"Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act."

It follows from the foregoing considerations that section 4 of Ordinance No. 813 of the city of Eureka is unconstitutional and void, and that the petitioners are entitled to be discharged from their present restraint.

Accordingly, the writ is granted, and the petitioners are discharged.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 426

(221 P.)

HANSEN v. MARKET STREET RY. CO.
et al. (Civ. 4683.)

(District Court of Appeal, First District, Division 2, California. Nov. 17, 1923. Hearing Denied by Supreme Court Jan. 16, 1924.)

1. Municipal corporations ⚡821(19)—Whether water company guilty of negligence proximately contributing to injury of pedestrian struck by street car held for jury.

Where defendant water company, in digging a trench, piled dirt therefrom, in violation of ordinance, less than a foot from the rail of a street car track, and blocked street so that plaintiff had either to cross it or skirt the dirt pile along the track, and while skirting the dirt pile he was run down and struck by the side of a street car, whether negligence in so piling the dirt was concurring cause of injury was for jury.

2. Municipal corporations ⚡821(25)—Pedestrian injured when skirting dirt pile wrongfully on street held not negligent as matter of law.

Where plaintiff, in passing along a street in the morning, noticed a pile of dirt therein taken from a trench by defendant water company, and on return at night found the street barricaded and had either to cross the street or skirt the edge of the dirt, he could assume there was safe passageway between the dirt and the car track for those leaving the sidewalk; and fact of his having noticed dirt in the morning would not make his attempt to skirt the dirt pile at night, when he was injured by street car striking him, negligent as matter of law.

3. Street railroads ⚡117(17) — Pedestrian held not negligent as matter of law in failing to look for approaching street car.

Where a pedestrian could assume that dirt was lawfully piled in the street, leaving space along the car track to walk, he was not negligent as matter of law when he failed to look for approaching street car when stepping from sidewalk to skirt the pile, in view of San Francisco Ordinance No. 581 (N. S.) § 19, requiring motorman to give timely warning of street car's approach to persons about to cross the track; what was "timely" warning being for jury.

4. Street railroads ⚡117(34)—Whether failure to sound warning of street car's approach was a proximate cause of pedestrian's injury held for jury.

Where a water company, in violation of ordinance, piled dirt on the street near the outer rail of street car tracks, and a pedestrian, in attempting to skirt the pile, was run down by a street car and struck by its side, in view of evidence that no warning of any kind of the car's approach was sounded, and that pedestrian became aware of proximity of the car when it was almost on top of him, a jury might have found that such failure to sound timely warning of street car's approach to pedestrians about to cross the street, as required by San Francisco Ordinance No. 581

(N. S.) § 19, jointly with negligence of water company in blocking the track, proximately caused the injury.

5. Negligence ⚡15—One or both tort-feasors liable.

Where direct personal injury is occasioned by the separate but concurring negligence of two parties at one and the same time, an action lies against one or all of them.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Christ Hansen against the Market Street Railway Company and another. Judgment of nonsuit, and plaintiff appeals. Reversed.

A. P. Dessouslavy, of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco (W. Lindley Abbott, of San Francisco, of counsel), for respondent Market Street Ry. Co.

H. S. Young and R. G. Hudson, both of San Francisco, for respondent Spring Valley Water Co.

LANGDON, P. J. This is an appeal from a judgment of nonsuit in an action for personal injuries sustained by plaintiff and alleged to have been proximately caused by the negligence of defendants. The facts appearing from the evidence are in part as follows:

Defendant Market Street Railway Company operated a single-track cable railway along the center of Sacramento street from the Embarcadero to Drumm street, and beyond, on which its cars traveled westerly. Prior to the accident defendant Spring Valley Water Company had excavated a trench about 5 feet wide and 6 to 8 feet deep on the north side of Sacramento street, which commenced about 2 feet east of Drumm street and extended easterly some 30 feet. The dirt from the trench was piled upon the south side thereof, and at the time of the accident the pile came to a point less than a foot from the northerly rail of the car tracks and to the northerly edge of the running board of the cable cars. The pile was 30 feet long and about 5 or 6 feet high. At the time of the accident the water company had not placed any lights on the top of the pile, or at any place where light could be thrown on its southerly side. This work of excavation was being done by the water company without a permit from the board of public works, in violation of an ordinance of the city and county of San Francisco (Ordinance No. 1461, N. S.). Furthermore, the position of the dirt pile, less than a foot away from the car track, was also violative of said ordinance of the city and county of San Francisco, which provided that—

"In no case shall they [materials and appliances] be placed within four feet six inches of the outer rail of any street railroad track."

On the afternoon of October 22, 1921, plaintiff, a man then about 73 years of age, left his residence at the Scandinavian Sailors' Home on the east side of Drumm street, between Clay and Sacramento, to go to Alameda, Cal. He proceeded along the sidewalk (which was then open) on the north side of Sacramento street on his way to the Ferry building. He attempted to return to his residence about 9 o'clock upon the same evening. Upon leaving the Ferry building he walked along the northerly sidewalk on Sacramento street until he reached a point about 40 feet easterly from Drumm street, where he found that a barricade had been thrown across the sidewalk. He did not then know and had no means of knowing the position of the dirt with relation to the car track. Because of the barricade across the sidewalk plaintiff left the sidewalk and skirted the dirt pile looking for a passage to go through until he came to the easterly end of said pile, when he again turned westerly toward Drumm street, walking along the south side of the dirt pile, with his left foot on the northerly rail of the car track and his right foot in the dirt. The south side of the street was obstructed by a line of dirt wagons which came to about 5 feet of the southerly car rail. Plaintiff had thus walked halfway along the pile—some 15 feet—when he heard the noise of a cable car approaching him from behind. No warning bell had been sounded by the motorman, and plaintiff was not made aware of the proximity of the car until, as he testified, it was almost "on top" of him, or within 3 or 4 or 5 feet of him, when the noise incidental to the operation of the car arrested his attention. Plaintiff explained upon the witness stand that, as the street car with its running board was about 6 feet wide, and traveling faster than he could move, he could not cross the track to the south side thereof—a place of safety—and so he attempted to get off the track upon the north side by climbing upon the piled-up dirt which blocked his escape. He attempted to climb upon this pile of dirt because the water company had not left sufficient space between the track and the dirt upon which he could stand. He succeeded in getting partly up the dirt pile, which was several feet high and sloped away from the track. The front of the car passed plaintiff, but before the car had cleared him the dirt slid and he was brought into such a position that he was struck by the side of the moving street car, sustaining severe injuries.

Plaintiff testified that before leaving the sidewalk he did not look toward the Ferry building to see if a cable car was approaching on Sacramento street, because he did not intend to cross the street, but merely intended to

find a passage through the dirt pile. Because of the position of the dirt pile, however, plaintiff found no place along which he could proceed westward until he had reached the northerly rail of the street car track.

Upon substantially these facts the trial court granted the motions of defendants for nonsuits. Appellant contends that the order granting the motions for nonsuits was improperly made, as the facts hereinbefore set forth warrant a finding by a jury that the defendant water company was negligent in creating a nuisance in dangerous proximity to the car track, in violation of an ordinance, and that the defendant railway company was negligent in failing to maintain a lookout and to give plaintiff timely warning and notice of the approach of the car, as required by ordinance, and in failing to stop the car after discovering plaintiff's position of danger so as to afford him an opportunity of placing himself in a position of safety, and that the plaintiff's injuries were proximately caused by such concurring negligence upon the part of both defendants.

[1, 2] It seems to us that a jury might have drawn a reasonable conclusion that the negligence of the defendant Water Company in maintaining a dirt pile so close to the railroad track in violation of law was a concurring cause of the injury to plaintiff. Said defendant had blocked the sidewalk, thus requiring pedestrians either to cross the street or to skirt the dirt pile and proceed upon their way along its southern edge. Plaintiff chose to do the latter, and no contention is made that his action in selecting this route was negligent as a matter of law. Plaintiff had no knowledge of the extent or position of the dirt pile or of its proximity to the street car track, and the mere fact that he had noticed the dirt piled upon the street when he left his home to go to Alameda in the morning does not charge him with such knowledge as would make his attempt to skirt the dirt pile negligent as a matter of law. *Meindersee v. Meyers*, 188 Cal. 498, 502, et seq., 205 Pac. 1078. Plaintiff had the right to assume that the defendant water company would not leave the street in a dangerous condition, but would allow a safe passageway for those having occasion to use the sidewalk who were forced to walk upon the street because of the blockade erected by said water company. *Meindersee v. Meyers*, supra. Had said defendant, in obedience to the mandate of the ordinance, left a clear space of $4\frac{1}{2}$ feet between its dirt pile and the north car rail, plaintiff might have proceeded upon his way in safety. Had such a distance been left free to plaintiff, when he heard the car close to him, he could have stepped to the north into a place of safety; but under the existing conditions the only egress from the track which was open to him in the short time available was blocked unlawfully by

said defendant. Plaintiff had no choice but to take his chance and climb upon the dirt pile, with the result already narrated. Since a jury might have found the defendant water company to have been guilty of negligence proximately contributing to plaintiff's injury, the order granting said defendant's motion for a nonsuit was improperly made.

[3] We now come to a consideration of the evidence with reference to the liability of the defendant railway company. We shall eliminate at the outset the contention of respondents that plaintiff was guilty of negligence as a matter of law in failing to look toward the Ferry building for an approaching car before stepping upon the track. It is important in this connection to recall that plaintiff testified that he did not look toward the Ferry building to discover an approaching car, if any, because he did not intend to cross the street. He expressed his belief that the water company should have left a place for one to walk between the dirt obstruction and the track. It is fair to assume from his testimony that he expected to find the pile of dirt at a safe distance from the track, as required by law; and, had he found this space clear and proceeded along it, there would have been no necessity for him to look behind for an approaching car. But, quite apart from these considerations we do not think that plaintiff's failure to look for this car convicts him of contributory negligence as a matter of law. In the case of *Bidwell v. Los Angeles, etc., Ry. Co.*, 169 Cal. 780, 148 Pac. 197, it was said:

"The failure of a person to look or listen for an approaching car before crossing a street car track in a city is not always and under all circumstances an act of negligence. [Citing cases.] According to the authorities above cited, the failure of plaintiff to look and listen, if it is assumed that he did fail, was therefore not, as matter of law, negligence on his part, but at most a question to be determined by the jury."

In the case of *Mann v. Scott*, 180 Cal. 550, 182 Pac. 281, it was said:

"There is no positive duty to stop, look, and listen when a pedestrian is about to cross a city street."

To the same effect, see, also, *Driscoll v. Market Street Cable Railway Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; *Runnels v. United Railroads*, 175 Cal. 528, 166 Pac. 18; *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 Pac. 125; *Park v. Orbison*, 43 Cal. App. 74, 184 Pac. 428; *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94.

[4] Our only consideration, then, is whether or not, from any of the facts and circumstances appearing in the record, a jury might have found, properly, that the railway company was guilty of negligence. The negligence with which the appellant seeks to charge this defendant is its failure to sound

a warning at a time which would have allowed the plaintiff to cross the track to a place of safety on the north side thereof. An ordinance of the city and county of San Francisco was pleaded, providing:

"The motorman, gripman or other person in charge of a car in motion must always, by ringing the bell or striking the gong on such car, give timely warning of the approach of such car to pedestrians, drivers of vehicles and others who may happen to be on or about to cross the track in front of such car." Section 19 of Ordinance 581 (N. S.), approved Oct. 23, 1908.

What is "timely" warning would be a question of fact under all the circumstances of the case, and would present a question for a jury. In view of the fact that a jury might have believed from testimony appearing in the record that no warning of any kind was sounded, and that plaintiff only became aware of the proximity of the street car when it was "almost on top of him," or within 3 or 4 feet from him, when he had no time to cross to a place of safety, we think the jury might have concluded, reasonably, that the failure of the defendant railway company to sound a timely warning as required by ordinance, jointly with the negligence of the water company in blocking the space on the north side of the track, proximately caused the injury to the plaintiff.

In the case of *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 216, 107 Pac. 317, 321, it was said:

"Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle."

That one driving a vehicle over or in proximity to a street railroad track has a right to expect and rely upon some warning to be given him by the motorman of a car approaching him from behind and that this right should be taken into consideration by a jury as an element in determining the question of contributory negligence on the part of a plaintiff is established in this state. *O'Connor v. United Railroads*, 168 Cal. 43, 49, 141 Pac. 809.

[5] We think the question of whether or not the negligence of the defendants proximately caused the injury to the plaintiff was one for a jury, which might have found, properly, upon the testimony, that the defendants were guilty of concurring negligence proximately causing the accident and injury to plaintiff.

"Where direct personal injury is occasioned by the separate but concurrent negligence of two parties at one and the same time, an action will lie against one and all of them." *Doeg v.*

Cook, 126 Cal. 213, 218, 58 Pac. 707, 708 (77 Am. St. Rep. 171).

See, also, *Keiper v. P. G. & E. Co.*, 36 Cal. App. 362, 368, 172 Pac. 180; *Lininger v. S. F.*, etc., *R. R. Co.*, 18 Cal. App. 411, 420, 123 Pac. 235; *Muller v. Hale*, 138 Cal. 163, 168, 71 Pac. 81.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 369

OUZOONIAN et ux. v. VAUGHAN et al.
(*DER BOGHOSIAN*, Intervener).
(Civ. 2761.)

(District Court of Appeal, Third District, California. Nov. 10, 1923. Rehearing Denied Dec. 10, 1923.)

1. Appeal and error $\S$ 801(4)—Appellate court cannot order judgment on merits on motion to dismiss appeal.

The appellate court cannot order a judgment entered on the merits of the case, on motion to dismiss an appeal.

2. Appeal and error $\S$ 356—Appeal not timely filed, nugatory.

An attempt to appeal from a judgment in an action to quiet title to real estate, and for recovery of personal property, and order directing that moneys and property be paid and turned over to plaintiffs, by filing a purported notice of appeal over seven months after the entry of the judgment, and nearly five months after the date of the order, is nugatory under Code Civ. Proc. $\S$ 939, 953a.

On Petition for Rehearing.

3. Appeal and error $\S$ 123—Appeal does not lie from findings or conclusions of law.

An appeal does not lie from findings or conclusions of law, or from either.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by James Ouzoonian and wife against J. Vaughan and others, in which John Der Boghosian intervenes. From a judgment for plaintiff, the intervener appeals. On motion to dismiss appeal. Appeal dismissed.

George G. Graham, of Fresno, for appellant.

N. Lindsay South, of Fresno, for defendants.

E. C. Laughlin, of Selma, and M. F. McCormick, of Fresno, for respondent.

HART, J. This is a motion to dismiss the appeal herein. The action was one for the quieting of the title to certain real property situated in Fresno county as against the defendants and also for the recovery of certain personal property. The complaint also asks for the appointment of a receiver to take

charge of said real and personal property. The court appointed a receiver, and the latter, by virtue of the authority vested in him by the court, took possession of the real property and also certain personal property. The action grows out of a certain contract whereby the plaintiffs and the defendants agreed to exchange and sell to each other certain real and personal property. The agreement, among other things, provided that, immediately upon its execution, the defendants were to take possession of the premises exchanged or sold to them by the plaintiffs, and the complaint alleges that the defendants did take such possession. The agreement further provided that, in case of the violation by the defendants of certain of the covenants or conditions thereof, the plaintiffs should be at liberty to declare the agreement forfeited and that all payments theretofore made should be treated as liquidated damages and that the plaintiffs might enter said premises, "remove all persons therefrom, and be released in law as well as in equity to convey said premises." The appellant, by leave of the court, was permitted to intervene. The complaint in intervention alleges that the defendants, on the 1st day of June, 1921, and after the execution of the agreement above mentioned, borrowed from the intervener the sum of \$2,500, and gave their promissory note therefor, payable on or before two years after date, with interest from March 1, 1921, at the rate of 7 per cent. per annum; that, to secure the payment of said note, the defendants, on said 1st day of June, 1921, executed and delivered to the intervener a mortgage on 55 per cent. of the crop of alfalfa, Thompson and Muscat grapes and raisins for the year 1921, and all other crops for the year 1922 grown and produced upon said premises. It is alleged in said complaint in intervention that said defendants "have failed, neglected and refused to pay the amount due on said note, or any part thereof, and that the same is now justly due and owing in full over and above all offsets of every nature." The prayer of said complaint is that the intervener have judgment against the defendants and the plaintiffs for the possession of the crops raised on said premises for the year 1922, and that the mortgage of the intervener be foreclosed, and that said crops be sold as provided by law and the money applied to the payment of said note.

The court's findings and judgment were in favor of the plaintiffs and against the defendants and the intervener. The notice of appeal, which was filed on the 28th day of June, 1923, by the intervener, states that the latter "appeals from the judgment of the trial court given in favor of the plaintiffs on the 27th day of June, 1923," and also appeals "from the order of the court made June 26, 1923," ordering and directing the moneys

and property mentioned in intervenor's complaint be paid and turned over by the receiver to the plaintiffs.

The defendants have not appealed, so far as this record shows.

The motion to dismiss is based upon the ground that the purported appeal was not taken within the time prescribed by law, and is supported by an affidavit made and filed by the attorney for the plaintiffs. From said affidavit it appears that the judgment in the action is dated November 29, 1922, and was filed and entered in the office of the county clerk on December 1, 1922; that no motion for a new trial in said cause was ever made, "and no other action or proceeding by defendants, or either of them, or of said intervenor, was taken with respect to said judgment, except that defendants did, on January 20, 1923, give notice of appeal from said judgment and file the same in said court, and the said intervenor did thereafter give his notice of appeal as hereinbefore stated; * * * that said notice of appeal is the one and only notice of appeal filed in this proceeding by said intervenor." The affidavit further alleges that no order of the court by which said cause was heard and tried was entered on the 26th day of June, 1923, "but that there was an order and decree of said court settling the account of the receiver appointed therein and distributing the assets and property coming into the hands of said receiver, which order bears date January 30, 1923, and was filed in the office of the said county clerk on said date; * * * that no appeal from said order has ever been taken except the attempted appeal of the intervenor by giving the notice hereinbefore referred to; that no other or subsequent order has been made respecting the property mentioned in intervenor's complaint; that no judgment or order of any character has been made or entered by the trial court in said action subsequent to the 30th day of January, 1923; that no motion to set aside, modify, or vacate said order has ever been made by any of the parties to this action; that the same has been at all times since the entry thereof in full force and effect."

The appellant practically made no counter showing. Indeed, in an affidavit made by his attorney in purported resistance to the motion to dismiss, he admits that the facts stated in the affidavit of the attorney for the respondents are true; but he complains in said affidavit that no judgment has ever been entered by the clerk "on the findings of the court disbursing the funds in the hands of the receiver, dated January 3, 1923," and, further, that the judgment entered "on the 27th day of June, 1923," does not dispose of or refer to the finding of the court that the intervenor and the defendants are and each of them is barred from setting up or asserting or claiming title, etc., in or to any of the crops produced thereon (on the land in con-

troversy) subsequent to the commencement of this action or any possession thereof adverse to the plaintiffs. He further states in his affidavit that he has "many times requested respondents' attorney to get these judgments entered for this appeal and the county clerk * * * refused in this case, and refuses in all other cases, to enter any judgment unless the same is first signed by the judge trying the case." Upon these statements he asks this court to enter an order "requiring the respondents to have a judgment entered on the findings of the court as hereinabove set out if the same shall be regarded necessary by this court to render complete justice to the appellant herein, and that said judgments be certified to this court by the county clerk of Fresno county," etc.

[1] Obviously, the facts set out in the affidavit of the attorney for the appellant involve matters with which this court cannot concern itself. Nothing could be clearer than that this court in a proceeding of this character cannot order a judgment to be entered in a case. If an erroneous judgment or a judgment which derives no support from the findings has been entered, the remedy for the correction of the same is by appeal properly taken therefrom.

[2] The fact is, however, that a judgment and an order were entered; but the difficulty confronting the appellant is that he allowed the time to pass for taking an appeal from either before attempting to do so. It will be noted that a period of over seven months elapsed from the time of the entry of the judgment until the date of the filing of the purported notice of appeal, and that from the date of the making and filing of the order from which the intervenor attempts to appeal to the date of the filing of his notice of appeal a period of nearly five months elapsed. It follows that the attempt to appeal both from the judgment and the order was abortive. Code Civ. Proc. §§ 939 and 953a.

Accordingly, the appeal is dismissed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

HART, J. Counsel for the intervenor appellant prefaces his petition for a rehearing of the above-entitled cause with the statement that this court, in its judgment dismissing the appeal herein evidently went off on an erroneous understanding of "the matters contained in the record on appeal." We had no misunderstanding of what the record contained. Indeed, counsel for the intervenor himself stated in his affidavit resisting the motion to dismiss that he had "read the affidavit of M. F. McCormick and that the same is true." Said affidavit was filed in support of the motion to dismiss, and if the facts therein stated are true, then there was no alternative left to

this court but to grant the motion to dismiss the appeal, for it is therein and thereby plainly shown that, even if the judgment and the order really rendered and entered were or either of them was subject to appeal by the intervener, the latter's appeal was too late. But it appears that the judgment referred to affected the rights of the defendants only and not the rights of the intervener. Moreover, as shown in the original opinion, the judgment was rendered on the 29th day of November, 1922, and entered of record on the 1st day of December, 1922. If the intervener's rights had been affected by said judgment, it is obvious, as pointed out in the former opinion, that his attempted appeal therefrom, on the 28th day of June, 1923, was too late and wholly nugatory. The order mentioned was made on the 29th day of November, 1922. If such order be appealable, and as to it the intervener was an aggrieved party, the attempted appeal was too late. Counsel, however, calls attention to findings and conclusions of law made by the court on June 23, 1923, whereby the court decided, and concluded, as a matter of law, that the intervener (appellant herein) is entitled to take nothing "by reason of his complaint in intervention"; but, so far as the present record shows to the contrary, no judgment was ever rendered upon those findings and conclusions of law.

[3] It is too obvious to require more than a mere statement of the proposition that an appeal does not lie from findings and conclusions of law or from either. But special emphasis is placed on section 939 of the Code of Civil Procedure as the same was amended by the Legislature of 1915. Stats. 1915, p. 205. The particular provision of said section upon which counsel lays stress reads as follows:

"No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry."

We are unable to see what application said section has to the situation presented by the record before us. As stated, there was no judgment rendered upon the findings and conclusions of law filed on the 23d day of June, 1923, and which were the only findings and conclusions of law affecting the rights of the intervener or attempting to dispose of the claim made in his complaint in intervention.

It is not the duty of this court to point out the course which should be pursued in such circumstances, but it may not be improper to say that, if the court below has refused and still refuses to render a judgment upon the findings and conclusions of law made June 23, 1923, a ready remedy is available to the intervener for compelling the court to do so. Or, if in point of fact the court has rendered

a judgment on said findings and conclusions of law, the same might have been included in the record here upon a suggestion of a diminution of the record. The alleged failure of the clerk to enter the judgment which counsel intimates was rendered on the findings and conclusions of law made June 23, 1923, is, in view of the provision of section 939 of the Code of Civil Procedure, above quoted herein, a matter of no consequence, in so far as the right of the intervener to take an appeal from said judgment is concerned.

The petition for a rehearing is denied.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 353

PEOPLE v. RAMIREZ. (Cr. 1027.)

(District Court of Appeals, Second District, Division 1, California. Nov. 8, 1923.)

1. Criminal law — 312—Specific intent as element of offense must be proved.

Except in murder cases, whenever a specific intent is an element of an offense, no presumption as to its existence can arise, and it must be shown like any other fact.

2. Homicide — 292(1)—Instruction on intent, where defendant shot at one person and struck another, held proper.

In prosecution for assault with intent to kill, where facts showed defendant's shot, which struck prosecuting witness, was directed toward another, in view of Pen. Code, § 217, providing that every person who assaults another with intent to commit murder is punishable, it was not error to instruct that, when one intends to assault a certain person and by mistake assaults another, the intent is transferred, and the party making the assault will be deemed guilty the same as if he had originally intended to assault the person so assaulted by mistake.

3. Homicide — 292(1)—Instruction that person assaulting intended all natural consequences of his act held not error.

In prosecution for assault with intent to kill, where facts showed that shot which struck prosecuting witness was intended for another, and included in the information was the charge of assault with a deadly weapon, a crime which may be committed without intent to kill, it was not error to instruct that a person may be presumed to intend to do that which he voluntarily and willfully does do and must also be presumed to intend all the natural consequences of his act.

4. Criminal law — 823(2)—Instruction held not expression of opinion on question of fact.

In prosecution for assault with intent to commit murder, where facts showed that shot which struck prosecuting witness was intended for another, an instruction that defendant urges that, although he may have been guilty of tech-

nical violation of law, he was innocent of guilty purpose, was not an expression of opinion that defendant was guilty of violation of law, in view of another instruction that court did not intend to intimate any opinion as to facts or inferences from evidence.

5. Criminal law — 823(2)—Instruction held not invasive of jury's province.

In prosecution for assault with intent to commit murder, an instruction that defendant's testimony tended to prove he was at a certain place at the time of crime charged, and that state has introduced evidence connecting defendant with commission of crime, at another place, is not objectionable as an expression of opinion that the evidence was sufficient to connect defendant with the commission of a crime, where the court further informs the jury that in this contradiction of witnesses the jury must determine for themselves where lies the truth.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Guadalupe Ramirez was convicted of assault with intent to commit murder, and he appeals. Affirmed.

See, also, 219 Pac. 73.

W. W. Judd, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was accused and convicted of the crime of assault with intent to commit murder, in that he made an assault with a deadly weapon upon one Lorenzo Ramirez with intent to kill and murder the said Lorenzo Ramirez. Defendant appeals from the judgment. There was no motion for a new trial. The points relied upon in support of the appeal are those hereinafter stated.

[1, 2] It is admitted by counsel for appellant that the evidence is sufficient to prove (although there is evidence to the contrary) that appellant fired the shot which struck Lorenzo; but he contends that the murderous intent, if any, was directed toward one Laura Salcido. From the evidence on which the verdict depends the facts appear to be that appellant fired at Miss Salcido; that the shot missed her and hit the boy Lorenzo; and that there is no evidence that appellant actually intended to hit Lorenzo.

Taking into consideration this state of the evidence, appellant contends that the court erred in giving to the jury the following instruction:

"When one intends to assault a certain person with a deadly weapon and by mistake or inadvertence assaults another person with such deadly weapon in his stead, it is nevertheless a crime; the intent is transferred from such other person so assaulted, and the party com-

mitting such assault will be deemed guilty of assault with a deadly weapon the same as if he had originally intended to assault the person so assaulted by such mistake or inadvertence."

He claims that this rule of the transfer of intent is confined to murder trials, where the general malice constitutes the intent, and is not applicable in the trial of a case like the present, where (so he contends) the only charge is that of assault with intent to kill. It is true that, except in the case of murder, it is the law that whenever a specific intent is an element of an offense, no presumption of law can arise, and that the specific intent is a fact to be shown like any other fact in the case. *People v. Jones*, 160 Cal. 358, 370, 117 Pac. 176. But it does not necessarily follow that in the case at bar the conviction cannot be sustained without proof that the defendant intended to murder the person assaulted. "Every person who assaults another with intent to commit murder, is punishable," etc. Pen. Code, § 217. "Where one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other." *People v. Wells*, 145 Cal. 138, 140, 78 Pac. 470, 471. This rule has been affirmed in many states, although it is denied in others. 30 *Corpus Juris*, p. 25; also, *State v. Thomas*, 127 La. 576, 53 South. 868, Ann. Cas. 1912A, 1063.

[3] The court instructed the jury that—

"A person must be presumed to intend to do that which he voluntarily and willfully does in fact do and must also be presumed to intend all of the natural, probable, and usual consequences of his own acts."

Appellant contends that this instruction violates the rule that where specific intent is an essential element of the crime, the fact of such intent must be proved. There is no doubt that the rule is correctly stated. Where the specific intent to kill and murder is an element of the offense charged, it is necessary that the existence of that intent be established as a fact by such evidence as will warrant the conclusion to that effect by the jury. It is not to be presumed from the commission of the unlawful act, though the jury may infer it from the acts and conduct of the defendant. This is true wherever the crime falls short of homicide, even if it be the crime of assault with intent to commit murder. 8 Cal. Jur. p. 26, and cases there cited. But it does not follow that the instruction as given in this case is in conflict with the law. Included within the information charging the offense of assault with a deadly weapon with intent to commit murder there is the charge of assault with a deadly weapon, a crime which may be committed

without intent to kill. 3 Cal. Jur. p. 225. The court gave instructions under which, without proof of "intent to kill and murder," the jury might have found the defendant guilty of assault with a deadly weapon. The instruction complained of, referring to the presumptions arising from a voluntary and willful act is a correct instruction, applicable to this lesser offense. If the defendant desired to limit this instruction by a declaration that it did not apply to an assault with a deadly weapon with intent to kill and murder, he should have requested the court to so declare.

[4] The next instruction criticized by appellant involves the question of intent in connection with the definition of the words "knowingly" and "willfully." For the same reasons given in discussing the last preceding instruction mentioned herein, we hold that the giving of such instruction was not erroneous. The further contention of appellant that the court in this instruction invaded the province of the jury by expressing an opinion on a question of fact is not well founded. The court in this instruction suggested:

"That the defendant urges that although he may have been guilty of a technical violation of the law, he was innocent of any guilty purpose connected therewith."

This was not an expression of opinion by the court that the defendant was guilty of any violation of the law. In another instruction the judge directly informed the jury that he did not intend to intimate any opinion as to what facts were or were not established or what inferences should be drawn from the evidence adduced.

[5] It is further contended that the court invaded the province of the jury in the second sentence of the following quotation:

"The defendant has introduced testimony tending to prove that he was at 512 California street, at time of commission of crime charged in the information. The state has introduced evidence connecting defendant with commission of crime at 1017 No. Broadway."

But immediately following the quoted statement the court informed the jury "that in this contradiction of witnesses the jury have to determine for themselves where lies the truth." From this and other portions of the same instruction, it is plain that the court was not expressing an opinion that the evidence was actually sufficient to connect the defendant with the commission of any crime.

The judgment is affirmed.

I concur: CURTIS, J.
I dissent: HOUSER, J.

64 Cal. App. 450

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, Inc., v. MURPHY.
(Civ. 4649.)

(District Court of Appeal, First District, Division 1, California. Nov. 20, 1923.)

1. Agriculture ☞6—Option of co-operative association to purchase own stock held not to invalidate produce sale agreement with subscriber.

A clause in subscription agreement purporting to give co-operative poultry association to be incorporated the optional right to purchase its stock from any of its shareholders, if illegal and void, was intended for the benefit of the corporation and not for the subscribers, and did not render invalid an agreement of subscribers to sell all of his eggs to the corporation or stand liable for liquidated damages.

2. Specific performance ☞68 — Promise of subscriber to sign agreement for sale of produce to co-operative poultry producers' association may be specifically enforced.

Promise of subscriber in subscription agreement, purporting to give to a poultry association to be incorporated to promote and foster the business of raising poultry and marketing eggs and poultry by co-operative method, to sign the "produce sale agreement," requiring him to sell all of his eggs and poultry to the corporation, may be specifically enforced, in view of Code Civ. Proc. § 580, and Civ. Code, § 3529.

3. Appeal and error ☞1009(2)—Finding of fact supported by evidence conclusive upon appeal.

In suit to specifically perform contract, a finding of the lower court upon a question of fact amply supported by the evidence is conclusive upon appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Poultry Producers of Central California, Inc., against John M. Murphy. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Kierce and W. E. White, both of San Francisco, for appellant.

Sapiro, Levy, Hatfield & Hayes, of San Francisco, for respondent.

ST. SURE, J. The plaintiff is a nonprofit association of poultry producers, organized for the purpose of promoting and fostering the business of raising poultry and marketing eggs and poultry by co-operative methods. The defendant, together with other producers of poultry products, signed a subscription agreement which provided for the organization of a corporation under which each producer agreed to purchase stock on the basis of one share for each 1,000 hens owned by the subscriber. The agreement

further provided that the corporation (plaintiff herein) have an option to repurchase its stock; that the corporation should be organized upon the securing of subscriptions in a certain amount; and it also made provision for the number of directors, the manner of their selection, and various other matters usually contained in such a subscription agreement.

The defendant, owning about 1,000 hens, subscribed for one share of stock at the time he signed the subscription agreement, and paid \$2.50, representing 25 per cent. of the subscription price, which, in accordance with the terms of the subscription agreement, was to be credited for the stock if the organization was completed.

To the subscription agreement was attached a "produce sale agreement" providing that the signer should sell and deliver to the plaintiff corporation all eggs produced by him during the years 1917, 1918 and 1919; that the plaintiff should pool the eggs delivered with eggs of like grade and quality, market the eggs so delivered, and, after making proper deductions for marketing costs and overhead expenses, pay over the net resale price to the stockholders who had delivered the eggs; also, that plaintiff might recover liquidated damages for the eggs sold by the signer in violation of the terms of the agreement. The requisite number of subscriptions was secured and the corporation was organized. The defendant refused to sign the "produce sale agreement," and sold 11,400 dozen eggs in violation of its terms.

This suit was commenced for the purpose of compelling the defendant to execute the "produce sale agreement" which he had agreed to execute in the subscription agreement; to secure specific performance of the provision in the "produce sale agreement" that the defendant should sell and deliver all eggs produced by him to the plaintiff; to recover liquidated damages for the eggs sold by the defendant in violation of the terms of the agreement; and to recover the balance of \$7.50 due on the defendant's stock subscription. The period of performance of the "produce sale agreement" had elapsed before the case was brought to trial.

The lower court gave judgment in favor of the plaintiff and against the defendant, directing defendant to sign the "produce sale agreement," and awarding the plaintiff \$577.50, which sum represents a balance of \$7.50 due on a subscription for stock, and \$570, liquidated damages for the failure to deliver eggs to the plaintiff in accordance with the terms of the "produce sale agreement."

[1] Defendant appeals, attacking the judgment upon the grounds: First, that the provision of the subscription agreement giving the plaintiff an option to repurchase its stock is illegal, and that this renders the entire contract void; second, that because of

the absence of mutuality in the "produce sale agreement," it cannot be specifically enforced; third, that as the contract is illegal no damages can be recovered for the breach thereof.

Counsel for defendant call our attention to the decision of the Supreme Court in Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 208 Pac. 93. For the sake of brevity we will designate and hereafter refer to the cited case as the Barlow Case. In the Barlow Case plaintiff corporation recovered judgment in the lower court against the defendant, one of the contracting stockholders, for liquidated damages for breach of contract by reason of sale of eggs to other purchasers, and for specific performance of the contract to sell and deliver eggs to plaintiff during the unexpired term covered by the contract, and enjoining defendant from making sales of his product to other persons. The District Court of Appeal affirmed the judgment of the trial court for recovery of damages, but granted a reversal as to injunction and specific performance. The Supreme Court took the matter over for hearing. "We were in accord with the part of the decision affirming the judgment for damages," say the Supreme Court, "but were not satisfied at the time that plaintiff was not also entitled to the equitable relief by injunction and specific performance. On further consideration of this part of the judgment we have reached a conclusion in accord with that of the District Court of Appeal."

The purpose of the plaintiff corporation in the Barlow Case, and the purpose of the plaintiff corporation in the instant case, are identical. Each corporation was organized for the purpose of promoting the raising of poultry and the production of eggs through and by means of co-operative methods that had been suggested by the state market director. Counsel for defendant assert that in both cases the subscription agreement is substantially identical, and that the only difference between the Barlow Case and the instant case is that a "produce sale agreement" was executed by both parties in the former, while in the latter it was not signed by the defendant until he was compelled to do so by the judgment of the lower court.

In the Barlow Case the Supreme Court held that the clause in the subscription agreement, purporting to give to the corporation to be formed thereunder the optional right to purchase its stock from any of its shareholders, was illegal and void, and consequently unenforceable. We quote from the opinion:

"The defendant, as well as each of the other poultrymen who joined with him in the execution of the subscription agreement and the produce sale agreement, promised to do several things, one of which was to give to the corporation about to be incorporated and or-

ganized the optional right to purchase its own stock at any time that it elected so to do. The corporation was not obligated to buy its own shares. It could do so or not at its option. It is here seeking to recover damages for the breach of and to specifically enforce one only of several promises made by defendant—a promise that, considered by itself, is legal and valid. The exercise by the corporation of its optional right to purchase any of defendant's stock is no part of the consideration for any of the promises made by defendant. The option was intended for the benefit of the corporation, not defendant. Each of the valid promises made by defendant is supported by a legal consideration. Defendant's illegal and unenforceable promise to give to the corporation, when formed, the optional right to purchase any of his stock at any time after its issuance to him is not so mingled and bound with the other and valid promises that they cannot be separated. All of the consideration moving from the corporation to defendant for his legal promises is legal and valid."

The obvious and conceded similarity between the Barlow Case and the one at bar makes the opinion in the Barlow Case decisive of the first point urged by defendant, and renders further discussion thereof by us unnecessary.

[2] The next contention of defendant is that the trial court erred in requiring him to sign the "produce sale agreement." His counsel argue that this action of the trial court compelled him to specifically perform the provisions of the signed subscription agreement, and that, upon the authority of the Barlow Case, this cannot be done. In the Barlow Case, as we have seen, the lower court gave a decree of specific performance, compelling defendant to deliver his eggs to the plaintiff corporation in accordance with the terms of the "produce sale agreement." The Supreme Court held that, in this particular, the contract called for services on the part of the plaintiff corporation of a highly personal nature, requiring the exercise of skill and discretion and covering repeated transactions to extend over a number of years, and declared that it has not been the practice of courts of equity to attempt to enforce such complicated personal obligations, or to burden themselves with the supervision of frequently recurring duties of contracting parties. The Supreme Court therefore held that such a decree of specific performance was improper. Concerning the promise of the defendant to sell and deliver to plaintiff corporation all the eggs produced from his poultry during a given period of time, the Supreme Court held that such promise was a valid one, and that plaintiff corporation was entitled to damages which the trial court found were suffered by it by reason of defendant's breach. As we have heretofore stated, in the Barlow Case the producers' agreement was signed

by all of the parties, while in this case the defendant refused to sign it. We think that the promise of defendant to sign the "produce sale agreement" is valid and enforceable (*Wharton v. Stoutenburgh*, 35 N. J. Eq. 266), and that there is nothing in the decision of the Barlow Case to the contrary. This case is one in equity, and the trial court was authorized to grant any relief consistent with the case made and embraced within the issues. Section 580, Code Civ. Proc.; *Zellerbach v. Allenberg*, 99 Cal. 57, 68, 33 Pac. 786. And if this were not so, plaintiff might invoke that maxim of jurisprudence which reads:

"That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." Section 3529, Civ. Code.

[3] Upon the question of damages the court found that under the provisions of the agreements it was impractical and extremely difficult to fix and determine the actual damages resulting to and suffered by the plaintiff from the failure and refusal of defendant to deliver eggs to plaintiff, and that the liquidated damages provided for in said agreements were valid liquidated damages. This finding, upon a question of fact, amply supported by the evidence, is conclusive upon us. If more need be said, it seems to be settled that the propriety of liquidated damages in a case such as this is recognized in *Poultry Producers of Southern California, Inc., v. Barlow*, supra, and *Anaheim Citrus Fruit Association v. Yeoman*, 51 Cal. App. 759, 197 Pac. 959.

The judgment is affirmed.

We concur: TYLER, P. J.; NEEDHAM, Justice pro tem.

64 Cal. App. 463

SMITH v. MITCHELL. (Civ. 2595.)

(District Court of Appeal, Third District, California. Nov. 21, 1923.)

I. Husband and wife ⚭ 335.—Instruction in alienation suit on "enticement" of wife held erroneous.

In an action for alienation of affections, brought against a stranger in blood, an instruction that plaintiff must prove that defendant intentionally enticed plaintiff's wife away from him and in doing so acted maliciously, and that merely giving advice was not actionable if given honestly and with a view to the welfare of both parties, by one who had no influence or authority, held erroneous in view of Civ. Code, § 49, forbidding the enticement of a wife from her husband, and sections 47 and 48, relating to privileged communications.

2. New trial — 90—Properly granted when witness swore testimony was false and induced by successful party.

In an alienation of affections suit, it was not error to grant a new trial where the wife, after testifying that defendant had nothing to do with alienating her affections and that she left her husband on account of his cruel and abusive treatment, made an affidavit that such testimony was false and induced by defendant.

3. New trial — 159—Question one of law where uncontradicted evidence shows misconduct prevented fair trial.

On motion for new trial in an alienation of affection suit, where it appeared by uncontradicted evidence that defendant had induced the wife to give false evidence and thereby prevented a fair trial, the question was one of law.

4. Appeal and error — 856(5)—Supreme Court may affirm order for new trial though trial court granted it on other grounds.

That the trial court granted plaintiff a new trial on other grounds did not preclude the court from affirming the order on ground of defendant's misconduct.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by T. D. Smith against Louis Mitchell for damages for alienation of wife's affections. Judgment for defendant, a new trial was awarded, and defendant appeals. Affirmed.

Geo. F. Gill and G. W. Zartman, both of Tulare, and Farnsworth, McClure & Burke, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondent.

FINCH, P. J. Plaintiff sued to recover damages for the alienation of his wife's affections by defendant. The jury returned a verdict in favor of defendant, and judgment was entered accordingly. Plaintiff moved for a new trial upon the following grounds, among others:

"(1) Irregularity of the proceedings of the court, jury and adverse party, to wit, the defendant, by which the plaintiff was prevented from having a fair trial. * * * (7) Error in law occurring at the trial and excepted to by the party making the application."

The court granted the motion "upon the ground of errors in the instructions given to the jury by the court." This appeal is from the order granting a new trial.

The evidence is sufficient to sustain a judgment for either party. In view of the necessity of a new trial, the evidence will not be discussed further than is necessary to an intelligent understanding of the questions of law involved. The plaintiff and his wife and their three little children were living on a ranch belonging to defendant, who was boarding with them. The plaintiff became jealous because of the relations, real or imaginary,

between his wife and defendant, resulting in domestic quarrels and culminating in the separation of plaintiff and his wife on the 17th of June, 1921. Shortly thereafter Mrs. Smith went to her former home in Oklahoma. The defendant furnished Mrs. Smith with money to go to Oklahoma and sent her money while she was there. A few weeks after Mrs. Smith left, the plaintiff found a letter, inclosed in a sealed envelope, near the post office at Tipton, Cal., addressed to Mrs. Smith at Carney, Okl. The letter was dated July 7, 1921, and was signed "L. M." Inclosed with the letter was a money order, dated July 7, 1921, designating Mrs. Smith as payee and the defendant as remitter. The contents of the letter were such as to indicate that the plaintiff's suspicions concerning the relations between his wife and the defendant were well founded. Thereafter, on August 5, 1921, this action was commenced. In October, 1921, Mrs. Smith left Oklahoma for California in company with her sister and the latter's husband. They came through in an automobile and arrived in California about three weeks before the trial of the action, which was commenced November 29, 1921. Mrs. Smith was the most important witness for defendant at the trial. She denied the material parts of her husband's testimony and testified that defendant had in no manner influenced her conduct toward her husband or caused her to lose her affection for him. Her testimony was, in effect, that she had lost her affection for plaintiff by reason of his cruel and abusive treatment of her.

At the hearing of plaintiff's motion for a new trial the affidavit of Mrs. Smith was admitted in evidence. She therein stated:

"That at the time of said trial she was under the dominion and influence of the defendant to such an extent that at said time by reason of the persuasion, promises and influence of the defendant to and for her, she testified at said trial to facts material to said issue that were not true and in particular as follows, to wit."

Then follows a statement of the material facts testified to by affiant at the trial. Affiant then proceeds to state that the defendant was the sole cause of her separation from her husband; that their married life had been happy and harmonious until defendant "gained her love and affection"; that defendant "promised affiant that if she would separate from her husband and obtain a divorce from him that he would place her in a more comfortable home, surrounded by luxuries than could ever be given to her by her said husband; that he promised her jewelry, a ranch and a choice of living wherever she might see fit; * * * that said Louis Mitchell gave her a gold ring; that he promised her a gold watch and chain and immediately after the trial of this action and on the day of the closing of such trial gave her such gold

watch and chain, thereby carrying out his promises"; that he took her to the office of an attorney to ascertain whether she could secure a divorce and promised to pay all costs of securing a divorce from her husband; that he persuaded her "to go to her people in Oklahoma and leave said plaintiff" for the "purpose of obtaining a divorce in the state of Oklahoma"; that with money furnished by defendant she went to Oklahoma and there instituted an action for divorce; that defendant sent her money to pay the costs thereof; that just prior to the separation of plaintiff and affiant the defendant expressed the desire to marry her; "that for the purpose of retaining his dominion over her and for the purpose of controlling her testimony in the trial of the above-entitled action said Louis Mitchell did prior to said trial meet affiant in the state of Arizona and there joined her on her return to California, and at such time in many conversations had between affiant and said Louis Mitchell he still insisted that he loved affiant and desired her to become his wife, and that in order that he might prevail in the trial of the above-entitled action she would have to testify as she did upon the stand in said trial, and that affiant on said trip and at various times up to the date of said trial agreed with said Louis Mitchell to testify falsely as she did at said trial."

A few counter affidavits were filed to the effect that Mrs. Smith had made statements prior to the trial which were inconsistent with some of her statements in the affidavit, and her testimony given at the trial is wholly inconsistent with that contained in the affidavit; but her statements in the affidavit to the effect that defendant had induced her to testify falsely at the trial stand without substantial contradiction. Many of the facts stated in the affidavit, from the nature thereof, must have been within the exclusive knowledge of Mrs. Smith and the defendant; yet the defendant wholly failed to deny any of them. No affidavit of the defendant was presented on the motion for a new trial. The only rational inference is that the defendant could not truthfully deny such statements.

The only instruction pointed out by respondent to justify the order granting a new trial reads as follows:

"You are instructed that before you can find a verdict in favor of the plaintiff it is necessary that plaintiff prove by a preponderance of evidence and to your satisfaction that the defendant intentionally enticed plaintiff's wife away from him, and also that in doing so he acted maliciously.

"Merely giving advice to a wife, which induces her to leave her husband, is not actionable if given honestly, with a view to the welfare of both parties, by one who has no special influence or authority."

[1] Section 49 of the Civil Code provides: "The rights of personal relations forbid

* * * the abduction or enticement of a wife from her husband." The definition of the word "entice," as given in 15 Cyc. 1054, is "to allure to ill, to attract, to seduce, to coax. A word which may import an initial, active, and wrongful effort." It is apparent that the word "enticement," as used in section 49, imports wrongful conduct. The effect of the instruction given, therefore, is that it is not enough for the plaintiff to prove that the defendant intentionally and wrongfully induced Mrs. Smith to leave plaintiff, but that he must further prove that defendant acted maliciously in so doing. Defendant is a stranger in blood to Mrs. Smith. Section 47 of the Civil Code provides:

"A privileged publication is one made * * * (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information."

Section 48 provides:

"In the cases provided for in subdivisions three, four, and five, of the preceding section, malice is not inferred from the communication or publication."

The defendant was not "interested" in Mrs. Smith's marital affairs, in the sense in which the word is used in section 47, and he was not privileged to intermeddle voluntarily therein. Had any advice, which defendant may have given her, been given at her request, then, under section 48, malice could not be inferred from the mere fact that he gave the advice; but when a stranger wrongfully volunteers to advise or encourage one party to the marriage to leave the other malice may be inferred without further proof. The principles of law announced in sections 47 and 48 are variously expressed by the authorities in actions for alienation of affections:

"The decisions require a much stronger case to be made out where the defendant is a parent of the spouse alleged to have been enticed." *Cripe v. Cripe*, 170 Cal. 91, 93, 148 Pac. 520, 521.

"The privilege accorded to parents, relatives, and guardians of a spouse in their communications and conduct with reference to the marital relation does not exist in favor of strangers. In the former case advice which may lead to a separation is presumed to have been given in good faith, but in case of a stranger malice is presumed." 21 Cyc. 1620.

"In case of a stranger in blood the causes must be extreme that will warrant him in interfering with the relation of husband and wife. * * * The burden is on him to show good cause and good faith for his conduct." *Boland v. Stanley*, 88 Ark. 562, 569, 115 S. W. 163, 165, 129 Am. St. 114, 119.

"While a stranger may, without liability, har-

bor a wife who has left her husband, he may not persuade her to leave him, or not to return to him. Though she may have just grounds for a separation, yet she may choose to return, and a stranger has no right to intermeddle, and if he does so voluntarily, he must answer the consequences." *Oakman v. Belden*, 94 Me. 280, 281, 47 Atl. 553, 80 Am. St. 396, 397; 13 R. C. L. 1465.

"If a wife has good ground for a separation from her husband, or for a divorce from him, and she voluntarily seeks the advice, shelter, and protection of a stranger, and he gives her his advice and protection in good faith, and from motives of kindness and humanity, the husband cannot recover in an action for the alienation of her affections; although it would be otherwise if she would not seek the separation or sue for divorce except for the intentional and unsolicited interference of such third person inducing her so to act." Note, 44 Am. St. Rep. 851; *Modisett v. McPike*, 74 Mo. 636. See, also, note, 46 L. R. A. (N. S.) 465.

"Where the action is against a stranger, the plaintiff need only show that it was wrongfully brought about. * * * Where the defendant is a stranger and intended to cause a separation, the burden of proof, in one sense, is upon the defendant to give a proper explanation for inducing the wife (or husband) to leave. If the advice was given honestly and for the best welfare of the parties, the defendant must show this fact." *Elliott on Evidence*, § 1643.

"The motive of the parent is presumed to be good until the contrary is proved, but where the alienation is caused by a stranger, the defendant must generally show that his conduct was actuated by proper motives." *Id.*, § 1645.

"A stranger must explain his motive. * * * Whenever there is a deliberate intention of causing a separation of the husband and wife and doing a grievous wrong, without legal justification or excuse, malice or evil intent may be implied, as the very essence of malice is a disposition or willingness to do a wrongful act injuring another." *Id.*, § 1646.

[2, 3] The uncontradicted evidence presented at the hearing of the motion for a new trial was such as to entitle the plaintiff to a retrial. When a party to an action induces a witness to give perjured testimony in matters material to the case, he thereby prevents the other party from having a fair trial. Since the misconduct of defendant in preventing a fair trial is shown by uncontradicted evidence, the question presented is one of law.

[4] The fact that the trial court granted a new trial on other grounds does not preclude this court from affirming the order on the ground of defendant's misconduct. *Stell v. Sun Insurance Office*, 171 Cal. 795, 798, 155 Pac. 72. Plaintiff is entitled to a new trial on the ground of defendant's misconduct and also on the ground that the foregoing instruction is erroneous.

The order is affirmed.

We concur: HART, J.; PLUMMER, J.

64 Cal. App. 314

SHAY, Sheriff, v. ROTH, County Auditor.
(Civ. 4415.)

(District Court of Appeal, Second District, Division 1, California. Oct. 31, 1923. Hearing Denied by Supreme Court Dec. 27, 1923.)

1. Constitutional law ☞35—Constitution binding on all state departments.

The provisions of the Constitution, being by article 1, § 22, mandatory and prohibitory unless by express words declared to be otherwise, are binding on every department of the state government.

2. Constitutional law ☞14—Words given meaning in ordinary use.

In construing the Constitution, words employed therein are given the meaning they bear in ordinary use.

3. Counties ☞3½, New vol. 14A Key-No. Series—Right to amend limited by powers granted in freeholders' charter.

What may not be done in a freeholders' charter framed under Const. art. 11, § 7½, may not be done in amendment thereto in absence of constitutional authority for such enlarged power by amendment.

4. Officers ☞100(1)—Charter amendment increasing sheriff's salary subject to clause forbidding increase after election and during term; "consistent with"; "subject to."

Amendment to freeholders' charter framed under Const. art. 11, § 7½, increasing salary of sheriff, must be "consistent with" and "subject to" section 9, providing that compensation shall not be increased after election or during term; "consistent with" meaning in harmony with, and "subject to" meaning subordinate to, obedient to, and hence amendment increasing salary ratified by the Legislature after election was inconsistent with section 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consistent; Subject to.]

5. Officers ☞100(1)—Constitutional inhibition against increase of salaries held to apply to approval of charter adopted by people of county.

Inhibition of Const. art. 11, § 9, providing salaries of county officers shall not be increased after election or during term, applies not only to acts of the Legislature but also where the act of the Legislature approves a charter adopted by the people, since the action of the county in ratifying such charter and the Legislature in approving it classifies the result as governmental action within the legislative department as defined by article 3, § 1.

6. Constitutional law ☞13—Court cannot substitute its ideas of legislative intent.

Courts cannot, by construction, substitute their ideas of intent of the law when that intent is unmistakably expressed in legislative words.

7. Sheriffs and constables ~~§~~29 — Repealing clause in charter amendment held not to deprive sheriff of salary.

Notwithstanding repealing clause in amendment to freeholders' charter increasing sheriff's salary effective after election, a sheriff, elected before amendment became effective, was not thereby denied a salary, since Const. art. 11, § 7½, provided that compensation should be provided either by charter or by supervisors, and, charter not providing for fixing salary by supervisors, the amendment will be held in abeyance until incumbency of officer on whom increase would operate.

8. Counties ~~§~~3½, New, vol. 14A Key-No. Series—Constitution providing for charters contemplated legislation by subordinate governmental subdivisions.

Original Const. 1879, art. 11, § 8, providing for adoption of municipal charters by vote of the people and prescribing the same general plan as is outlined in the present Constitution, contemplated legislation by subordinate governmental subdivisions.

Conrey, P. J., dissenting.

Original application for writ of mandate by W. A. Shay, Sheriff of San Bernardino County, against Vincent Roth, Auditor of San Bernardino County. Peremptory writ denied.

Swing & Wilson, of San Bernardino, for petitioner.

George H. Johnson, Dist. Atty., of San Bernardino, for respondent.

SHENK, Justice pro tem. Application for writ of mandate to compel the respondent, as auditor of the county of San Bernardino, to issue a warrant on the county treasurer directing the payment of the sum of \$300 to petitioner as salary due him for the month of May, 1923, as sheriff of said county.

Petitioner was elected to the office of sheriff at the general election held November 7, 1922. His term of office commenced on the 8th day of January, 1923. At the same general election of November 7, 1922, the people of the county of San Bernardino ratified a proposed amendment to the charter of said county. The amendment added two new sections to article 2 of the charter which read as follows:

"Sec. 5a. The salary of the sheriff shall be and is hereby fixed at thirty-six hundred dollars per annum.

"Sec. 5b. Section 5a hereof shall take effect and be in force and the salary fixed shall be effective from and after 12 o'clock noon on the 8th day of January, 1923. All provisions of said article II in said charter in conflict with the foregoing section are hereby repealed."

The amendment so ratified was approved by the Legislature on the 29th day of January, 1923. Prior to the amendment the salary attached to the office of sheriff as estab-

lished by the charter of the county was \$2,-400 per annum.

It is the contention of the respondent that the charter amendment increasing the petitioner's salary did not take effect or become a law until January 29, 1923, a date subsequent to the election of petitioner and after the commencement of his term of office, and that the increase in salary did not and does not apply to him, because of the following provisions of section 9 of article 11 of the Constitution:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office."

The charter of the county is a freeholders' charter framed and adopted pursuant to the provisions of section 7½ of article 11 of the Constitution, and the foregoing amendment was ratified and approved in all respects as required by that section. It is the position of the petitioner that the prohibitions of said section 9 do not apply to the amendment to the charter so adopted, and this is the only question for determination.

[1,2] The provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise (Const. art. 1, § 22), and are binding upon every department of the state government, legislative, executive, and judicial. *People v. California Fish Co.* 166 Cal. 587. 138 Pac. 79. It is said in *Cake v. City of Los Angeles*, 164 Cal. 709, 130 Pac. 725, that the declarations of the Constitution "are all mandatory and prohibitory unless the contrary is expressly declared." The section is plain and unambiguous. There is therefore no room for construction. The intent is to be found in the language itself. It is the general rule that in construing the provisions of the Constitution the words employed therein shall be given the meaning which they bear in ordinary use. 5 Cal. Jur. 595. In *City of Pasadena v. Railroad Commission*, 183 Cal. 532, 192 Pac. 28, 10 A. L. R. 1425, it is said:

"The Constitution, 'unlike the acts of our Legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.'"

To the same effect, see *Turlock Irrigation District v. White*, 186 Cal. 186, 198 Pac. 1060, 17 A. L. R. 72.

We find no words in section 9 which could be termed legal or technical and the prohibitions of the section must be enforced as written, unless it may properly be concluded that they have no application to a county charter or an amendment thereto, as urged by petitioner.

[3] It is first contended that under section 7½ of article 11 the power of the people of the county to amend a charter is unrestricted. It is clear that what may not be done in the charter as originally adopted may not be done in an amendment to the charter in the absence of constitutional authority for such enlarged power by amendment. No such enlarged power is found in the Constitution. The provisions of section 7½ must therefore be examined in order to determine their effect, if any, upon the prohibitions of section 9.

[4] As to matters which must be included in the county charter and as to matters which in addition it is competent to include in such charter, section 7½ is definite and specific. So far as applicable to this proceeding, it provides as follows:

"Any county may frame a charter for its own government consistent with and subject to the Constitution * * * and relating to matters authorized by provisions of the Constitution. * * * If a majority of said qualified electors [of the county] voting thereon, * * * shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be forthwith submitted to the Legislature * * * for its approval or rejection as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided. * * * The charter, so ratified, may be amended"—with the same provisions for ratification by the electors of the county and approval by the Legislature as is specified for the original charter.

It will be noted that the section requires that the charter shall provide for sheriffs and for their compensation or for the fixing of their compensation by boards of supervisors. It will also be noted that the provisions of such charter must be consistent with and subject to and must relate to matters authorized by the Constitution. That the provisions of the charter must be consistent with the Constitution is recognized in *Jones v. De Shields*, 187 Cal. 335, 202 Pac. 137. There is nothing in section 7½ which would authorize a violation of section 9 of the same article, nor is the amendment as applied to petitioner's claim consistent with that section. The phrase "consistent with" means "in agreement with; harmonious with." The amendment must also be subject to section 9. The phrase "subject to" means "subordinate to; obedient to." The amendment did not become a law until its approval by the Legislature on January 29, 1923. See *Apple v. Zemansky*, 166 Cal. 83, 134 Pac. 1149; *Snyder v. Murray*, 170 Cal. 656, 151 Pac. 128. The increase in salary, if allowed, would become fixed by law both after the petitioner's election and after the commencement of his term of office, and would therefore constitute

legislation as to him in a manner inconsistent with, not subordinate to, and, in fact, contrary to the provisions of said section 9.

[5] It is contended that the inhibitions of section 9 apply to the Legislature and not to the people. Reliance is placed on the case of *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, wherein it is stated that in approving a charter the Legislature is not the lawmaker, but exercises a power similar to that delegated to the governor with reference to bills passed by the Legislature, namely, that of approval or rejection. There is nothing in that case which would sanction a charter provision in violation of a constitutional mandate. Although the action of the Legislature in approving a charter is not a legislative one, the action of the county in ratifying the charter and of the Legislature in approving it would classify the result as governmental action within the legislative department of the state government as defined by section 1 of article 3 of the Constitution. The same declaration may be applied to a charter of a county as has been applied to the charter of a city adopted under section 8 of article 11 of the Constitution. In *Sheehan v. Scott*, 145 Cal. 687, 79 Pac. 351, it is said:

"The authority to provide a municipal government for a city is referable to the lawmaking power of the state, and the enactment of a charter for a municipality is a legislative act."

Such a charter has for some purposes been declared to be a statute. *Frick v. Los Angeles*, 115 Cal. 512, 47 Pac. 250.

Petitioner relies upon the case of *Kingsbury v. Nye*, 9 Cal. App. 574, 99 Pac. 985, wherein it is said with reference to the effect of section 9 of article 11 as applied to the facts in that case:

"The policy has been, we think, not that salaries may not be increased during the term of the incumbent, but that the Legislature shall not exercise the power. * * * When, therefore, we find a limitation or restriction of legislative power, it is directed to the Legislature and not to the people, the source of all power."

It is therefore urged that the judicial declaration of that case has the effect of removing the amendment to the charter from the prohibitions of section 9. That case involved the validity of an increase by constitutional amendment of the salaries of certain incumbent state officers, and it was held, in conformity with the views expressed in *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674, that salaries could be changed at any time by constitutional amendment. This proposition is not disputed by respondent. When the language of the *Kingsbury* Case is viewed in the light of the facts involved therein, it must be concluded that what was meant to be adjudicated was no more than that the prohibitions of section 9 do not apply to the people of the state—the source of all power—when exercising that power by constitutional

amendment. Such language must also be held to mean that the restrictions of section 9 are directed against the exercise of legislative power as distinguished from power exercised by the people of the state by constitutional amendment. It certainly may not be properly urged that, because the language of the Kingsbury case apparently limited the prohibitions of section 9 in terms to "the Legislature," it was intended to construe the effect of the prohibitions of section 9 so that the same would not apply to other bodies subordinate to the Constitution and exercising legislative functions, such as boards of supervisors, city boards of trustees, and city councils, nor to exclude from the operation of that section cities or counties legislating by initiative ordinance or charter provisions by direct vote of the people. Furthermore, the court said in that case that the organic law of the state is framed for the guidance of all persons and bodies subordinate to its will. In *Cameron v. City of Richmond*, 42 Cal. App. 262, 183 Pac. 604, it was held that section 9 prohibited the increase in salary of an incumbent city councilman of the charter city of Richmond.

Petitioner also cites *Puterbaugh v. Wadham*, 162 Cal. 611, 123 Pac. 804, to the effect that the prohibitions of section 9 of article 11 are directed to the Legislature, but likewise what is said in that case obviously was not intended to exclude from the operation of section 9 other governmental bodies legislating subject to constitutional restraint. In that case it was held that section 9 of article 11 had no application to an automatic increase in official salary due to the passing of a city by increased population from one class to another. It was there said:

"The salary of an officer which may not be increased 'during his term of office' has reference only to his compensation as fixed by law when his term of office began."

The compensation claimed by the petitioner in that case was the salary as fixed by law at and prior to the commencement of his term of office.

In the case of *Gibson v. Civil Service Commission*, 27 Cal. App. 396, 150 Pac. 78, also relied upon by petitioner, it is said in referring to the adoption of said section 7½:

"The constitutional provision so adopted was comprehensive to the end that the counties should have the power to provide a complete system for the election and appointment of their officers and for the fixing of their compensation."

Such, no doubt, was the purpose of the section. And it may be assumed that the result has been accomplished so far as interference by general laws is concerned. But that broad general statement of the purposes of the section should not be held to sanction such a system for the control of county officers as would do violence to the provisions

of the instrument under which the system was authorized.

There are no exceptions which may be read into the language of section 9 so as to exclude from its operation legislation by any subordinate body. In *People v. Campbell*, 138 Cal. 15, 70 Pac. 920, the Supreme Court said:

"The Constitution is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions."

If counties acting in a legislative capacity in adopting a charter are not bound by the prohibitions of section 9, what is to prevent them from transcending any other provisions of the Constitution? For instance, section 21 of article 4 of the Constitution provides that no person convicted of embezzlement or defalcation of public funds shall ever be eligible to any office of profit in this state. Could a county charter provide for a county treasurer and assuming to exercise complete control over the election and appointment of its county officers install and retain in the office of treasurer a person who had been convicted of embezzlement of public funds? Again, section 20, art. 4, provides that no person holding any lucrative office under the United States shall be eligible to any civil office of profit under this state. Assuming, also, to exercise such complete control over its officers, could a county provide in its charter for the election of a sheriff and elect and retain in office one who at the same time held the office of United States marshal? And, again, section 2 of article 22 provides that any person who shall fight a duel shall not be eligible to hold any office of profit under the Constitution. The reasons for this prohibition may not now be as apparent as in the olden days when such deadly personal combat was more in vogue. Even so, but may it be said that a county charter could provide for the election or appointment of a coroner or any other salaried official and install and retain in office one who was disqualified under that section?

We think the questions answer themselves. Reference to other sections of the Constitution might be multiplied, but sufficient has been said to illustrate the point that a county is not wholly unrestricted in exercising control over its charter officers. It seems clear that under present law a county is not clothed with immunity from constitutional obedience, whether it act by charter adoption or amendment thereto. Whatever political autonomy a county may enjoy and whatever means it may employ in exercising self-government must be consistent with the grants and limitations of such powers prescribed by the organic law of the state.

It is contended that the reasons for the enactment of section 9 do not apply to an in-

crease of salary accomplished by a vote of the people of the county. In *Puterbaugh v. Wadham*, supra, also cited in support of this contention, it is declared that section 9 of article 11 of the Constitution "was designed to protect taxpayers from legislative interference with their rights by increasing the compensation paid to their elected officers without consent of the electorate," and it is argued that when the increase is accomplished by a vote of the electorate of the county there could be no such legislative interference. The reason indicated in that case for the adoption of the section is very apparent, but it cannot be said that such was the only reason. It may be that it was also designed generally to set at rest the question of compensation of public officers after their election in all subdivisions of the state when an increase might be sought by any method of legislative action. It was said in *Weill v. Kenfield*, 54 Cal. 111, with reference to the mandatory provisions of section 15 of article 4 of the Constitution:

"But we are not permitted to consider the policy of a provision, where its language, as in the present instance, seems to us plain and positive. The whole of this line of argument is disposed of by the phrase, '*Ita lex scripta est.*'"

Judge Cooley says, in his work on *Constitutional Limitations* (7th Ed.) at page 88:

"A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable."

The same author says, at page 89:

"The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

[6] The court has no right, by construction, to substitute its idea of the intent of the law when that intent is unmistakably expressed in legislative words. *Chenoweth v. Chambers*, 33 Cal. App. 111, 164 Pac. 428.

It is further contended by the petitioner that section 7½ confers upon the county unrestricted power in fixing the compensation of the sheriff for the reason, so it is claimed, that section 9 prescribes a general rule applicable to officers of all counties and that in conflict therewith is the alleged special provision of section 7½ applicable only to officers of counties operating under a freeholders' charter. The familiar rule that a special provision controls an inconsistent general provision on the same subject is sought to be applied. We discover no inconsistency in the two sections, and consequently find no place for the application of the rule. Section 7½ does not confer unrestricted special power in dealing with the

subjects of sheriffs and their compensation, but the power conferred by the language of the section itself must be exercised in a manner consistent with and subject to the Constitution. There is no conflict when the two sections are read together. When so read and relating to the matter in controversy the two sections would mean: "Consistent with and subject to the prohibitions of section 9 of this article said charter shall provide for sheriffs and fix their compensation."

[7] It is suggested that because of the repealing clause in the charter amendment the sheriff must receive the increased compensation or be denied any and all compensation whatever. But this result cannot follow for two reasons: In the first place, it is the mandate of section 7½ that the compensation of the sheriff must be provided for either in the charter itself or by the board of supervisors in a manner to be indicated in the charter. The charter of San Bernardino county as now framed contains no provision for the fixing of the salary of the petitioner by the board of supervisors after the commencement of his term of office. It would therefore be contrary to the constitutional provision to so amend the charter as to deprive the sheriff of the county of all compensation. In the second place, it has been held that when an increase in salary is provided for contrary to the provisions of section 9, the law providing for the increase is held in abeyance until the incumbency of an officer upon whom the increase may constitutionally operate, and until such time the salary in effect at the time of the election and the commencement of the term of the officer as to whom the increase cannot apply shall be the salary fixed by law for him until the expiration of his term. *Harrison v. Colgan*, 148 Cal. 73, 82 Pac. 674.

The fact that there is an attempted direct repeal of the former salary provision in the charter amendment instead of an implied repeal usually applicable in such cases is of no moment. The result in either case is the same. The charter amendment deals with but one subject, to wit, the increase in salary of the sheriff, coupled with the expressed intent to have it supersede the former charter provision on the same subject. The same intent is implied and is given equal effect when the increase in salary is provided for and the repeal is effected by implication. See *Kingsbury v. Nye*, supra.

[8] There is no force in the suggestion that when section 9 of article 11 was adopted legislation by subordinate governmental subdivisions by direct vote was not contemplated. The original Constitution of 1879, in section 8 of article 11, provided for the adoption of a municipal charter by a vote of the people of the city and prescribed the same general plan as is now outlined for

that purpose in the Constitution, including the provision that the charter should be consistent with and subject to the Constitution.

It is unnecessary to determine the effect of the provision of section 5b of the amendment where it is declared that the increased compensation shall be in effect on January 8, 1923, a date prior to the time the amendment became a law, for the reason that section 9 of article 11 prohibits the increase after the election of the officer as well as after the commencement of his term. Assuming, but not deciding, that the increase in salary could be made retroactive and operative from and after January 8, 1923, still that date was more than two months after the election of petitioner and equally contrary to the constitutional provision.

It is therefore concluded that the petitioner is entitled only to the compensation fixed by the charter and in effect immediately prior to his election, and that the increased compensation provided for by the amendment is not applicable to him.

The petition for a peremptory writ is denied.

I concur: HOUSER, J.

CONREY, P. J. I dissent. The Constitution, in article 11, § 7½, provides that the charter of a county, when duly adopted and approved, "shall become the organic law thereof relative to the matters therein provided." The amendment to the charter of San Bernardino county, having been so adopted and approved, is a part of that organic law. The provisions of said section 7½ were contained in that section as adopted in the year 1911, and remain unchanged in the same section as amended in 1914. Section 9 of article 11 of the Constitution has not been amended since the adoption of the Constitution in 1879. It reads as follows:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

Respondent contends that this provision of section 9 is applicable to officers of county governments operating under freeholders' charters. This proposition is denied by petitioner. This presents the only question in the case.

Said section 7½ of the Constitution provides that—

"It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following matters:
* * * (2) For sheriffs, * * * for the

election or appointment of said officers, or any of them, for the times at which and the terms for which, said officers shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors. * * *

In framing the charter for San Bernardino county, advantage was taken of the authority thus given to fix the salary of the sheriff at a sum named in the charter, instead of leaving the control of that matter to the board of supervisors.

The charter amendment attaching to the office of sheriff a salary of \$3,600 per annum is in force as a part of the charter. Therefore it is operative as applied to the sheriff now in office, unless it plainly appears in the amendment itself, or by virtue of some controlling provision of the Constitution, that such operation is intended to be postponed to some subsequent time. No such intention to postpone is contained in the charter amendment, or in said section 7½ of article 11 of the Constitution. On the contrary, the charter amendment itself affirmatively declares the intention that it shall go into effect and be in force, "and the salary fixed shall be effective" on and after January 8, 1923. And then, not content with the implied repeal of the former salary provision for the sheriff, the amendment affirmatively states that all provisions of said article 2 in conflict with the amendment "are hereby repealed." The effect of a direct repeal of the salary clause, standing alone, would be to immediately revive the provisions of the general law (the operation of which is now suspended) which give to the sheriff of San Bernardino county, as a county of the ninth class, a salary of \$4,500 per annum. Pol. Code, §§ 4005c, 4006 and 4238; Jones v. De Shields, 187 Cal. 331, 202 Pac. 137.

It is not claimed that there is any other provision of the Constitution outside of section 9 of article 11 that would interfere with the complete and present effectiveness of the charter amendment now under consideration. It has been held by this court that the constitutional provision authorizing counties to adopt freeholders' charters for purposes of local government "was comprehensive to the end that the counties should have the power to provide a complete system for the election and appointment of their officers and for fixing of their compensation." Gibson v. Civil Service Commission, 27 Cal. App. 396, 150 Pac. 78. Again, in the same decision, this court said that—

"Plainly, the intent was of the people when they adopted the amendment to give to counties in their charter government complete control of all officers thereof as to their election or appointment and the compensation to be paid to them."

In *Puterbaugh v. Wadham*, 162 Cal. 611, at page 616, 123 Pac. 804, 806, the Supreme Court said:

"Section 9 of article 11 is an inhibition directed to the Legislature because it applies not only to attempted increases of salaries but to efforts to extend terms of office. The latter part of the section is unquestionably a limitation upon legislative power and the former from its association should be similarly construed."

Consequently, it was there held that the section could have no application to a change in salary due to the passing of a city, not by legislative act, but by increased population, from one class to another—not a legislative act, but an automatic change. While in the present instance the change of salary is not due to any automatic change of conditions, it is due to a constitutionally authorized act of the people of the county, which became effective upon the approval thereof by the Legislature. But such approval was not itself an act of legislation. In *Mesmer v. Board of Public Service Commissioners*, 23 Cal. App. 578, 138 Pac. 935, this court, relying upon the authority of earlier decisions of the Supreme Court, held that the Legislature does not exercise lawmaking power when it approves freeholders' charters. It was pointed out that the Legislature has no power to mold or change a freeholders' charter when such instrument is before it for consideration, and that the approval is by resolution and not by bill. In *Puterbaugh v. Wadham*, supra, the Supreme Court declared that section 9 of article 11 of the Constitution "was designed to protect taxpayers from legislative interference with their rights by increasing the compensation paid to their elected officers without consent of the electorate. * * *"

Since it appears from the decisions to which I have referred that the adoption and approval of the charter amendment did not include any legislative act by the Legislature of the state, or any legislative interference with the control by the electors of the county, of the allowance of compensation to their elected officers, I think it should be held that the right of petitioner to receive compensation at the rate provided in the amended section accrued immediately when the amendment became a part of the charter. In coming to this conclusion, I am not unaware of the fact that in *Cameron v. City of Richmond*, 42 Cal. App. 262, 183 Pac. 604, it was assumed by the court (there being apparently no contention made to the contrary) that the right of a city operating under a freeholders' charter to increase the compensation of a municipal officer was subject to the provisions of said section 9 of article 11. On that unchallenged assumption the actual question presented for con-

sideration was decided. The attempted increase of salary in that case was by municipal ordinance, adopted by the city council, and not approved by the electors as provided by the charter in the case of an attempt to vary the compensation specified in the charter.

Also, I am of the opinion that that part of section 7½ of article 11, which grants authority by a freeholders' charter to provide for the compensation of the sheriff and of certain other officers, is a special provision granting an express power for a specific purpose, and that by reason of that character it would prevail over more general provision, adopted at an earlier date, like that contained in section 9 of article 11, which, by its terms, refers to "any county, city, town, or municipal officer," and does not take into account the formation of a county government by freeholders' charter.

I think that the peremptory writ should issue.

64 Cal. App. 455

REDWOOD INV. CO. OF STITHTON, KY., v. EXLEY et al. (Civ. 4596.)

(District Court of Appeal, First District, Division 1, California. Nov. 21, 1923. Hearing Denied by Supreme Court Jan. 17, 1924.)

1. Specific performance ~~103~~—Jurisdiction of specific performance of contract to convey lands.

A Kentucky court has jurisdiction to entertain a bill for specific performance of contract to convey California lands.

2. Courts ~~18~~—Property ~~6~~—Lex loci rei sitæ exclusively governs real property.

Real property is exclusively subject to the lex loci rei sitæ and no other laws or courts can transfer its title.

3. Judgment ~~818(1)~~—Kentucky judgment directing conveyance of California lands may be pleaded in California courts.

Under the full faith and credit clause (Const. U. S. art. 4, § 1), a decree of a Kentucky court directing conveyance of land in California may be pleaded as a cause of action or defense in a California court, and is entitled to be given the force of record evidence of the equities therein determined, unless impeached for fraud.

Appeal from Superior Court, Mendocino County; R. L. Thompson, Judge.

Action to quiet title by the Redwood Investment Company of Stithton, Ky., against Rose Exley and others. From a judgment of dismissal, plaintiff appeals. Reversed.

G. E. Redwine, of Ukiah, for appellant.

Clarence A. Linn, of San Francisco, for respondents.

TYLER, P. J. Appeal from a judgment dismissing plaintiff's complaint. A demurrer

interposed by defendants was sustained by the trial court, and 10 days were granted within which to amend. Plaintiff declined so to do, and the judgment of dismissal followed.

The action concerns the title to certain lands in this state. It appears from the complaint, which was filed May 18, 1921, that on July 9, 1913, Robert P. Daugherty, R. A. Viers, and M. C. Triplett were the owners in common of a certain tract of timbered land situated in Mendocino county. On that day they entered into an agreement in writing in the state of Kentucky, whereby they agreed to convey the same to plaintiff, a Kentucky corporation. Viers and Triplett executed conveyances according to their agreement, but Daugherty, who owned an undivided one-half interest in the lands, refused to do so, notwithstanding he had been paid the full consideration agreed upon. In consequence of such refusal plaintiff on the 20th day of May, 1914, commenced an action in specific performance against Daugherty in the circuit court of Hardin county, state of Kentucky, and in that action it was sought to compel Daugherty to convey to plaintiff his interest in the lands in question according to the terms of his contract. Plaintiff in the meantime had gone into possession, and had erected fences and constructed roads, buildings, and other improvements upon the land which it had occupied. Daugherty filed an appearance in the Kentucky action, and made defense. The complaint herein sets forth the entire record in that action. It appears therefrom that after proceedings had to that end judgment was rendered against Daugherty, directing that he convey the property in question to plaintiff on or before April 15, 1915. Appeal was taken, but this judgment was affirmed, and it became final January 11, 1917. Daugherty never complied with this judgment and decree, but, on the contrary, prior to the time limited for him to make a conveyance, he executed a deed purporting to convey his interest in the land to one Rose Exley, one of the respondents herein. Upon receiving this conveyance, Rose Exley and her husband, Martin D. Exley, executed a mortgage to Daugherty of the land so conveyed to them as security for payment of the sum of \$7,000. This mortgage was subsequently assigned by Daugherty to defendants Thomas B. Daugherty and Frank McConnell. It is alleged that these several conveyances were made without consideration and with full knowledge by the various parties of the terms and effect of the Kentucky judgment and of R. P. Daugherty's lack of title. The complaint then goes on to allege that as a consideration for the contract to convey the land to plaintiff Daugherty was to and did receive the sum of \$1,000 in cash and 100 shares of the capital stock of plaintiff corporation, the equivalent of the sum of \$10,000, which sum was the reasonable value

of Daugherty's interest in the land, all of which he has retained.

Plaintiff prayed that it be decreed to be the owner in fee in Daugherty's interest; that his deed to Rose Exley and the mortgage executed by her to Daugherty, together with the assignment thereof, be declared null and void; that Rose Exley be compelled to convey the land to plaintiff; and that her husband be decreed to have no interest therein. General relief is also prayed for.

To this complaint defendants Rose Exley and her husband—who are the only defendants who have appeared—filed a demurrer, both general and special, raising various objections to its sufficiency. It was alleged thereunder as one of the grounds of demurrer that the complaint did not state facts sufficient to constitute a cause of action. The statute of limitations was also pleaded. The trial court sustained the demurrer, and, plaintiff refusing to amend, judgment of dismissal followed.

[1] It is the claim of appellant that the trial court erred in that it failed to accord to the Kentucky judgment the full faith and credit and the effect to which it was and is entitled under the Constitution of the United States and the general laws of Congress enacted in pursuance thereof.

It must be conceded that the Kentucky court had jurisdiction to entertain the bill for specific performance of the contract of the parties, although the land is situated in this state. 2 Story Eq. Jur. § 743 et seq. It is claimed, however, that, although full faith and credit must be given to the judicial proceedings of the several states, it has never been held that the "full faith and credit" clause of the Constitution permits the courts of one state to control the title to real property situated in another; that to give such a construction to the judgment would be to surrender to the Kentucky court the power to control the title to real property in this state. Accordingly, it is contended by respondents that the judgment here sued on is impotent as the basis of plaintiff's action, and the demurrer was properly sustained. In support of this position, we are cited to the case of *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853, and the recent case of *Taylor v. Taylor*, decided by our own Supreme Court September 14, 1923, 218 Pac. 756.

The case of *Fall v. Eastin* was one wherein a Washington court, in an action where it had jurisdiction of the parties and subject-matter, determined the equities in certain property situated in Nebraska; the successful litigant in the Washington court sought to enforce the judgment in Nebraska against persons who succeeded to the property with full knowledge of the Washington judgment and without a consideration; the Nebraska court refused to directly enforce the Washington judgment, and the Supreme Court of

(221 P.)

the United States sustained its action. It was held that, while a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the decree nor any conveyance under it except by the party in whom title is vested is of any efficacy beyond the jurisdiction of the court; that to concede such power would be to attribute to such a decree the force and effect of a judgment in rem by a court having no jurisdiction of the res. It was there further held that the full faith and credit clause of the Constitution does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit; and the courts of the state in such a case do not deny full faith and credit to a decree of courts of another state by holding that it does not operate directly upon and transfer the property.

Such, in effect, is the rule laid down in the Taylor Case, *supra*, where it is held that the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction, such decree being effectual only by means of the court's power over the person of the parties before it. The reason for the rule is there stated to be that jurisdiction to affect the title to real estate by a judgment in rem or directly against the thing itself exists only in the courts of the state wherein the land is situated.

[2] There can be no question that real property is exclusively subject to the laws and jurisdiction of the state where located, and that no other laws or courts can affect it by an attempt to create, transfer or vest title thereto. Judgments or decrees, therefore, which are rendered in one state cannot of themselves affect title to lands in another. From the very nature of the property land must be governed by the *lex loci rei sitæ*.

[3] But this does not mean that a decree directing a conveyance is without its effect *per se*. It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated, and is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud. 2 Black on Judgments, § 872; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

The complaint, therefore, states a cause of action upon the judgment. It also contains allegations to the effect that respondents herein took with notice of the infirmity of Daugherty's title, and that Rose Exley was not a bona fide purchaser. These allegations must be deemed true for the purposes of demurrer. This being so, it follows that the

court committed error in sustaining the demurrer to the complaint.

No question of the statute of limitations is involved. The Kentucky judgment became final January 11, 1917, and the action was commenced within five years thereafter.

The judgment is reversed.

We concur: ST. SURE, J.; NEEDHAM, Justice pro tem.



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192 Cal. 770

**AMERICAN TRADING CO. (Pacific Coast)
v. SUPERIOR COURT OF CITY AND
COUNTY OF SAN FRANCISCO et al. (S.
F. 10922.)**

(Supreme Court of California. Dec. 29, 1923.
Modified on Rehearing Jan. 28, 1924.)

**1. Appeal and error §447 — Court cannot
grant injunction pending appeal from order
denying injunction, except as part of latter
order.**

A court refusing an injunction pendente lite cannot grant an injunction pending appeal, except where the latter order is to be deemed a portion of that denying the injunction pendente lite.

**2. Appeal and error §447—Further notice of
application for restraining order pending ap-
peal from order denying injunction pendente
lite held unnecessary.**

Since the trial court's power to continue a restraining order in effect pending appeal from an order denying an injunction pendente lite is only incidental to the right of appeal, no other notice than that given of the hearing on the motion for the injunction pendente lite is necessary.

**3. Appeal and error §447—Order restraining
transfer of corporate property held not in-
valid because bond not executed to transferee.**

An order continuing in effect a restraining order against a transfer of property by a corporation pending appeal from an order refusing an injunction pendente lite held not invalid, because the required bond was executed to transferor, instead of transferee; such order being made in pursuance of the court's inherent power to preserve the status quo pending appeal and not under Code Civ. Proc. § 527.

In Bank.

Application by the American Trading Company (Pacific Coast) for a writ of review directed to the Superior Court of the City and County of San Francisco and others to annul an order of the Superior Court continuing a restraining order pending an appeal from an order denying an injunction pendente lite. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for petitioner.

Frank J. Golden and Humphrey, Grant, Zimdars & Warren, all of San Francisco, for respondents.

WILBUR, C. J. Petitioner seeks a writ of review to annul an order of the superior court continuing in force a restraining order

pending an appeal from an order denying an injunction pendente lite in an action brought by certain stockholders of the La Zacualpa Hidalgo Rubber Company to prevent that company from executing a deed of certain of its properties to the American Trading Company as provided by an agreement of December 20, 1921, between the La Zacualpa Hidalgo Rubber Company and the American Trading Company, wherein and whereby it was agreed that at the expiration of 18 months, to wit, on June 20, 1920, the La Zacualpa Hidalgo Rubber Company would transfer its properties to the American Trading Company. On June 19, 1923, certain stockholders of the La Zacualpa Hidalgo Rubber Company began an action for an accounting and for an injunction to restrain the proposed transfer, and in connection therewith secured a temporary restraining order and an order to show cause why an injunction pendente lite should not issue. Upon the hearing of this application the superior court denied the application for the injunction pendente lite and dissolved the restraining order. The plaintiff stockholders appealed from the order denying the temporary injunction and secured an injunction pending the appeal restraining the La Zacualpa Hidalgo Rubber Company from transferring the property to the American Trading Company. In accordance with the order granting the injunction pending the appeal, plaintiffs gave a bond in the sum of \$2,500, payable to the La Zacualpa Hidalgo Rubber Company.

[1-3] The American Trading Company petitions this court to annul the order granting the injunction pending the appeal, upon the ground that the order was void because no notice of the application was given and the bond does not protect the American Trading Company. Upon the argument it was conceded that the superior court had authority to grant an injunction pending the appeal in order to preserve the status quo. *City of Pasadena v. Superior Court*, 157 Cal. 781, 109 Pac. 620, 21 Ann. Cas. 1355; *Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818. The jurisdiction of the superior court to grant such an injunction pending an appeal, after having refused an injunction pendente lite, can only be sustained on the theory that the order granting the injunction pending the appeal is a portion of the order denying the injunction pendente lite; for, where the court has refused an injunction, it could not subsequently grant the injunction, because the order refusing the injunction is an appealable order. This principle is established in the case of *United Railroads v. Superior Court*, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199, where it was held that the trial court, having granted a preliminary injunction without reserving the power to modify the same, could not subsequently suspend the effect of the

temporary injunction, for the reason that such injunction could only be modified or set aside on appeal. If the order under attack in this proceeding be regarded as the result of a separate and distinct application for an injunction after the refusal to grant an injunction pendente lite, it was clearly beyond the jurisdiction of the superior court for the reason stated. Assuming, as it is conceded, that the trial court had the power to make the order, such power exists only because it is incidental to the right of appeal from the order refusing the injunction pendente lite, and is necessarily based upon the notice and hearing for the injunction pendente lite, consequently no other notice was necessary. It is also contended that the order is invalid because the bond required by the superior court was executed to the La Zacualpa Hidalgo Rubber Company and not to the American Trading Company, and that the latter company, the petitioner herein, would be injuriously affected by the injunction without any security. It is a sufficient answer to this contention to call attention to the fact that the court in making the order in question was acting in pursuance of its inherent power to preserve the status quo pending the appeal and not under section 527 of the Code of Civil Procedure. *City of Pasadena v. Superior Court*, supra.

Order affirmed.

We concur: LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

64 Cal. App. 170

KORNBLUM et al. v. BANK OF ITALY.
(Civ. 4689.)

(District Court of Appeal, First District, Division 2, California. Oct. 19, 1923.)

1. Evidence ⚡410—Parol evidence admissible to prove agreement between bank and special depositor, notwithstanding written instrument signed merely by depositor.

In action against a bank for conversion of a portion of a special deposit, testimony as to what was said by the depositor and the bank's manager at the time the deposit was made was admissible on behalf of the bank to prove the agreement between the bank and the depositor, notwithstanding written instrument signed merely by the depositor containing instructions to bank.

2. Banks and banking ⚡90—Damages ⚡62 (4)—Damages must be minimized; measure of damages recoverable by special depositor because of bank's payment for more goods than were purchased by depositor stated.

Where purchaser of grapes deposited a certain amount with a bank with directions to pay designated amounts to designated sellers and the bank received a bill of lading for grapes in excess of the poundage purchased and paid

therefor, the purchaser could not recover the amount so paid, but was required to minimize the damages by receiving the grapes and selling them for the best price obtainable, and could recover merely the loss, if any, proximately caused by bank's act, under Civ. Code, § 3300.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by S. J. Kornblum and another against the Bank of Italy. Judgment for defendant, and plaintiffs appeal. Affirmed.

Jack Greenberg, of Los Angeles, and Everts, Ewing & Wild and O. A. Tuttle, all of Fresno, for appellants.

Harris, Johnson, Willey & Griffith, of Fresno, for respondent.

STURTEVANT, J. The plaintiffs commenced an action to recover a judgment against the defendant for \$2,849.60 alleged to have been converted. The trial court rendered a judgment in favor of the defendant and the plaintiffs have appealed. The trial court, according to the appellants, made two errors. The first alleged error is that it received oral evidence to vary the terms of a written instrument, and the second error is that one of the principal findings is not supported by the evidence. As the case was presented in the trial court, and as it is presented in this court, it is difficult to treat the two points separately.

On the trial of the case the plaintiffs produced the deposition of one of the plaintiffs, S. J. Kornblum. In that deposition the witness deposed as follows: That his name was S. J. Kornblum, and that he resided at 426 East Third street, Brooklyn, New York. He was in Fresno October 26, 1920, and during that month and the two previous months he had business dealings with the branch of the Bank of Italy located at Fresno. On October 26th the witness went to Mr. Heaton, the manager of the branch bank, and told him that he had negotiated with several merchants in Fresno for some grapes that were about to be shipped. The conversation took place in Mr. Heaton's office. The witness told Mr. Heaton that the grapes were about to be shipped, but that he had to go back east, and that it was urgent for him to go home, and that he wanted to be protected so that they would not ship him any more grapes than he had bought, and he wanted to leave \$30,000 in Fresno. He drew a check and deposited it with Mr. Heaton for \$30,000. Mr. Heaton asked him how the bank was going to pay—supposing the stuff was not good. And the witness answered that the buyers had to take these chances whether the stuff was good or not, but to pay simply on presentation of a bill of lading for fresh grapes. Mr. Heaton stated they had better have that in writing, and the witness remarked that

that was the very thing he wanted to do. Mr. Heaton called the stenographer, and the witness just specified the different merchants and the different amounts to be paid to each one. That writing stated:

"I hand you herewith, \$30,000, to be credited to my account with you. Upon receipt of the bills of lading to the order of Samuel J. and William Kornblum, with invoices for fresh grapes, you are hereby authorized and instructed to pay out of these funds the following amounts to the following firms: Arkelian Bros. \$8,000; Bedig Produce \$6,000; E. Maljan \$3,000; San Joaquin Growers' and Shippers' Co. \$10,000. You are also instructed to pay E. F. Ardzooni, upon receipt of bill of lading and invoice for grapes, \$2,000, which must be, however, inspected by Mr. Cook, inspector, and same O. K. ed by him. S. J. Kornblum."

November 19, 1920, S. J. Kornblum wrote to Mr. Heaton that on November 5th he wired to Peter Maljan:

"See if you can obtain five or ten cars second muscats at \$100 a ton. Now Maljan is no agent of mine. He receives his brokerage from the San Joaquin Growers and Shippers Company. Take notice that I did not tell him to buy, only to see if he could obtain, and if he succeeded in doing so he might have answered me accordingly. But instead he wired that he bought five cars from San Joaquin and one car has been shipped, the balance to follow one a day. Have wired him back what has been already shipped I would accept, but don't want any more."

It was stipulated by counsel in the trial court that the defendant paid to the San Joaquin Growers' & Shippers' Company \$13,477.76, and that all of the payments were made upon receipt of bills of lading to the order of Samuel J. and William Kornblum. It was also stipulated that the excess payments for which the plaintiffs claimed judgment was \$2,849.60, being payments on two cars, 10259 and 10238. Mr. Heaton, called as a witness on behalf of defendant, testified that his name was R. S. Heaton, that he resides at Fresno, and was connected with the Bank of Italy on October 26, 1920. He stated:

"S. J. Kornblum came into the bank along about 4 o'clock in the afternoon and gave some oral instruction regarding the disposition of \$30,000 that he placed with me. He asked me to accept certain carloads of fruit that were to be shipped from Fresno. Well I thought we should have more specific instructions, so I asked him to put them in writing. He said it wasn't necessary, it obstructed his agents here, but I insisted on putting it in writing, which he did. He told me from whom he had purchased fruit in Fresno. Those parties are named in the letter dated October 26, 1920."

Counsel stipulated that the bills of lading were received for each shipment and were duly forwarded, and each one was made for fruit, and that the plaintiffs received all of

the cars excepting car 10238 and car 10259, which they refused to receive, and that the amount paid for the grapes in those two cars was \$2,849.60. Continuing, the witness testified that the bank paid E. Maljan \$3,194.65. It was also stipulated by counsel that the amounts designated in the letter of October 26, 1920, to wit \$8,000, \$6,000, \$3,000, \$10,000, \$2,000, are not in any instance exact multiples of the value of a carload of grapes according to the price being paid by the plaintiffs.

[1] Over the objection and exception of the plaintiffs, the trial court received evidence as to what was said by Mr. Kornblum and by Mr. Heaton at the time that the letter dated October 26, 1920, was being written and signed. The appellants now assign those rulings as error and claim that the effect of the rulings was to vary the terms of a written instrument. It will be noted that the written instrument was unilateral, it was signed by the agents of the appellants, but Mr. Heaton was not asked to sign, nor to accept in writing the terms of the instrument, and, furthermore, he did not do so. Under these circumstances, the letter was but a part of the parol evidence going to make up the agreement between the parties. *Austin v. Wilcoxson*, 149 Cal. 24, 29, 84 Pac. 417. In the case of *Neresheimer v. Smyth*, 167 N. Y. 202, 60 N. E. 449, there was before the court a bill of sale made by a debtor in behalf of his creditors. Moreover, there was a side agreement reduced to writing as to what the assignees were to do. Oral testimony was also received. On page 207 of 167 N. Y., on page 451 of 60 N. E., the court said:

"Parol evidence was admissible to prove the purpose of the bill of sale, and that it was made with the consent of the creditors and for their benefit. It did not tend to contradict the writing but to show the trust arrangement between the defendant and the creditors."

The appellants cite finding No. 2, which is quite long, and complain that the same is not supported by the evidence. In this behalf the appellants' grievance rests on the language "that thereafter, said defendant, pursuant to said instructions, and also further instructions given by plaintiffs to defendant, did pay out of said deposit to San Joaquin Growers' & Shippers' Company the aggregate sum of \$13,477.76," and appellants contend that the bank was limited in its instructions to pay \$10,000, and no more. We think the point is without merit. When Mr. Kornblum called on Mr. Heaton, it is patent that he wanted to pay for the grapes he had bought. He mentioned the names of the parties, but did not, until questioned by Mr. Heaton, disclose the probable amount payable to each vendor. He was purchasing grapes in carloads. Until each carload was

weighed, the amount of the invoice could not be ascertained. As the facts later transpired, no one purchase exactly met the figure named in the letter as to any one vendor. Mr. Kornblum was particularly concerned to the effect "that they (the vendors) would not ship me any more grapes than I am buying. * * *" To that end he was employing the services of the plaintiff bank. The evidence shows that the plaintiffs have not been injured in that respect, and that the bank in no way deprived the plaintiffs of the protection which they sought. These views are further emphasized by the fact that although the plaintiffs deposited \$30,000, the expenditures authorized amounted to only \$29,000, and the expenditures actually made amounted to a still smaller sum.

[2] The appellants assume, and the respondent apparently concedes, that if the bank received a bill of lading from one vendor for a car of grapes in excess of the poundage purchased from that vendor, and paid out of the appellants' funds the price thereof, then and in that event the measure of damages is the amount so paid out. We do not agree with this view of the law. Non constat but what the carload of grapes was needed to fill plaintiffs' purchase and was of the full value of the price paid therefor, and that the appellants were not damaged in the least. In other words, if the bank received more cars from one vendor than that vendor's proportion, that fact alone would not warrant a judgment for the price paid for such car. But the appellants' right to damages "is the amount which will compensate" them "for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. In such a case the duty rested upon the appellants to minimize the damages. They were bound to receive the grapes and sell them for the best price obtainable, and then, if they suffered damage by defendant's act, their right to recover would be, not the total sum so paid out, but the loss, if any, incurred on the particular car, proximately caused by the defendant's act. There is not in the record any evidence showing the facts touching this element of the case. On the other hand, there is evidence showing that when two of the cars arrived at their destination the appellants refused to receive the same and claimed that the contents of the cars were the property of the respondent. There is also evidence to the effect that the grapes were then left in the cars until they had greatly deteriorated in value and were then sold by some other person.

We find no error in the record.
The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 268

In re CARD'S ESTATE.

KESSLER et al. v. STEWART.

(Civ. 4220.)

(District Court of Appeal, Second District,
Division 2, California. Oct. 29, 1923.)

1. Executors and administrators $\S$ 77—May sometimes be allowed credit for payments on unverified claims before appointment.

Under Code Civ. Proc. § 1632, providing that an executor or administrator may be allowed credit, on settlement of his account, for amounts paid, under certain circumstances, on demands not founded on verified claims, as required by sections 1493-1496, credit may sometimes be given for voluntary payments made by individuals who later become executors or administrators.

2. Executors and administrators $\S$ 522—When creditors may exhaust local estate of non-resident decedent stated.

Creditors in California may exhaust the estate of a nonresident decedent therein for payment of their claims, after payment of administration costs, and perhaps expenses of the funeral and last illness, if administration in the state of his residence demonstrates that they cannot be paid thereby, unless the whole estate is insolvent, in which case creditors of the same grade must prorate the proceeds of the property in both states.

3. Executors and administrators $\S$ 3(1)—Settlement of decedent's affairs without aid of courts not favored.

Settlement of a decedent's affairs without the aid of the courts is not favored by the laws.

4. Executors and administrators $\S$ 526—Administratrix held not entitled to credit for expenditures and payments made without verified claims.

The administratrix of the estate of one dying in another state, wherein he resided and left property, held not entitled to credit for amounts expended without presentation of verified claims as against California creditors, whose claims exceeded the amount of decedent's estate in this state, in the absence of any domiciliary administration.

5. Executors and administrators $\S$ 180—Minor children of decedent may be awarded allowance for past period of maintenance from other sources.

Under Code Civ. Proc. § 1464, an allowance may be made to minor children of decedent for a past period during which they were maintained from other sources.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

In the matter of the estate of William Perry Card, deceased. From orders granting a family allowance and settling the final account of Addie V. Stewart, administrator, M. Kessler, her successor as administrator,

and another, appeal. Affirmed in part and reversed in part, with directions.

William Ellis Lady, of Los Angeles, for appellants.

Henry E. Carter, of Los Angeles, and Leonard Wright, of San Diego, for respondent.

WORKS, J. William Perry Card died intestate in Oklahoma. At the time of his decease he was a resident of that state. When he was in his last illness as it afterward transpired, he wired his daughter, Addie V. Stewart, who resided in Los Angeles county, Cal., that he was ill, and she immediately proceeded to Oklahoma by train. Mrs. Stewart had no reason to suppose her father's death was imminent, and prepared to remain in Oklahoma long enough to nurse him back to health. Unfortunately, however, he passed away before she reached his bedside. Card had been married twice, and Mrs. Stewart was a child of his first matrimonial union. His second marriage had been dissolved by divorce. At the time of his decease he had residing with him two minor sons, the fruits of this latter union. Up to within a few days before his death Card was the owner of 180 acres of land in Oklahoma, but at that time he transferred the property to his sons in consideration of love and affection. At his decease he left in Oklahoma certain cash, cattle, and other personal property. The cash was in bank, and was by Mrs. Stewart, immediately upon her arrival in the state, withdrawn by means of signed checks which Card had prepared prior to his decease. She also converted into cash the cattle and other personal property. These steps toward a summary administration of the estate of Card were all taken without the sanction of the laws of Oklahoma providing for the settlement of the estates of deceased persons. Out of the proceeds thus arising from her father's Oklahoma property Mrs. Stewart then paid out certain amounts, for purposes which are specifically shown below, and departed for California with the balance remaining in her hands, the sum of \$600. This amount was consumed by the order for family allowance hereafter to be mentioned. On her return to California Mrs. Stewart was accompanied by her two minor half-brothers.

Card left real property in the county of San Diego, in this state, appraised at \$750. He left no other property in California. After her arrival in this state Mrs. Stewart applied for letters of administration in San Diego county, and they were issued to her. Upon the presentation of her first and final account, after the settlement of which her trust as administrator was terminated, she was allowed credit for certain amounts which she had expended on and in connection with her journey to Oklahoma and return. The items constituting these expenditures are stated thus in the account:

"Amount of railroad fare to Oklahoma and return to conserve property of deceased, \$103.64. Railroad fare for Perry Madison Card and William Purl Card from Denison, Texas, to Los Angeles, \$99.82. Expense of berths for said minors from Denison, Texas, to San Antonio, \$8.42. Railroad fare from Caney, Okl., to Denison, Tex., \$2.50. To doctor's fees paid to Dr. Henderson, of Oklahoma, for services to deceased in his last illness, \$65. Paid to druggist for medicine for the deceased during his last illness, \$1.60. Paid to Mr. Cooper of Oklahoma for coffin and funeral expenses of deceased, \$60. Paid for groceries being an indebtedness of deceased, \$7.48. Paid to C. L. Skinner of Oklahoma for pasturage of decedent's cattle, \$3.50. Paid for writing contract and telephone bill at Oklahoma, \$1.40. Paid to [six named persons] for gathering cattle upon range at Oklahoma, \$39. Paid to Mr. Cooper for feed and care of cattle, \$6.50. Paid to T. M. Akers, notary public, \$2.50. To A. L. Childress for board for said minors, \$11.40. For grave marker for decedent, \$35. Amount paid for coats and caps for minors, \$14.50. For taxes on property in Oklahoma, \$29.80. To two pairs of stockings for said minors, \$.50. For suits, shirts, underwear and overalls for said minors at Oklahoma, \$40. To expenses for board, etc., for said minors from Oklahoma to Los Angeles, \$15.39. J. A. Dirke for horse hire for gathering cattle, \$4.50."

These items make a total of \$587.55, and it will be observed that they alone, without regard to attorney's and administrator's fees and other costs of administration, practically consume the California estate, appraised, as we have already remarked, at \$750. There is a difference of but \$162.45 between the two amounts. One Clara Card asserts a claim against the estate upon a California judgment for \$1,380, together with \$16 costs, rendered in March, 1919, with interest from that date. That creditor and the present administrator of the estate appeal from the order of the trial court settling the account of Addie V. Stewart, as the former administrator, and from a certain order granting a family allowance to the minor sons of decedent.

[1] Appellants contend that the trial court erred in giving Mrs. Stewart credit as administrator for each of the items set forth above and totaling \$587.55. No verified claim was presented against the estate as to any of these items, and appellants insist for that reason that none of them may be allowed. We see no escape from this contention. The necessity for the presentation of verified claims by creditors of the estates of deceased persons is fixed by sections 1493-1496 of the Code of Civil Procedure; but it is provided in another section of the same Code (section 1632) that executors or administrators may be allowed credit upon the settlement of their accounts for amounts paid under certain circumstances upon demands not founded upon verified claims. The section reads, in part:

"If * * * it appears that debts against the deceased have been paid without the affidavit and allowance prescribed by statute * * * and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts."

Although the application of this enactment is limited, in strictness, to those cases in which executors or administrators make voluntary payments of demands, there are instances in which such payments, when made by individuals who later become executors or administrators, will be approved and due credit given. It is said in an opinion of the District Court of Appeal which was adopted by the Supreme Court:

"There was allowed to the administrator credit for a payment of \$1,500 to the Portuguese-American Bank. * * * This payment was made * * * four days subsequent to the date of filing his petition for letters of administration. Whether a payment could be allowed when made by a stranger to the administration and before he had become connected therewith need not be at this time determined, although some California authorities incline to their allowance. In *re Galland's Estate*, 92 Cal. 293, 28 Pac. 287. In *Estate of Heeney*, 3 Cal. App. 553, 86 Pac. 842, this court uses the following language: 'One thing is certain, and that is that the law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment, can be established by his uncontradicted evidence.' But in the instant case the petitioner had already filed his petition and the widow had consented in writing to his appointment. At the time of making the payment there existed practically no doubt that in a few days he would be appointed. The estate was paying interest on the amount and it was clearly for the best interest of the estate that the obligation should be liquidated without delay. Under these circumstances we find no embarrassment in holding that the appointment subsequently made related back, for the purposes of this payment, to the date of filing the petition for letters. This view finds support in 11 R. C. L. p. 464, where we read: 'In effect the subsequent granting of letters of administration relates back to the death of the intestate, and makes valid acts which otherwise would or might have been tortious.' This payment was properly allowed." *Estate of Machado*, 186 Cal. 246, 199 Pac. 505.

[2-4] It is plain to us that respondent cannot come within the rule announced in this quotation. As decedent departed this life in Oklahoma, as that state was the place of his residence, and as he left property there, Oklahoma was the jurisdiction within which the principal or domiciliary administration of his estate should have taken place and may yet have to take place. His Oklahoma estate was properly the fund out of which, primarily,

his Oklahoma debts should have been settled. His California estate bears legally the same relation to his California debts, with the proviso that any administration of the California estate should have been merely ancillary to an Oklahoma administration. It is plain that the California estate is insufficient to pay the claim of Clara Card, to say nothing of the claims of other California creditors, if such there are. The creditors here have the right to exhaust the California estate for the payment of their claims, after the payment of the costs of administration and, perhaps, the funeral expenses and expenses of the last illness, provided that a due and formal administration of the Oklahoma estate should demonstrate that they could not be paid by the estate located in that jurisdiction, all this, however, with the proviso that, if the estate as a whole were insolvent, creditors of the same grade must prorate from the proceeds derived from the property in both California and Oklahoma. By her summary methods of procedure while in Oklahoma respondent did all she could to nullify these rules of law. Moreover, she essayed to settle the affairs of decedent in Oklahoma without the aid of the courts, a thing not favored by the laws. Whether she actually accomplished all these results we cannot know. There may be creditors in Oklahoma whom she did not reach. Those creditors may already have taken out letters of administration there, or they may hereafter do so. The deed conveying the Oklahoma real property to the minor sons, executed a few days before Card's death in consideration of love and affection, may have been set aside or it may hereafter be set aside, at the suit of Oklahoma creditors, or, if sufficient grounds existed, it might be set aside by California creditors whose claims could not be satisfied out of the California estate. All these considerations will serve to show the lamentable condition in which the estate of Card now stands. They will also demonstrate the necessity of our conclusion that the California estate should not be saddled with the liquidation of the items making up the total of \$587.55, or, at least, that estate should not be called upon to meet them in the absence of verified claims presented by the original creditors. The rules of law which we have stated as bearing upon the relationship between a domiciliary and an ancillary administration of the estate of a deceased person are epitomized in a standard law publication. See 24 C. J. 1110-1128.

[5] The only remaining point relates to the order for family allowance. On July 21, 1922, the court made its order awarding to each of the minor sons of decedent the sum of \$25 per month from January 27, 1918, to January 27, 1919, or the total sum of \$600. Appellants contend that the court was without jurisdiction to make such an order for a

period of time which had already passed and during which the minors had been maintained from other sources. The order was proper under section 1464, Code of Civil Procedure, as construed in *Estate of Moore*, 170 Cal. 60, 148 Pac. 205.

The order for family allowance is affirmed. The order settling the first and final account is reversed, with directions to the trial court to disallow the credits above mentioned, amounting to \$587.55.

We concur: FINLAYSON, P. J.; CRAIG, J.

64 Cal. App. 523

PEOPLE v. HALE. (Cr. 1113.)

(District Court of Appeal, First District, Division 1, California, Nov. 27, 1923.)

1. Robbery — 24(3)—Accused held sufficiently identified as person who committed robbery.

Testimony of prosecuting witness and another who was an ex-convict, both of whom were robbed by two men, held sufficiently to identify accused as one of the two who committed the robbery.

2. Robbery — 23(1)—Admission of evidence as to identification of accused at city prison held not error in absence of showing identification was not bona fide.

In a robbery prosecution in which alibi was a defense, admission of testimony as to the identification of accused by prosecuting witness at the city prison held not error, in absence of a showing that the identification was not a bona fide one.

3. Criminal law — 1163(2)—Question propounded by district attorney after ruling of exclusion presumed not prejudicial.

In prosecution of accused, a former bootlegger, for robbery, in which the defense was alibi, as supported by testimony of defendant's witness, in which the court ruled against questioning defendant's witness as to her former employment, question thereafter propounded by district attorney to witness, "Did you ever work down in South City selling drinks?" to which court sustained objection, while improper, held not prejudicial in view of necessary assumption jury disregarded the question when objection was sustained, and because it could not be assumed on appeal that of two meanings possible to be attached to the question the jury took a sinister and unlawful one.

4. Criminal law — 726—District attorney's remarks in objecting to final argument of accused's counsel held not misconduct.

In a robbery prosecution in which defense was alibi and accused admitted he was a bootlegger, and in which defendant's counsel during final argument lauded accused's character, saying he had no police record, was never in jail because if he had been state would have produced record of his arrest, to which district attorney objected that such statement was improper "coming from counsel, as he knows the

facts, and as he knows the defendant in this case," remarks of district attorney held not misconduct, but the whole incident was within the scope of legitimate argument.

5. Criminal law — 730(16)—If district attorney's remarks were misconduct, error was not prejudicial in view of admonition by court.

If remarks of district attorney in objecting to statements in final argument of accused's counsel were misconduct, such error was not prejudicial in view of court's admonition that jury must confine themselves to what was proved.

6. Criminal law — 419, 420(10), 1186(4)—Admission of hearsay description of persons committing robbery erroneous, but not prejudicial.

Where identity of accused was the principal issue, testimony of the police officer to whom complaint of robbery was made, over accused's objection, as to the description of the robbers, furnished by the holdup victims, was based on hearsay, if given to prove identity of accused as the guilty party, and was incompetent, and, had such evidence been the sole proof of identification, its admission would have been reversible error; but, there being other sufficient evidence to support jury's verdict, the error, if any, was not prejudicial, and hence did not require reversal in view of Const. art. 6, § 4½.

7. Robbery — 17(5)—As respects ownership, information charging property belonged to one other than accused is sufficient.

With respect to the ownership of the property alleged to have been robbed, the information is sufficient if it lays ownership in some one other than accused.

8. Criminal law — 1173(2)—If trial court erred in failing to instruct as to ownership of property robbed, error was harmless.

If, in a prosecution for robbery, the trial court erred in failing to instruct that the property stolen belonged to prosecuting witness and was not the property of the accused, such error was harmless, where the information which charged the property belonged to prosecuting witness was read to the jury, and the trial court told jury accused pleaded not guilty, thereby putting in issue all of the material allegations contained in the information "which has been read to you," and the entire prosecution was conducted on the theory the property belonged to prosecuting witness and his cousin.

9. Criminal law — 785(16), 1163(4)—Instruction held compliance with statute, but giving or failure to give it would not be error in absence of showing of prejudice.

An instruction that, if the jury believed that any witness willfully testified falsely in regard to any fact material to issue, the jury could disregard the whole testimony of that witness in arriving at a verdict, held a compliance with Code of Civ. Proc. § 2061, subd. 3; but the giving or refusing to give such instruction does not constitute prejudicial error unless injury is shown.

10. Criminal law $\S$ 823(15)—If instruction on reasonable doubt was partially wrong, error was cured by further sentence therein.

If the first sentence of the trial court's instruction did not correctly state the law on the subject of reasonable doubt, the error was cured where, in the same instruction, the court gave a stock instruction which contained a correct statement of the law upon the subject.

11. Constitutional law $\S$ 58 — Pardon $\S$ 2 — Indeterminate Sentence Law held not void as interfering with the distribution of governmental powers or the Governor's pardon powers; "pardon."

Indeterminate Sentence Law, which under limitations named authorizes a board of a prison or reformatory to which one is confined to shorten term of sentence, held not to interfere with Governor's pardon powers and is not in conflict with Const. art. 3, $\S$ 1, and article 7, $\S$ 1, as the act of the board only shortens the term of sentence, leaving the conviction of guilt unaffected; "pardon" meaning the remission of guilt, amnesty, oblivion, or forgetfulness.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pardon.]

12. Constitutional law $\S$ 250 — Criminal law $\S$ 1206(1) — Indeterminate Sentence Law held not violative of equal protection clause.

Indeterminate Sentence Law, which gives powers to the governing authority of a prison or reformatory, in which accused is confined, to shorten the term of sentence under certain conditions, held not violative of the equal protection clause of the federal and state Constitutions.

13. Statutes $\S$ 87 — Indeterminate Sentence Law held not void as special legislation.

Indeterminate Sentence Law applies alike to all persons who have been convicted of a public offense punishable by imprisonment in the state prison, and it is general in its purpose, because it gives to all persons similarly situated equal opportunity to avail themselves of its benefits, and hence does not violate Const. art. 1, $\S\S$ 11, 21, or article 4, $\S$ 25, subds. 2, 26, 33.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Roy Hale was convicted of robbery, and he appeals from the judgment and the order denying his motion for a new trial. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan and Wm. F. Cleary, Deputy Attys. Gen., for the People.

ST. SURE, J. Defendant was convicted by a jury of the crime of robbery. He appeals from the judgment of conviction and the order denying his motion for a new trial.

The points urged for reversal are stated in the opening brief as follows: Insufficiency of identification; error of court in admitting evidence as to identification in city prison; misconduct of district attorney; error in admitting testimony of police officer; error in instructions.

Defendant filed a supplemental brief in which he urges, in addition, that the Indeterminate Sentence Law (Pen. Code, $\S$ 1168) is unconstitutional and void, because, in effect, a usurpation by the state board of prison directors of the exclusive executive power of the governor to commute sentences or grant pardons, and also as obnoxious to the Fourteenth Amendment of the United States Constitution, and to article 1, $\S\S$ 11 and 21, and article 4, par. 25, subds. 2, 26, and 33, of the state Constitution.

[1] Briefly, the record tells the story of the crime as follows: Two men entered a soft drink place on Bryant street, in San Francisco, on October 5, 1922, at about 8:30 o'clock in the evening. The entry was peaceful, there was no immediate display of weapons, nor did either of the men wear masks. One, identified as defendant herein, asked for cigarettes, and when the proprietor turned from getting them, thrust a gun against his body and commanded him to hold up his hands. At the same time his companion pointed a gun at the proprietor's cousin (prosecuting witness herein) who sat at a table near by. The cash register was emptied and each victim relieved of his watch and money. The victims were then shut into a back room and the holdup men left. About 20 minutes later the robbery was reported to the police officer on the beat. He searched the neighborhood for two suspected holdup men, failed to find them, and made written report of the robbery about 25 minutes after the complaint to him. Defendant was arrested about 6:30 o'clock in the evening of the following day. The prosecuting witness visited the city prison and recognized, while crossing the corridor, the defendant as one of the robbers. Later the same witness picked defendant as one of the robbers out of 12 or 15 prisoners. At the trial both of the victims positively identified the defendant and gave substantially the same description of the robbers and their dress on the occasion of the holdup. The defendant was dressed slightly differently at the prison. The defense was alibi, one witness (Mrs. Sheehan) beside himself testifying for the defendant that he spent the entire day and night on which the robbery took place at the home of witness and her husband. She also testified that he spent most of the next day there.

We cannot agree with counsel for defendant that his client was not sufficiently identified as one of the robbers. The evidence shows that the holdup men peacefully en-

tered the premises. They were unmasked. Defendant was arrested the following day upon description furnished by the victims. The prosecuting witness visited the city prison and recognized the defendant, and both victims, at the trial, positively identified the defendant as one of the offenders. We cannot indulge the presumption, as counsel seems to wish, that the place of the robbery was a bootleg liquor shop and the prosecuting witness customer, and his cousin, proprietor thereof, intoxicated with its product. These things were not proved, though defendant's counsel attempted to elicit testimony to that effect at the trial. True, one of the witnesses was an ex-convict, but this does not establish the innocence of one charged with robbing him, nor stamp the entire story of the robbery false. The fact that one witness could not say with certainty that there was or was not wood on the stock of the gun with which he was held up does not blot out the identification of the robbers. That the witness was frightened and excited was but natural, and, under the circumstances, we think he could not be expected to establish that he examined minutely a gun pressing against his body to enforce inactivity, and which was also partially concealed in the hand of the robber.

The jury had the witnesses before them and were given opportunity to pass on the sufficiency of their identification and their general credibility. This court cannot say that the story of the robbery was too improbable for belief by a reasonable person.

[2] The next complaint of defendant is that the court committed error in admitting evidence as to the identification of defendant by the prosecuting witness while in the city prison. It cannot be assumed that any irregular methods were used in connection with the visit of the witness to the city prison, nor that the identity of the defendant was suggested to him in any improper manner. The record discloses only the testimony of the witness that while at the elevator he identified the defendant crossing the corridor and called him to the attention of a detective companion; that he later picked defendant out of a lineup of 12 or 15 prisoners. Though counsel for defendant objected to the testimony on the ground that there was no showing of the "ins and outs" or how the lineup was made, and that the identity of the defendant had been suggested to the witness beforehand, he made no particular effort to follow the court's suggestion that these matters could all be brought out on cross-examination, but went instead into an examination calculated to show that the memory and perception of the witness were so weakened by drinking intoxicating liquor that his statements were not to be believed. The jury evidently chose to believe the story of the identification at the prison as first told by the witness.

[3] Defendant next assigns for reversal misconduct of the district attorney in the asking of defendant's witness the question, "Did you ever work down in South City selling drinks?" to which the court sustained an objection. The question was asked after the court had ruled against questioning as to the employment of the witness prior to her immediate employment. While the question was improper after such ruling and the conduct of the district attorney is not to be commended, we do not think that it was prejudicial. We must assume that the jury disregarded the question when the objection was sustained, and we cannot assume that of two meanings possible to be attached to the question they took a sinister and unlawful one.

[4, 5] Further misconduct is assigned on the part of the district attorney in referring to defendant's counsel and his knowledge of the facts in the case, and of the defendant. Defendant's counsel, during his final argument, proceeded to laud the character of the defendant, saying:

"Hale has no police record, has never been in jail before in his life, because if he had they would have produced the record of his arrest."

The district attorney objected, saying that such statement was improper, "coming from counsel, as he knows the facts, and as he knows the defendant in this case." The remarks of the district attorney were assigned as misconduct and defendant asked the court to instruct the jury to disregard them. The court then said:

"Well, eliminating statements of both counsel, ladies and gentlemen, of course, you have had some experience here and you know that counsel are assumed to talk about the evidence, and not what might have been proven or what might not have been proven. It is what has been proven; that is all you are entitled to discuss here. Go ahead."

Defendant complains that this admonishment was insufficient. The retort of the district attorney may have been occasioned by the facts adduced at the trial. Defendant admitted that he was not working at the date of the robbery and had not worked at any legitimate business for a long time. He testified:

"To tell you the truth, I was in the bootleg business. * * * We was running a still. * * *"

The whole incident may be regarded as within the scope of legitimate argument. And further, it appears, that the court suggested to the jury that statements of both counsel should be eliminated, and that, in arriving at a verdict, they must confine themselves to what has been proved. Under all of the circumstances of the case, we believe the defendant was in no way prejudiced by

the occurrence, and that the court's admonishment was sufficient.

[6] Error is assigned in the admission of the testimony of a police officer descriptive of the robbers, as hearsay. The record shows there was some confusion as to the date of the commission of the crime. The information charged the 6th day of October and all the parties in the early stages of the case assumed this to have been the correct date. During the trial a police officer was called to clear up this matter. It was finally made clear, by the officer's report to headquarters, that the crime was committed on the evening of October 5th. The arrest occurred on the following evening, October 6th. The court, over the objection of defendant, allowed the officer to testify that he had a conversation with the victims of the holdup on the night of its occurrence, that he searched the neighborhood immediately thereafter for two men, and, finally, permitted him to give descriptions of these two men furnished by the victims. The receipt of the complaint by the police officer, and his written report at the time thereon, was an act in the line of his duty and may have been admissible to show that complaint of the robbery was made on that date. The descriptive testimony based on hearsay, if given to prove the identity of the accused as the guilty party, was incompetent. *People v. Johnson*, 91 Cal. 265, 27 Pac. 663; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953. Had such evidence been the sole proof of identification, its admission would clearly have been reversible error. Aside from the complained of evidence, there was sufficient direct testimony on the subject, unshaken by defendant, to justify the verdict of the jury. But in view of the rule laid down by our Supreme Court in the *Johnson and McNamara* Cases, supra, it would appear that the action of the trial court in refusing to exclude the hearsay testimony verged on prejudicial error, and we feel constrained to invoke section 4½ of article 6 of the state Constitution, and in so doing, we believe, upon a consideration of the entire evidence, the error, if any, was harmless.

[7, 8] Errors are assigned in three instructions. It is asserted that the trial judge omitted a vital element from a part of his charge to the jury, in that he did not state that the property stolen was that of the prosecuting witness, and not the property of the defendant. The court gave a résumé of the information, containing the statute definition of robbery, but omitted that part of the information declaring the ownership of the property taken. The court then went on to say, however:

"The defendant entered a plea of not guilty, thereby putting in issue all of the material allegations contained in the information which has heretofore been read to you. The minutes

of the court set out in the record show the following:

"* * * Thereupon the roll of the jury was called and all answered present.

"Thereupon the clerk read the information.
* * *"

The copy of the information set out in the clerk's transcript contains the language: " * * * And of the personal property of the said Pasquale Laureti. * * *"

If the information lays the ownership of the property in some one other than the defendant, it is sufficient. *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15. The entire prosecution was conducted on the theory that the property was that of the prosecuting witness and his cousin, and no contention was made by defendant that this was not the fact.

[9] The second instruction complained of is as follows:

"If you believe that any witness in this case has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard and entirely discard the whole testimony of such witness in arriving at your verdict."

The instruction complained of is, in effect, a compliance with section 2061, subdivision 3, Code of Civil Procedure. *People v. Sprague*, 53 Cal. 491, 494; *People v. Clark*, 84 Cal. 573, 583, 24 Pac. 313. It is settled law that the giving or refusing to give this instruction, unless injury is shown, does not constitute prejudicial error. *Poor v. Fuller & Co.*, 30 Cal. App. 650, 655, 159 Pac. 233.

[10] The third instruction attacked is one given by the court upon the subject of reasonable doubt. Counsel for defendant quotes only the first sentence of the instruction, and contents himself with saying it is not the law. The court gave a stock instruction which contained a correct statement of the law upon the subject, and the assignment of error is therefore without merit.

[11] The last contention of defendant is that section 1168 of the Penal Code, under which appellant was sentenced, is unconstitutional and void as violative of article 3, § 1, and article 7, § 1, of the state Constitution. In the case of *In re Lee*, 177 Cal. 690, 171 Pac. 958, the Supreme Court of this state had under consideration the constitutionality of the Indeterminate Sentence Law, especially as violative of article 3, § 1, of our Constitution. The court there held that the actual carrying out of the sentence under the law, and the application of the various provisions for ameliorating the same, are administrative in character and properly exercised by an administrative body; that the indeterminate sentence is not a delegation to the prison directors of judicial authority, the judicial branch of the government being intrusted with the function of determining the guilt of the individual and of imposing

the sentence provided by law for the offense of which he may have been found guilty; that the act itself, in effect, becomes a part of every judgment, and the state board of prison directors only one of a series of agencies for the execution of the judgment. The conclusion of the court was that the Indeterminate Sentence Law does not violate the constitutional provision such as ours (article 3, § 1), providing for a segregation of governmental powers into the three departments—legislative, executive, and judicial.

It is contended that the provisions of the statute are in direct and irreconcilable conflict with article 3, § 1, and article 7, § 1, for the reason that they interfere with the exclusive right of the executive to commute or pardon sentences for crime after conviction. The statute (paragraph d) provides that the governing authority of the prison "shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined, unless the sentence be sooner terminated by commutation or pardon by the Governor of the state; and if it be determined that such person so sentenced be released before the expiration of the maximum period for which he is sentenced, then such person shall be released at such time as the governing * * * authority may determine."

Nowhere does the statute give the prison board the right to commute or pardon, nor does it attempt to impair such power reposing exclusively in the Governor; indeed, the statute expressly recognizes that such power remains with the Governor, where it has been placed by the Constitution. One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but he must show that by the natural and necessary import of the language it is clearly in conflict with the supreme law. If the language employed is capable of two or more constructions, any one of which is in harmony with the Constitution, it is our duty to give it that construction. *People v. Hayne*, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211.

There is now, and there has been for more than half a century, a statute in force in this state allowing credits to convicts which are deducted from their terms of imprisonment. These credits, shortening very materially the term of the sentence, are given, not by the court, nor by the Governor under his power to commute or pardon, but purely and simply by administrative officers—the prison board. The validity of such legislation was upheld by the Supreme Court in *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190. Says the Supreme Court:

"The statute provides, in express terms, that certain credits or deductions from the term

of imprisonment imposed shall be allowed for good conduct. (Supplement to Deering's Codes, p. 490, § 20.) This statute does not require any action on the part of the Governor, nor is any such action necessary. The statute, by its terms, entitled the petitioner to his discharge, the same as if his term of imprisonment had expired without such commutation as he is allowed by its provisions. The statute is not unconstitutional as an infringement of the power of the executive to pardon. It does not take away or interfere with such power in any way. The statute simply fixes the term of imprisonment in certain cases and upon certain conditions. This provision enters into and becomes a part of the judgment of the court below."

The power to pardon is something more than the power to release from servitude. "Pardon" is the remission of guilt, amnesty, oblivion, or forgetfulness. *And. Law Dict.* 745. The act of the board only shortens the term provided by the sentence, and leaves the conviction of guilt unaffected. "The effect of such pardon by the king is to make him, in effect, a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon, and not so much restore his former as to give him a new credit and capacity." *Bl. Comm.*, book 4, p. 402. "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 386; *U. S. v. Padelford*, 9 Wall. 531, 19 L. Ed. 788; *U. S. v. Klein*, 13 Wall. 128, 20 L. Ed. 519; *Carlisle v. U. S.*, 16 Wall. 147, 21 L. Ed. 426.

Statutes similar in meaning to our Indeterminate Sentence Law, and some of them in practically the same language, have been enacted in many of the states, and while the courts of last resort in a few of these states have declared the acts unconstitutional, like courts of a majority of them have upheld their validity. *Wilson v. Commonwealth*, 141 Ky. 341, 132 S. W. 557; *Murphy v. Commonwealth*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; *Oliver v. Oliver*, 169 Mass. 592, 48 N. E. 843; *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1; *George v. People*, 167 Ill. 447, 47 N. E. 741; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *People v. Warden of Sing Sing Prison*, 39 Misc. Rep. 113, 78 N. Y. Supp. 907; *State v. Duff*, 144 Iowa, 142, 122 N. W. 829, 24 L. R. A. (N. S.) 625, 138 Am. St. Rep. 269; *People v. Madden*, 105 N. Y. Supp. 554, 120 App. Div. 338;

People v. Nowasky, 254 Ill. 146, 98 N. E. 242; Commonwealth v. Kalck, 239 Pa. 533, 87 Atl. 61; Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

[12] The contention that the statute is violative of the equal protection clause of the federal and state Constitutions is untenable. In *People v. Finley*, 153 Cal. 59, 94 Pac. 248, the defendant, while undergoing a life sentence in the state prison, was indicted under section 246 of the Penal Code, tried, found guilty, and the death penalty imposed. The defendant on appeal advanced the proposition: First, that section 246 denied to him the equal protection of the law guaranteed by the Fourteenth Amendment; second, that it contravened the provisions of article 1, § 11, of the Constitution of this state. The Supreme Court said (page 62 of 153 Cal., 94 Pac. 249):

"This amendment [Fourteenth] means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (*Missouri v. Lewis*, 101 U. S. 22.) Paraphrasing the language of the Supreme Court of the United States in *Moore v. Missouri*, 159 U. S. 676, at 677, 678, 16 Sup. Ct. 179, we cannot perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment."

[13] The further contention that the statute is obnoxious to article 4, § 25, subds. 2, 26, and 33, of the state Constitution, prohibiting local and special laws, is also without merit.

"The distinction between a special and a general law may not be capable of being formulated in a definition which will be exhaustive of the subject and applicable to every case; and the question may be better determined upon a consideration of each particular case presented for its application by taking into view the purpose and character of the law, as well as the individuals upon which it is to operate. The Legislature, in its function of providing for the public welfare and the benefit of the entire people of the state, must determine the character of the laws which it will enact, and, except in so far as it is prohibited by the Constitution, should adapt these laws to the condition or necessities of different portions of the state or the different classes of its citizens. The Constitution does not require that all the laws which the Legislature shall pass shall have a uniform operation in every part of the state, nor does it prohibit legislation for different classes of citizens. The requirement that all laws of a general nature shall have a uniform operation, and that the Legislature shall not pass special laws upon certain subjects, still leaves open for determination whether any particular statute is a general or a special law. A law which operates only upon a class of individuals is none the less a general law, if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law.

* * * If the conditions of such a class are such as to require legislation which would be inappropriate or injurious to others, or such as to require the enactment of laws which, either in their mode of enforcement or the remedy they provide, are inapplicable to others than the designated class, laws enacted for that class are not special for the reason that they apply to all of the individuals within the conditions." *People v. Central Pacific Railroad Co.*, 105 Cal. 576, 583, 38 Pac. 905, 906.

The statute is general in its application, for it applies alike to all persons who have been convicted of a public offense punishable by imprisonment in the state prison, and it is general in its purpose, for it gives to all persons similarly situated equal opportunity to avail themselves of its benefits.

For the reasons given, we are of the opinion that the Indeterminate Sentence Law is not violative of the Fourteenth Amendment of the Constitution of the United States, nor of article 3, § 1; article 7, § 1; article 1, §§ 11 and 21; article 4, § 25, pars. 2, 26, and 33, of the California Constitution.

The judgment and order are affirmed.

We concur: TYLER, P. J.; NEEDHAM, Justice pro tem.

64 Cal. App. 200

LOS ANGELES COUNTY v. STATE.
(Civ. 2574.)

(District Court of Appeal, Third District, California. Oct. 31, 1923.)

1. Reformatories ⇨11—Amendment to Juvenile Law held to compel counties to support wards at state schools; "may."

An act approved March 26, 1895 (St. 1895, p. 123) § 2, provided that for each person committed to either state school the committing county shall pay into the state treasury \$132 annually. Amendment of 1919 (St. 1919, p. 476) to the Juvenile Court Law, § 11, provided that the court may pay a sum not exceeding \$20 monthly. Held, that the word "may" in the amendment had a mandatory meaning equivalent to must, and the trial court could not deny provision for the support of the wards or shift the burden to other counties of the state by adding to the state's expense, since the amendment did not expressly repeal the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

2. Evidence ⇨18—Court takes cognizance of increased cost of living to determine meaning of amendment to Juvenile Court Law.

In construing the word "may" in an act (St. 1919, p. 476) amending Juvenile Court Law, § 11, which provided that counties shall pay a certain sum for maintenance of each person committed by it to state schools, so as to read that the court "may" direct an additional amount, etc., the amount designated being an increase, the court may take cognizance that between 1895 and 1919 the cost of living and

necessarily the cost of maintaining inmates at any of the state institutions practically doubled.

3. Statutes — 227—Word "may" takes on mandatory form when rights of public or other persons require performance of the act.

While the word "may" is ordinarily a permissive term, and not peremptory, when the rights of the public or of other persons are dependent upon the exercise of the power conferred, it takes on a mandatory form, and performance of the act is neither optional nor discretionary upon the person or officer designated.

4. Reformatories — 11—Payment to state by county auditor without order from court held not to vitiate his act under statute.

Under the 1919 amendment (St. 1919, p. 476) to the Juvenile Court Law, § 11, requiring payment of \$20 monthly into the state treasury by counties committing boys to state schools, the fact that a county auditor made such payment irregularly, without an order of the court, did not vitiate the state's claim, since it was the court's duty to make the order.

5. States — 193—Payment to state by county auditor of funds as required by statute, though without court order, did not raise implied contract by state to refund.

Under St. 1893, p. 57, § 1, authorizing all persons having contract or negligence claims against the state not allowed by the State Board of Examiners to sue the state, the act of a county auditor in drawing warrants for the maintenance of boys committed by his county to state schools, though done irregularly, without authority of the court, did not raise an express or implied contract between state and county authorizing a suit for refund, since the auditor acted under a mandatory statute requiring the court to order the payments.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the County of Los Angeles against the State of California. Judgment for defendant, and plaintiff appeals. Affirmed.

A. J. Hill, Co. Counsel, and Edward T. Bishop, Asst. Co. Counsel, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guarena, Deputy Atty. Gen., for the State.

PLUMMER, J. In this action the county of Los Angeles seeks to recover from the state of California the sum of \$12,963.48, and bases its action upon the following facts: During the period between the 9th day of February, 1918, and the 28th day of December, 1920, a number of boys from the age of 18 and under the age of 21 years were committed to the Preston School of Industry by the superior court of the county of Los Angeles under the provisions of the Juvenile Court Law of the state (St. 1915, p. 1225). No finding of the court was made in any of the cases concerning the ability of the parents or guardians of the wards, or as to the

ability of the earnings of any of the wards, or of the estates belonging to any of them, to pay in whole or in part any of the maintenance charges at the Preston School of Industry. After commitment as aforesaid, and without any orders made by the superior court of the county of Los Angeles directing such payment, the auditor of the county of Los Angeles drew warrants upon the treasurer of that county in favor of the state of California, and the sum heretofore mentioned was accordingly paid to the state through the Preston School of Industry. Payments were made at the rate of \$20 per month for the cost and maintenance of each ward.

On or about the 16th day of May, 1921, the county of Los Angeles filed with the State Board of Control of the state of California a claim for the refund of the said sum of \$12,963.48, alleging that each and all of the various monthly payments to the state were illegal, and were made in the absence of the findings and orders for payment above referred to. This claim was disallowed by the State Board of Control. Action against the state was thereupon begun by the filing of the complaint setting forth the foregoing facts, to which complaint the defendant demurred, which demurrer was sustained without leave to amend. The matter is now on appeal to this court from the judgment of the trial court entered after sustaining the defendant's demurrer. In order to sustain its contention that a right of action existed on the part of the county of Los Angeles against the state of California, plaintiff lays down three propositions: First, that the payments of the county moneys were illegally made to the state; second, a cause of action for money had and received has arisen against the state; and, third, an action against the state for money had and received is authorized by statute. If any one of these propositions is faulty, then the action must fail, and for that reason consideration need not further be given if such is found to be the case.

Were the payments illegally made to the state? We think this question can be answered by a consideration of the law relating to the Preston School of Industry and the maintenance of wards committed thereto.

By an act by the Legislature provided March 11, 1889 (St. 1889, p. 100), the state of California provided for the establishment of an educational institution to be designated as the Preston School of Industry to be located at Ione, in the county of Amador. This act, however, made no provision for the maintenance or support of the wards committed to said school.

By the act approved March 26, 1895 (St. 1895, p. 123), the Legislature provided in section 2 of said act:

That "for each and every person hereafter committed to either the Whittier State School

or the Preston School of Industry, the county from which the commitment is made shall pay into the state treasury the sum of one hundred and thirty-two dollars per annum, and at that rate for each fraction of a year."

The Juvenile Court Law as originally adopted provided, in substance, for the court making the commitment to direct the payment of the same amount per month. In 1919, economic conditions having undergone such a radical change, and the sum of \$11 per month being manifestly insufficient for the maintenance of any ward committed to either Preston or Whittier, the Legislature amended section 11 to read as follows:

"Any order providing for the care and custody of a ward of the juvenile court may provide that the expense of support and maintenance of said ward shall be paid by the parent, parents, guardian of said ward or other person liable therefor, after citation thereto, or from the earnings, property or estate of said ward, and in such case shall state the amount to be so paid. If it is found, however, that the parent, parents, guardian of said ward or other person liable therefor, are unable to pay or that the earnings, property, or estate, of said ward is insufficient to pay the whole expense of support and maintenance of said ward, the court may direct such additional amount as may be necessary for the maintenance and support of said ward to be paid from the county treasury of the county for the support and maintenance of said ward, the amount so ordered to be paid from the treasury of said county not to exceed, in the case of any one ward, the sum of twenty dollars in any one month. * * *"
(St. 1919, p. 476.)

[1] These orders are valid for six-month periods. Provision is then made by the act for the keeping of books and reimbursements of the county by parents or guardians if found able, etc. On the part of the appellant, and in order to establish the illegality of the state's claim, it is necessarily argued that the making of any order by the superior court in relation to the maintenance of the wards being dealt with is purely optional or discretionary. Is this interpretation correct? The Juvenile Court Law does not directly repeal the provisions of section 2 of the act of 1895, making it mandatory for the counties to pay to the state the sum of \$11 per month for each ward committed either to the Preston School of Industry or the Whittier State School. Our attention has not been called to any portion of the Juvenile Court Law which repeals the act of 1895 by necessary implication, and for the purpose of this decision we do not deem it necessary to refer to the act of 1895 further than to call attention to its mandatory provisions, in which it is made obligatory upon the counties to pay the sum of \$11 per month irrespective of any order or orders made by the superior court. In this connection we deem it proper

to inquire as to the intent and purposes of the Legislature in amending section 11 of the Juvenile Court Law in 1919.

[2] It is a matter of common knowledge, a knowledge of which we think the court may take cognizance, that between the period of 1895, the date of the enactment of the law providing for the payment of \$11 per month for the maintenance of the wards, and the year 1919, the cost of living and necessarily the cost of maintaining inmates at any of the state institutions practically doubled, and we think the Legislature must have had this in mind in providing for the payment of a sum not exceeding \$20 per month for each ward by the counties from which the wards were committed. There is another matter which must also be taken into consideration when determining the meaning of the word "may" as used in section 11 of the amendment to the Juvenile Court Law, and that is the uniform operation and effect to be given to such section. If the words contained in that section, relating to paying the state for the maintenance and support of wards committed to it from the different counties, are purely optional and discretionary, then in that case it is possible for the larger counties, through the failure of the trial courts to exercise such option or discretion, to saddle the entire expense of maintaining their numerous wards upon the state, while other and smaller counties of the state, where the commitments are few in number, may exercise the option or discretion of providing for payment by the county; and thus a number of the counties of the state might be supporting their own wards, and also contributing to the expense of maintaining wards committed from other counties where the option or discretion was either not exercised, or, if exercised, determined in favor of the county. It is scarcely probable that the Legislature intended by the words used to adopt a system that would have no uniformity of operation, and leave the burden of maintaining the wards sent to the different institutions subject to any such shifting process. It seems to us the more reasonable conclusion that the Legislature intended not to relieve the counties from the burden of maintaining their own wards, but simply intended to limit the amount to a sum not exceeding \$20; and also that the word "may" as used in section 11 of the amendment to the Juvenile Court Law has a mandatory meaning, and that the trial courts are not at liberty either to deny provision for the support of the wards committed to said institutions under the terms of that act or to shift the burden of maintaining such wards to other counties of the state by adding to the state's expenses in failing to exercise such power. In the Matter of Cencinino, 31 Cal. App. 238, 160 Pac. 167, this court, in considering the meaning of the word "may," where the purpose of the law was to clothe a public officer with power to

be exercised for the benefit of the public, said:

"The word 'may' as used in a statute or constitution is often interpreted to mean 'shall' or 'must.' Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the law in which that word is used. It seems to be the uniform rule that, where the purpose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language, though permissive in form, is peremptory. As was said by the Supreme Court of the United States in *Supervisors v. United States*, 4 Wall. 436, 18 L. Ed. 419, construing a statute of the state of Illinois similarly phrased to the provision in question here: 'What they (public officers) are employed to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is given as a remedy to those entitled to invoke its aid.' See, also, *Hayes v. County of Los Angeles*, 99 Cal. 74 (33 Pac. 766)."

In *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, the court, in construing section 3804 of the Political Code, where it is stated that the board of supervisors may by order, etc., provide for the refunding of taxes, used the following language:

"It is urged by respondent that the Code, by providing that the board of supervisors may by order provide for refunding taxes, etc., paid more than once, made it optional with that body whether to do so or not, and that the board in this instance, having refused to refund, its action is conclusive upon the plaintiff. Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'shall.' *People v. Supervisors*, 68 N. Y. 119. Where the statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall.' *Rex v. Barlow*, 2 Salk. 609. Where a statute directs a thing to be done for justice's sake may means shall. *Selvey v. United States*, 7 Court of Claims, 334. Where persons or the public have an interest in having the act done by a public body, may in such a statute means must. *Phelps v. Hawley*, 52 N. Y. 27; *People v. Supervisors*, 51 N. Y. 401. See *Estate of Ballentine*, 45 Cal. 696. In *Supervisors v. United States*, 4 Wall. 436, a statute of Illinois provided that the board of supervisors 'may, if deemed advisable, levy a special tax,' etc. Mr. Justice Swayne sums up the authorities on the question as follows: 'The conclusion to be adduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a rem-

edy to those entitled to invoke its aid, and who would otherwise be remediless.'"

To the same effect is the case of *Brenner v. Los Angeles*, 160 Cal. 72, 79, 116 Pac. 397, where the previous California cases are cited with approval. In *Estate of Ballentine*, 45 Cal. 696, the court construing the provisions of the probate law, where it says that the trial court may set aside for the widow a homestead, it was held that the word "may" should be interpreted as a mandatory expression, a provision intended by the Legislature to be made for the support of the family. It can scarcely be doubted that the Legislature, in amending section 11 of the Juvenile Court Law, intended likewise to make provision, or at least that provision should be made by the court having to do with juvenile cases, for their support and maintenance. In states outside of California it seems, also, to be held by an almost unbroken line of authorities that wherever the word "may" is used in reference to courts and officers such words will be regarded as imperative in cases where the public or individuals have the right to demand the exercise of the power conferred. Note to *State v. Henry*, 5 L. R. A. (N. S.) 340.

[3] It thus appears that, while the word "may" is primarily and ordinarily a permissive term and not peremptory, nevertheless, when the rights of the public or of other persons—in this case the state of California—are dependent upon the exercise of the power conferred, the word "may" takes on the mandatory form, and that the performance of the act provided for is neither optional nor discretionary upon the person, or officer designated and authorized to perform the act.

[4] While the payments were undoubtedly irregularly made by the auditor and treasurer of the county of Los Angeles, does that necessarily vitiate the claim of the state for payment of expenses incurred by the maintenance of the wards committed to the Preston School of Industry by the superior court of Los Angeles county? We think not. It was the duty of the court of Los Angeles county to make the order, and, under the law, as we read it, it was also the duty of Los Angeles county to provide for the maintenance of its own wards and not to shift that burden upon the state or upon other counties of the state who, following the statute, had made provision for the support and maintenance of their wards.

[5] This brings us to the consideration of section 1 of the act of 1893 (St. 1893, p. 57), which reads as follows:

"All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the State Board of Examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdic-

tion, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided."

There is no question of an express contract or obligation on the part of the state to refund or pay any money to the county of Los Angeles. It can only arise, if at all, by implication. Can it arise in this manner in this case?

The earliest case in the state of California upon this subject to which our attention has been called is that of *Argenti v. San Francisco*, 16 Cal. 255, where it is held that if one obtains or if the city obtains money from another by mistake, or without authority of law, or property which does not belong to it, the moral duty immediately arises to make restitution. This doctrine is supported by a large number of California cases and cases from other states. If applicable to the present case, and, assuming as the Supreme Court did in the case of the County of San Luis Obispo v. Gage, 139 Cal. 408, 73 Pac. 174, that a county is a person having the right to maintain an action under the act of 1893, then in that case the judgment of the trial court should be reversed. But is the doctrine of the *Argenti Case* and others of similar import applicable? We think not. There is no express contract existing between the state of California and the county of Los Angeles for the payment of any part or portion of the sum claimed by the appellant. The moral obligations, as we have seen, all rest upon the county of Los Angeles. There is no violation of the principle of good conscience or right dealing on the part of the state in accepting and receiving the money from the county of Los Angeles which should have been paid to it by orders of the superior court of that county, for the maintenance of wards transferred from the county of Los Angeles and placed within the care, custody, and control of the institutions of the state, in which institutions, as we have seen, the costs of maintaining the several wards were intended to be borne by the counties making the commitments. If it was the intent of the Legislature, as evidenced by the acts to which we have referred and the interpretation which we think should be given by these acts, that the several counties should bear the burden of maintaining their own wards sent to the Preston School of Industry, not exceeding the sum of \$20 per month, then, and in that case, the state had a moral and a legal claim against the county of Los Angeles, and therefore has received nothing from the county of Los Angeles which in good conscience it should restore. This being true, then there is no contract, either express or implied, arising under the

provisions of section 1 of the act of 1893 heretofore referred to. That the county auditor of the county of Los Angeles before drawing warrants in favor of the state, and the treasurer of said county, before paying the same, should have been fortified by orders of the superior court, does not affect the claim of the state. In other words, the irregularity in payment does not reach down into and affect the validity of the claim itself or taint it with any moral turpitude which would cause or necessitate the court to attach to the receipt of money an implied contract to refund the same to the county of Los Angeles. As to whether a county is or is not a person within the meaning of the act of 1893, and is entitled to prosecute a suit against the state, we express no opinion, the determination of that question not being necessary to the decision herein. For the reason hereinbefore given, we are of the opinion that the judgment of the trial court, following its order sustaining the defendant's demurrer without leave to amend, should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 790

LOS ANGELES COUNTY v. DANIELS et al.
(Civ. 2546.)

(District Court of Appeal, Third District, California. Oct. 31, 1923.)

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus by the County of Los Angeles against the State of California. Judgment for defendant, and plaintiff appeals. Affirmed.

A. J. Hill, Co. Counsel, and Edward T. Bishop, Asst. Co. Counsel, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guertena, Deputy Atty. Gen., for the State.

PLUMMER, J. This is an action praying for the issuance of a writ of mandate requiring the board of control to audit and allow the claim of the county of Los Angeles for the sum of \$12,963.48. The trial court sustained the defendants' demurrer to the petitioner's petition without leave to amend. The matter is now before this court on appeal from the judgment entered after the sustaining of the respondents' demurrer as aforesaid. The same questions are involved in this action as were presented for determination in the case of *County of Los Angeles v. State of California* (No. 2574) 222 Pac. 153, this day decided. For the reasons therein given, we think the writ of mandate was properly denied, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 519

PEOPLE v. PUTTY. (Cr. 1023.)

(District Court of Appeal, Second District, Division 1, California. Nov. 27, 1923.)

1. Criminal law ☞252(4)—That charge of two offenses was combined in one complaint held not deprivation of right to have offense clearly charged.

The fact that a charge of two offenses, one for illegal possession of intoxicating liquor, as to which the justice of the peace had jurisdiction to try the case, and the other for illegal manufacture of liquor, as to which the justice had jurisdiction merely to sit as a committing magistrate on preliminary examination, was combined into one complaint, could not of itself deprive accused of any of his rights specified in Pen. Code, § 1426, requiring an offense to be charged with such clarity so that accused may understand the character of the offense.

2. Criminal law ☞1186(4)—Hearing and disposition by justice of the peace of two offenses at the same time in the capacities of justice of the peace and of committing magistrate not ground for reversal in absence of prejudice.

The fact that, in a hearing before the justice of the peace of a complaint charging in the first count the illegal manufacture of intoxicating liquor, as to which the justice had jurisdiction only to sit as a committing magistrate on preliminary examination, and in the second count charging the illegal possession of intoxicating liquor, as to which the justice had jurisdiction to try, the justice, instead of hearing evidence piecemeal as to each count in his respective capacities of justice of the peace and of committing magistrate, heard the evidence en masse, and on termination of that hearing, sentenced accused on one count and held him over to the superior court on the other count, pursuant to which an information was filed in that court charging illegal manufacture, *held* not ground for setting aside judgment of conviction in the superior court where it was amply supported by evidence, and in the procedure adopted by the justice of the peace accused was not deprived of any substantial right within Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Victor Putty was convicted of illegally manufacturing intoxicating liquor, and he appeals. Affirmed.

Mart Coles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

HOUSER, J. This is an appeal from a judgment of conviction of defendant for the commission of the offense of illegally manufacturing intoxicating liquor. The original complaint, which was filed in the justice's court, contained two counts, the first of which charged defendant with manufacturing liquor contrary to the provisions of the

statute, and the second of which accused defendant with illegally having intoxicating liquor in his possession. When the matter came on for hearing before the justice of the peace attention was directed to the fact that as to the second count the justice's court had jurisdiction to hear and determine the same, while as to the first count the only province of the court was to sit as a committing magistrate for the purpose of conducting the preliminary examination provided for by the statute. Counsel for defendant then offered a suggestion that, in view of the fact that defendant had never been in trouble before, and as the officers appeared "to have a case" against defendant, he be permitted to plead guilty to the second count, with the understanding that the action be dismissed as to the first count of the complaint. The prosecuting attorney declined to accede to such suggestion; whereupon the following occurred between counsel:

"Mr. Coles (attorney representing defendant): Very well; we are ready to proceed.

"Mr. Jamieson (prosecuting attorney): You have seen the complaint?

"Mr. Coles: I have seen the complaint. I am just going to let you go ahead.

"Mr. Jamieson: Have you any objection to trying these together? If you have, we will try each one separately.

"Mr. Coles: We are here to answer to the complaint.

"Mr. Jamieson: We will present the case as we have it."

[1, 2] Evidence was then introduced; the defendant was found guilty as to count 2, upon which he was sentenced by the justice's court; and as to count 1 he was held to answer to the superior court. After the information had been filed and the superior court had gained jurisdiction, defendant moved to set the information aside on the ground "that before the filing thereof the defendant had not been legally committed by a magistrate," which motion was denied by the court. From a judgment of conviction in the superior court as to count 1, defendant has appealed to this court—his contention being that the justice of the peace, in conducting a trial of defendant as to count 2 of the complaint, and at the same time holding a preliminary examination as to count 1 thereof, was acting in excess of his jurisdiction.

The statutes of this state provide for two separate and distinct functions of a justice of the peace, one of which being to hear and determine certain matters of either a civil or of a criminal nature, and the other being that of sitting as a committing magistrate in cases triable before the superior court. There can be no question but that, if in the present instance the defendant had been charged in one complaint with the commission of the offense of illegally having in-

toxicating liquor in his possession, and in another complaint with the offense of illegally manufacturing intoxicating liquor, the justice of the peace would have had jurisdiction thereof acting in his separate respective capacities of trial judge and as committing magistrate; and the fact that the charge of two offenses was combined into one complaint could not have the effect in itself of depriving defendant of any of his rights as specified in section 1426 of the Penal Code, requiring that there be set forth "the offense charged with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

The case of *People v. Swain*, 5 Cal. App. 421, 90 Pac. 720, is cited by appellant in support of his contention that the justice of the peace was without jurisdiction; but, as we read that case, all it holds, so far as is here applicable, is that, where a justice of the peace in his capacity of committing magistrate conducts a preliminary examination of a defendant upon a charge of grand larceny, he has no jurisdiction, after ordering the discharge of the defendant on such charge, to further order him to appear on a subsequent day before the justice's court on a charge of petty larceny arising out of the facts developed on the preliminary examination. No such question, nor one analogous thereto, arises herein.

The question here presented is that of the jurisdiction of the justice of the peace sitting as a committing magistrate to hold the defendant to answer to the superior court, taking into consideration the fact that contemporaneously therewith he also assumed to act as a justice of the peace in determining the guilt of the defendant on another charge. What possible difference could result as affecting any substantial right of defendant because the justice of the peace heard all the evidence en masse, and upon which he reached the conclusion that as to one count defendant was guilty, and as to the other he should be held to answer to the superior court, rather than that he should have heard the evidence piecemeal, first, as justice of the peace, as affecting the count in which as justice of the peace he had jurisdiction, and immediately thereafter (by some mental process, and perhaps by oral pronouncement, divesting himself of such capacity, but retaining his identical physical position on the bench with the same surroundings and attachés of his court) permitted the introduction in evidence of exactly the same statements by the same witnesses and the same exhibits as were used in the former hearing, is not readily apparent. The law adhors idle acts. In the course which was adopted the defendant was accorded every right and every privilege which he might have possessed assuming that the

technical and more burdensome procedure obtained. He complains of no lack of fairness in any respect. His claim is founded entirely upon the possible violation of technical procedure which neither worked to his hardship nor to his disadvantage. If there is nothing here that genuinely requires remedial action because of procedure which has resulted in injury to defendant, no valid reason appears for disturbing the judgment. The whole intent of the law is that no one shall receive unjust treatment. Even though it be conceded that there was some deviation from the beaten path of the law regarding the procedure before the committing magistrate, if in the end the result attained has been identical with the result had the regular course been pursued, no just cause for complaint can be said to exist. The judgment of the superior court was amply supported by the evidence. In such circumstances there is a clear application of the provisions of section 4½ of article 6 of the Constitution, to the effect that "no judgment shall be set aside or new trial be granted * * * for any error as to any matter of procedure * * * unless such error has resulted in a miscarriage of justice."

In addition to what heretofore has been set forth as having occurred at the hearing before the justice of the peace, the following statements were made by counsel for defendant:

"This matter which we have before us now, the testimony would compel the court to bind the man over, would it not? That is to say, the testimony in regard to the high-grade misdemeanor [count 1]. * * * Now, under the testimony here, there is nothing for the court to do but bind the man over for further hearing; but I don't see testimony here which would entitle the court to find on the low-grade misdemeanor charge [count 2]. I suppose the simplest solution, if Burke [deputy district attorney] wants him tried in the superior court, let's try it all in the superior court. Why use the law as a means of oppression? It certainly is one offense, no question about that. * * * We would like this court, if it would see fit, to pass sentence on this defendant for the low-grade misdemeanor of having liquor in his possession, contrary to the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), or the Wright Act (St. 1921, p. 79), and also, if the court should see fit, to bind the defendant over for having a still and operating a still at the same time. It appears to me there is sufficient proof of the high-grade misdemeanor so that the court might see fit to bind the defendant over."

The record of the proceedings had before the justice of the peace shows a tacit agreement among counsel and the court respecting the procedure which was adopted and carried to completion by the justice of the peace sitting in the dual capacities of justice of the peace and of a committing magistrate. Without further considering the possible

estoppel of defendant by reason of his apparent acquiescence in the procedure before the justice of the peace, the fact that no substantial right of defendant was in any wise invaded by reason of the course adopted by the committing magistrate is a sufficient reason for the denial of his appeal to this court.

It is therefore ordered that the judgment be, and the same is, affirmed.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 474

GRILLICH v. WEINSHENK et al.
(Civ. 4530.)

(District Court of Appeal, First District, Division 1, California. Nov. 22, 1923.)

1. Municipal corporations §705(2)—Driver approaching intersection at speed which would cause contact with automobile at right must yield right of way.

Where the relative speeds of a motorcycle approaching a crossing from the north and an automobile from the west were such that, at the point of intersection of their respective paths they would be brought into contact if such speed were continued, Motor Vehicle Act, § 20, subd. "f," as amended by St. 1919, p. 214, § 12, required driver of motorcycle to yield right of way; and if his omission so to yield proximately caused or contributed to his injury in an ensuing collision he could not recover.

2. Trial §295(3)—Failure of instruction laying down general rule to include qualifications stated elsewhere not cause for reversal.

If instructions, when considered together, harmonize as a whole, and fairly and correctly present the law bearing on the issues, judgment will not be disturbed because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

3. Trial §229—Repetition in instructions not ordinarily ground for reversal.

If instructions given are correct statements of the law, repetition will not ordinarily be ground for reversal.

4. Master and servant §332(4)—Instruction on father's liability for child's use of automobile held not misleading.

In action against a father and daughter for injury from an automobile collision, instruction that a father, who is not guilty of personal negligence, is not liable for injuries to third persons from negligent driving of an automobile by an adult member of his family for her own purpose, and not that of the father, the automobile being owned and maintained by the father for use and pleasure of his family, was neither misleading nor confusing, and not objectionable in use of word "personal" as conveying idea that father was not liable unless participating in act causing injury.

5. Trial §295(7)—Instruction on motorcycle driver's contributory negligence held without error.

In action for injury to a motorcycle driver from collision with an automobile approaching from the right at a street intersection, defendant's instruction that, if plaintiff saw defendant about to cross the intersection in time to have stopped or slowed down, or could, by the exercise of reasonable care, have stopped and slowed down and avoided the collision, he was guilty of negligence, and if such negligence contributed to the injury he could not recover, *held*, when read with the entire charge, to be neither misleading nor confusing, and not to withdraw question of contributory negligence from the jury.

6. Appeal and error §843(2)—In negligence case, question of agency of one defendant for another held immaterial in view of finding of no negligence.

In action against a father and daughter for injury from collision with automobile at a street intersection, where the jury found against plaintiff on the issue of negligence, question of the daughter's agency for the father in driving the automobile becomes immaterial.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Max E. Grillich against Sydney Weinshenk and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles S. Wheeler, Jr., A. D. Schaffer, and Anthony Podesta, all of San Francisco, for appellant.

Chas. W. Haswell and Haswell & Pierce, all of San Francisco, for respondents.

ST. SURE, J. Action for damages for personal injuries suffered by plaintiff as the result of a collision between a motorcycle operated by himself and an automobile operated by defendant Dorothy Weinshenk, who was giving her sister-in-law a ride in the open air for health's sake. The complaint alleged that the damages were caused through the negligence of Dorothy Weinshenk. Sydney Weinshenk, her father, was made a codefendant by reason of his ownership of the automobile. There was a plea of contributory negligence in the answer. The cause was tried before a jury, which gave a verdict in favor of defendants. Plaintiff appeals, basing his demand for a reversal upon the ground that the trial court gave certain instructions, at the request of defendants, which were erroneous and prejudicial.

The accident occurred at the intersection of Cabrillo street and Twelfth avenue, in San Francisco, at about 5 o'clock in the afternoon. Cabrillo street is 50 feet wide from curb to curb, and Twelfth avenue is 40 feet wide from curb to curb. Plaintiff was operating a motorcycle and Miss Weinshenk

was operating a seven-passenger Cadillac touring car. Plaintiff was traveling on Twelfth avenue, approaching the intersection from the north. Defendant Dorothy Weinshenk was traveling on Cabrillo street, approaching the intersection from the west. From aught that appears the streets were otherwise clear of traffic. A two-story building was situated on the northwest corner of Twelfth avenue and Cabrillo street.

Plaintiff testified that he was going at a speed of 14 or 15 miles an hour; that as he passed the two-story building on the corner he saw a Cadillac car coming about 75 feet away, and that he kept going right along; that the Cadillac was traveling at a speed of 20 or 25 miles an hour; that the Cadillac turned to the right, he turned to the left, and there was a collision. Upon cross-examination plaintiff further testified that he never slackened his speed or applied his brakes after seeing the approaching automobile, but kept going ahead at the same speed; that he could have stopped his motorcycle within a distance of 6 or 8 feet, and that he had a distance of 62 feet in which he could have brought it to a stop; that after he passed the property line of Cabrillo street he saw the automobile all the time, and kept watching it; that the position of the automobile and the motorcycle was such that when they reached the intersection of their paths a contact was inevitable; that the automobile and the motorcycle reached the intersection at the southwest corner of the streets at the same time; that the Cadillac was directly across the path of the motorcycle; that both reached the southwest corner at the same time, when the Cadillac swung to the right and the motorcycle to the left.

Mr. Braunagel, who came upon the scene immediately after the accident, testified that he saw the automobile standing in the street 20 or 30 feet from the corner of Cabrillo street and Twelfth avenue, and that the motorcycle was lying 15 or 20 feet to the rear of the automobile.

Miss Weinshenk testified that as she reached the point of intersection she was driving at a speed of approximately 12 miles an hour; that as she neared the center of the street she saw the motorcycle coming at a speed of 25 miles an hour; that the motorcycle seemed to be wavering in its path; that she watched the motorcyclist until she saw him turn, and then she turned onto the curb to get out of his way; that she could have stopped the car without going onto the sidewalk, but she was endeavoring to avoid a serious accident.

Mrs. Ruth Weinshenk, sister-in-law of Miss Weinshenk, was the only passenger in the automobile. She testified that in her opinion the automobile was traveling at a speed of about 15 miles an hour at the inter-

section, and that the motorcycle was coming very fast.

[1] Plaintiff complains that the court erred in giving the following instruction:

"I instruct you that, if you find from the evidence the relative speeds of plaintiff's motorcycle and the defendant's automobile were such that at the point of intersection of their respective paths would have brought them in contact if continued, in such case the Motor Vehicle Act of this state required the plaintiff to yield the right of way to this defendant, and if you further find that such omission on his part proximately caused or contributed to this accident, your verdict must be in favor of the defendants."

This instruction embodied defendants' interpretation of section 20, subd. "f," of the Motor Vehicle Act (Statutes of 1919, p. 215), which reads as follows:

"Excepting where controlled by such traffic ordinances or regulations as are permitted under this act the operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right unless such vehicle approaching from the right is further from the point of the intersection of their paths than such first-named vehicle."

It is urged that the interpretation contained in the instruction is contrary to that stated in *Hill v. Jacquemart*, 55 Cal. App. 498, 203 Pac. 1021, and *Whitworth v. Jones*, 58 Cal. App. 492, 209 Pac. 60. In *Hill v. Jacquemart* the court merely held that a person having the right of way upon entering an intersection does not, under the Motor Vehicle Act (Stats. 1919, p. 215, § 20, subd. "f"), continue to have it until he has passed out of the intersection, notwithstanding a complete change of course of his vehicle. In *Whitworth v. Jones* it was held, under certain evidence adduced at the trial, that the court was justified in concluding, as between two machines, which had the right to pass first.

The language of the statute of 1919 refers to the intersection as the "intersecting of their paths." It is the idea of counsel for plaintiff that the statute should be interpreted so that the words "further from the point of intersection of their paths" shall be construed to mean "further from the intersection of the streets upon or along which they are traveling." In addition to the complained-of instruction, and contrary to it, the court also gave an instruction, at the request of plaintiff, adopting plaintiff's construction, which we believe is contrary to the express wording of the statute.

In defense of the complained-of instruction counsel for defendants argue that any rights at a street intersection are correlative, and that the correlative basis of these rights involves the elements of relative position, relative speed, and relative distance from the point of intersection.

In *Hilton v. Iseman*, 212 Ill. App. 255, it is said that it is axiomatic that the rights of vehicles at street intersections are correlative. In other words, none has the right of way to the exclusion of others; all must proceed with due circumspection so as not to come into collision with other vehicles.

In *Barnes v. Barnett*, 184 Iowa, 936, 169 N. W. 365, the court said:

"The right of precedence at a crossing, whether given by law or established by custom, has no proper application, except where the travelers or vehicles on the intersecting streets approach the crossing so nearly at the same time and at such rates of speed that, if both proceed, each without regard to the other, a collision or interference between them is reasonably to be apprehended. In such case it is the right of the one having the precedence to continue his course, and it is the duty of the other to yield him the right of way."

Greater Motors Corporation v. Metropolitan Taxi Co., 115 Wash. 451, 197 Pac. 327, was an action for damages for negligence resulting from a collision of two automobiles at a street intersection. An ordinance of the city of Seattle required drivers of automobiles to look out for and give the right of way to vehicles simultaneously approaching a street intersection from the right. The court held that the right of an automobile driver who has the right of way is not exclusive, but is at all times relative and subject to the common-law doctrine that the law must be so used as not to injure another, citing *Paulsen v. Klinge*, 92 N. J. Law, 99, 104 Atl. 95, and *Ray v. Brannan*, 196 Ala. 113, 72 South. 16.

This court, in *Kinney v. King*, 47 Cal. App. 390, 392, 190 Pac. 834, had under consideration a traffic ordinance of the city of Los Angeles which provided:

"The drivers of all vehicles must look out for and give right of way to vehicles approaching simultaneously from their right at street intersections."

This court said, at pages 392, 393, of 47 Cal. App. (190 Pac. 835):

"It may be taken as established by the plaintiffs' evidence in the case that the defendant, in approaching the intersection of the two streets in question at a rate of speed exceeding 30 miles per hour, was guilty of negligence per se, but conceding this to be true, it must also be admitted, in view of the plaintiffs' own evidence, that when the plaintiff, F. E. Kinney, driving his automobile, approached the westerly line of intersection of these two streets, he saw the defendant's automobile traveling at such rate of speed and at such a point on Lake street as would bring the defendant's car in collision with his own if each proceeded on his respective line of approach at his respective rate of speed across such intersecting streets. This being so, the plaintiffs and the defendant must be held to have been 'approaching simultaneously such intersection' within the meaning and intent of

the provision of the ordinance above set forth. It was, therefore, the plaintiff's plain duty under such ordinance to give to the defendant the right of way across such intersection."

We are of the opinion, in view of the law and the evidence in the instant case, that the instruction complained of was a proper one.

[2] Plaintiff next complains that the "court erred in giving several instructions directing a verdict and omitting from said instructions the element of the doctrine of last clear chance." It is contended that these instructions, although stating correctly the general rule relating to negligence, were erroneous because they did not include a statement of the "last clear chance" doctrine. We must take the charge together, and, if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text. *People v. Doyell*, 48 Cal. 85, cited repeatedly with approval. The evidence establishes the fact that the operators of the vehicles were watching each other as they approached the intersection of their paths. The plaintiff testified that he might have stopped his motorcycle, and thus avoided an accident. Miss Weinschenk did not say that she could have stopped, but she did say she drove onto the sidewalk in an endeavor to avoid a collision. Both continued in their paths until the impact occurred. In *Konig v. Lyon et al.*, 49 Cal. App. 113, 192 Pac. 875, this court held that the doctrine of last clear chance has no application to a case of personal injuries resulting from a collision between a bicycle and a truck, where each driver saw the other approaching and each held to his course. In *Blackburn v. Marple*, 43 Cal. App. 236, 184 Pac. 873, a case arising from an accident where one driver turned to the left and the other turned toward the right in an effort to avoid a collision, it was held that, under the evidence, there was nothing which would make the doctrine of the last clear chance applicable to either party. An examination of the record before us shows, too, that the jury were instructed on the doctrine of last clear chance at the request of the plaintiff; so we must hold that this assignment is without merit.

Counsel for plaintiff next complain:

That "of the eighteen instructions given at the request of defendants, fourteen embodied the doctrine of contributory negligence in some form; that all of them were read by the court immediately following the instructions given at plaintiff's request, and their effect could not have been otherwise than to saturate the minds of the jurors with this principle and leave with them as a last impression that this emphasis

and constant repetition by the court implied fault on the part of plaintiff."

It may be, as suggested, that the order in which the trial court read the instructions made the "last impression" on the minds of the jurors, although we have heard it persuasively maintained that first impressions are the most lasting. This objection, however, borders on the realm of psychology, wherein the law seems loath to enter. And, as we are not permitted to speak *ex cathedra* upon the subject, we must refrain from further pursuing the discussion.

[3] The court gave 59 instructions, 19 at the request of plaintiff, a like number at the request of defendants, and the remainder of its own motion. It does appear that several propositions of law were separately stated, whereas they might have been contained in a single instruction. A few plain, simple propositions, clearly stated, give a jury a more satisfactory understanding of the principles involved than pages of dissertation. *People v. Ah Fung*, 17 Cal. 377, 379. Respective counsel, undoubtedly through partisan fervor of advocacy, iterated such forms as, "if you find from the evidence," thus and so and thus and so, "your verdict must be for the defendants," or "for the plaintiff," as the case may be. Plaintiff complains that prejudice resulted to him from such repetition, and he cites the following cases as supporting his view: *Chicago, M. & St. P. Ry. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626, 629; *Kahl v. Chicago, Milwaukee, etc., Ry. Co.*, 125 Ill. App. 294, 298; *Munsey v. Marnet* (Tex. Civ. App.) 199 S. W. 687, 690; *Storr v. Janes*, 84 Md. 282, 35 Atl. 965, 967; *Robbins v. Fugit*, 189 Ind. 165, 126 N. E. 321, 322; *Powell v. Messer*, 18 Tex. 402, 406; *Murray v. White*, 82 Cal. 119, 23 Pac. 35.

C., M. & St. P. Ry. Co. v. Alexander was an action to condemn land. The court held that certain evidence admitted as to damages was erroneous and upon that ground sent the case back for retrial. In passing, the court said:

"Appellant contends that the trial court erred in unnecessary repetitions of its instructions, especially of those favorable to respondents. It contends that such action had a tendency to place undue and particular stress upon such instructions, was prejudicial to appellant, and constituted reversible error. The instructions were frequently and unnecessarily repeated. In view of the new trial to be granted herein, we will state that such a course should be avoided by trial judges. * * * Although a judgment might not in every instance be reversed for such unnecessary repetitions, it might in furtherance of justice sometimes become necessary to grant a reversal. 1 *Blashfield on Instructions to Juries*, § 108; 2 *Current Law*, 470."

Kahl v. C., M. & St. P. Ry. Co. was an action for damages for negligence. The

court considered a series of instructions, and held that the jury was improperly instructed with respect to the duty of the railroad company to give crossing signals. An instruction on ordinary care was also held erroneous. The court said:

"Eleven of defendant's instructions contained repetitions of the doctrine that to entitle plaintiff to recover the evidence must show that deceased was in the exercise of due care for his safety, that his death was caused by the negligence of defendant and that his own negligence did not cause or contribute to it. We are of opinion that the frequent repetition of the same principle coming from the learned and able judge, whose fairness cannot be questioned, tended to create the impression that the court thought this element of the case should be particularly emphasized and was calculated to have an undue influence on the minds of the jury. While repetitions are not always avoidable and are not necessarily erroneous, when they are so frequent upon a vital point, as is the case in this record, we think the effect could not be otherwise than harmful."

Munsey v. Marnet was a suit for the purpose of canceling oil leases. The court reversed the judgment primarily for the reason that a single instruction on the subject of forfeiture was deemed to be prejudicial. The court commented as follows:

"In reference to the manner of submitting the issue to the jury, it is sufficient to say that, while in a general way either side is entitled to a full affirmative presentation of the case or defense, and a special grouping of facts in certain cases, any repetition or emphasis thereof that essentially gave such case, issue, or defense prominence would be erroneous, and the rule should be observed upon another trial."

Storr v. James was an action for trespass *quare clausum fregit*. The judgment was affirmed. The court, in passing upon a complaint that the court erred in refusing additional instructions, said:

"A refusal to grant other prayers which reiterate the same principles, though couched in different words, is not erroneous."

Robbins v. Fugit involved the contest of a will; issue undue influence and unsoundness of mind. The judgment was reversed because of inaccuracy of instructions on the subjects of monomania and hallucination. The court also expressed the opinion that the instructions were entirely too voluminous, and further observed that, while needless repetition is not always reversible error, it is always bad practice.

Powell v. Messer was a suit upon a promissory note. One of the grounds relied upon for reversal was error of the court in refusing to give certain instructions. The court held that it was proper to refuse the in-

structions, remarking that it was the court's duty to guard against repetitions.

Murray v. White (the only California authority cited on this point) was an action to set aside a transfer of property in fraud of creditors. The court said:

"It is apparent from appellant's brief that his main objection to the instructions of the court on this point is, that they 'placed too prominently before the jury the law applicable to partnership relations.' But that would be an unsubstantial ground for the reversal of a judgment, unless in a case much more extreme in that respect than the one at bar."

The general rule seems to be that the mere fact of repetition is not alone, in every case, reversible error. And we are not permitted to reverse a case because of an erroneous instruction unless it shall appear from the record that such instruction was prejudicial, and also that by reason of such instruction the party complaining suffered substantial injury, and that a different result would have been probable if such an instruction had not been given. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. Section 475, Code Civ. Proc.

In the case of Gandy v. Bissell's Estate, 5 Neb. Unof. 184, 190, 97 N. W. 632, 634, it appears that the instructions given by the trial court contained conclusions similar to those complained of in the case at bar. The court, in affirming the judgment, said:

"The complaint that these instructions are almost identical seems to be well founded, but we are unable to say as a matter of law that the repetition of the same legal principle in the manner here given was prejudicial error calling for a reversal of the judgment."

While the practice of repetition has been frequently disapproved, yet, if the instructions given are correct statements of the law, repetition will not ordinarily be ground for reversal. *Lecklieder v. Chicago City Railway*, 172 Ill. App. 557, 564. We have read the entire charge given by the court in the case before us; we have considered therewith the evidence adduced at the trial, and we are constrained to believe that the instructions attacked are not open to the objection that they were prejudicial to the rights of the plaintiff.

[4] Plaintiff next complains that the following instruction was erroneous:

"I instruct you that a father who is not guilty of personal negligence in the matter is not liable for damages sustained by third parties by reason of the negligent driving of an automobile by an adult member of his family, when such member of the family is using the same for his or her own purposes, and not those of the father, the automobile being owned and maintained by the father for the general convenience, use, and pleasure of his family, and

the particular member of the family operating the same having his permission to use the same at his or her pleasure."

It is contended that the instruction is misleading and confusing; that the use of the word "personal" conveys the idea that the defendant Sydney Weinschenk is not liable to plaintiff unless he, himself, actually participated in the act of negligence causing the injury, and the phraseology is involved and confusing. The instruction is neither misleading nor confusing. It contains a clear statement of the law. The objection to the use of the word "personal" is trifling. The instruction follows the rule laid down in *Spence v. Fisher*, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083.

[5] Plaintiff also attacks the following instruction given at the request of defendants:

"If you find from the evidence the plaintiff saw the defendant about to cross the intersection of Twelfth avenue and Cabrillo street in time to have stopped or to have slowed down, or that by the exercise of reasonable care the plaintiff could have stopped or slowed down his motorcycle and have avoided this accident, then I instruct you that he was guilty of contributory negligence; and if you further find that such negligence either proximately caused or contributed to this accident your verdict must be in favor of the defendant."

It is contended that this instruction is not only misleading and confusing, but withdraws from the jury the question whether plaintiff was or was not guilty of contributory negligence. This instruction, like others singled out for criticism, should be read in conjunction with the entire charge. So read it is neither confusing nor misleading, nor does it withdraw any question from the jury. Construed in reference to the proof, the instruction was a proper one. Plaintiff's further objection that the instruction deprived him of the benefit of the doctrine of last clear chance has heretofore herein been discussed and disposed of.

[6] In his last assignment plaintiff digresses from the line of attack stated in his opening brief, to the effect that he would "rely upon, and confine himself to, errors in law, consisting of the giving, at the request of defendants, of erroneous and prejudicial instructions to the jury." He asserts that the "evidence is sufficient to justify a finding by the jury that Dorothy Weinschenk was acting as agent for defendant Sydney Weinschenk in operating the Cadillac." The facts upon the subject in the instant case are quite similar to those mentioned in the case of *Spence v. Fisher*, 184 Cal. 209, 210, 193 Pac. 255, 14 A. L. R. 1083. The court, at the request of plaintiff, fully and elaborately instructed the jury upon the question of express or implied agency. The jury having found against plaintiff upon the issue of neg-

ligence, the question of agency becomes immaterial.

Judgment and order affirmed.

We concur: TYLER, P. J.; NEEDHAM, Justice pro tem.

64 Cal. App. 507

BEARDSLEY v. JOHNSON et al. (two cases).
(Civ. 4130.)

(District Court of Appeal, Second District, Division 1, California. Nov. 24, 1923.)

1. Appeal and error ⇨434—Appeal dismissed where no appearance made or points and authorities filed by appellants.

An appeal will be dismissed where there is no appearance on part of appellants and no points and authorities are filed in their behalf.

2. Costs ⇨260(1)—Court may award damages for frivolous appeal.

Where it appears from the record that there is no merit in an appeal and that the same is frivolous, the court may award damages in favor of respondents against appellants.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Actions by John Beardsley and Charles Edward Beardsley, by John Beardsley, his guardian ad litem, against F. O. Johnson and others. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

Haas & Dunnigan, of Los Angeles, and F. W. Nightingill, of San Francisco, for appellants.

John Beardsley, of Los Angeles, in pro. per.

CURTIS, J. [1] There being no appearance on the part of appellants and no points and authorities being filed in their behalf, the appeal is dismissed.

[2] It further appearing to this court, after examination of the record herein, that there is no merit in this appeal and that the same is frivolous, it is hereby ordered that respondents recover of appellants as damages the sum of \$100.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 486

SOARES v. DAVIS, Agent. (Civ. 4414.)

(District Court of Appeal, First District, Division 2, California. Nov. 22, 1923. Hearing Denied by Supreme Court Jan. 21, 1924.)

Master and servant ⇨278(18)—Evidence held insufficient to prove negligence of railroad in not warning section hand.

In action for death of section hand struck by train, in which it was claimed that the railroad was negligent in not giving the section

hand warning of the train's approach, evidence held insufficient to sustain finding of negligence.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Marie Louise Soares, also known as Marie Louise Sorce, administratrix of the estate of Joseph C. Soares, also known as Joseph C. Sorce, deceased, against James C. Davis, as Agent designated by the President of the United States of America, under the Transportation Act of 1920. Judgment for plaintiff, and defendant appeals. Reversed.

Louis O'Neal and Wm. F. James, both of San Jose, for appellant.

Archer Bowden and John J. Jones, both of San Jose, for respondent.

NOURSE, J. Plaintiff, as administratrix of the estate of Joseph C. Soares, recovered judgment in the sum of \$1,500, as damages for his death caused by being struck by a railroad train operated by the defendant as Agent for the United States government under the Federal Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.). The case was tried without a jury, and the trial court returned findings to the effect that the death of Soares resulted from his being struck by a locomotive attached to a train, and operated by the defendant, and that it was caused by the negligence of the defendant, "by his negligent operation, direction, and control of said engine and coaches and said railroad track." The defendant had specially pleaded the defenses of contributory negligence and assumed risk, but upon these issues no findings were made.

Upon this appeal appellant assigns as error the failure of the trial court to find on these two special defenses, and error in the findings upon the defendant's negligence. It is not necessary to discuss the points relating to the court's failure to find upon the two special defenses because a review of the evidence conclusively shows that the finding upon appellant's negligence is not supported.

Briefly, the facts are that the deceased was employed in a section gang of 7 men under the charge of a foreman, and at the time of the accident was working on the railroad tracks of the Southern Pacific Company at a point just outside of the city of Santa Clara. He was working at a point about 250 or 300 feet from the rest of the section gang as the train operated by the appellant approached. The foreman, who was stationed near the body of the section gang, warned them to get out of the way of the train and also called to the deceased, warning him of the approaching danger. The deceased was looking directly at the foreman at the time this warning was given, and no contention

is made that he failed to hear the warning. In addition to this the engineer of the train gave several loud sharp whistles of warning, and the bell upon the engine was automatically ringing throughout the approach of the train and until after the deceased was struck. All the evidence goes to show that the deceased was in possession of all his faculties of seeing and hearing, that he could not have failed either to have heard or seen the various warnings of danger which were given him. There is no conflict in the evidence except as to the giving of the whistles by the engineer. In this respect both the engineer and a number of other witnesses testified positively that the whistle was sounded several times during the approach of the train, and always at a time which would have enabled the deceased to get out of a place of danger. Two witnesses on behalf of respondent testified that they did not hear the whistle sounded until after the deceased was struck. There is, however, no denial of the positive testimony that the foreman gave a timely warning and that the bell on the engine was continually sounding the approach of the train.

There is no contention that the appellant violated any ordinance, statute, or other regulation in the operation of the train, that the tools, appliances, or equipment were unsafe or inefficient, that the train was operated at an illegal or unreasonable rate of speed, or, in fact, that any specific act on the part of the appellant in the operation of the train was careless or negligent.

For these reasons the judgment is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 498

DRUMHILLER et al. v. WRIGHT, City Clerk, et al. (Civ. 4612.)

(District Court of Appeal, Second District, Division 1, California. Nov. 23, 1923.)

1. Parties $\S$ 40(2)—“Interest” necessary to intervene in suit between others, stated.

Under Code Civ. Proc. $\S$ 387, restricting right to intervene to persons having an interest in the matter in litigation or success of either party, or an interest against both, such interest must be of such direct and immediate character that intervenor will gain or lose by the direct operation of the judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

2. Municipal corporations $\S$ 36(3)—Bonds of city consolidated with another are not a lien on private property.

Assuming that, after consolidating two municipalities, all property within both will be taxable to meet outstanding bonds of one city as they become due, such bonds are neverthe-

less not a lien on private property, though they may lead to the creation of a tax lien.

3. Mandamus $\S$ 153—Property owner held not entitled to intervene in proceeding to compel city clerk to transmit records of election to consolidate cities; “interest.”

Where electors and taxpayers after proceedings for consolidation of their city with another in attempted conformity to St. 1913, p. 577, as amended by St. 1917, p. 20, petitioned for mandate compelling the city clerk to transmit records of the election to the secretary or state as required by statute and the clerk demurred, another property owner, who had brought a quo warranto proceeding to test the election, *held* not entitled to intervene, as he had no “interest in the subject-matter of the litigation,” as required by Code Civ. Proc. $\S$ 387.

4. Injunction $\S$ 85(1)—Superior court without power to restrain city clerk from transmitting record of special election to secretary of state.

The superior court was without power to enjoin execution of St. 1913, p. 577, as amended by St. 1917, p. 26, requiring city clerks to transmit the records of special consolidation elections to the secretary of state, though the election were illegal in view of Civ. Code, $\S$ 3423.

Application by Dora V. Drumhiller and another for writ of mandate directed to Allen H. Wright, City Clerk of San Diego, and another. Writ granted.

Jesse George, of San Diego, for petitioners. S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for respondents.

Sloane & Sloane, Crouch & Sanders, and F. G. Blood, all of San Diego, amici curiæ.

CONREY, P. J. Petition for writ of mandate to compel respondent city clerk of the city of San Diego to certify and transmit to the secretary of state copies of certain records and a statement of facts concerning a special election relating to a proposed consolidation of the city of East San Diego and the city of San Diego. The consolidation proceedings were in attempted compliance with an act to provide for consolidation of municipal corporations as adopted in the year 1913 and amended in the year 1917. Stats. 1913, p. 577; Stats. 1917, p. 26.

The petition herein sets forth proceedings conducted by the city of East San Diego and by the city of San Diego, *prima facie* sufficient to establish the conditions which, under the provisions of section 4 of said act, as amended in the year 1917, imposed upon the clerk of the city of San Diego the duty to make and certify and transmit to the secretary of state the documents and statement demanded by petitioners herein. The law requires that the same shall be filed by the secretary of state, and provides that from

and after the date of the filing of said documents in the office of the secretary of state "the annexation of such territory shall be deemed to be and shall be complete," etc. The petitioners are residents, electors, and taxpayers of the city of East San Diego.

Without formal notice of application for a peremptory writ, and without the issuance of an alternative writ, counsel for petitioners and for respondents, together with Mr. Sanders, one of the attorneys appearing here as *amici curiæ*, severally waived notice and agreed on presentation of this matter to the court at a stated time. At that time respondents demurred to the petition on the ground that it does not state facts sufficient to constitute a cause of action or to entitle petitioners to any relief against respondents. At the same time Sloane & Sloane, representing one Charles H. Harris, a resident and taxpayer of the city of East San Diego, asked leave to file a petition for intervention by said Harris and requested that he be allowed to intervene in this proceeding. The petition proposed for filing sets forth the pendency in the superior court of San Diego county a quo warranto action wherein people of the state *ex rel.* Charles H. Harris are plaintiffs, and the city of East San Diego and the city of San Diego are defendants. Petitioner Harris in said proposed complaint in intervention sets forth facts upon which he contends that the granting of the writ of mandate in this proceeding will injuriously affect and damage the said Harris and prevent the relief prayed for in said quo warranto action. The court announced that the application for leave to intervene would be submitted, for decision, at this time.

[1] Section 387, Code of Civil Procedure, provides for intervention in an action or proceeding, by any person "who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." It is an established rule that—

"The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Elliott v. Superior Court*, 168 Cal. 727, 734, 145 Pac. 101.

[2, 3] We may assume it to be true that (as contended by counsel for Mr. Harris), upon completion of the consolidation proceedings, if the same are valid, all property within the present city of East San Diego, equally with all property within the present city of San Diego, will be subject to taxation to obtain funds with which to meet certain outstanding municipal bonds of the city of San Diego as they become due. But those bonds are not a lien upon private property, although they may at some time lead to the creation of a tax lien. The completion of

the annexation proceedings will not create any lien upon the property of Mr. Harris. Therefore, we are of the opinion that the proposed intervener can lose nothing by the direct legal operation or effect of a judgment granting the writ of mandate demanded in this proceeding.

Moreover, it does not appear that there exists any collusion or fraud whereby the respondents are failing to defend against the granting of the writ demanded. It being conceded that they are acting in good faith, they are not bound to interpose objections which they may think cannot be sustained, even though others in the situation of Mr. Harris or his counsel may be of a different opinion.

For the foregoing reasons the application for leave to file the proposed petition in intervention is denied. It was understood, however, that in the event of denial of the proposed intervention, the argument presented by counsel for Mr. Harris against the granting of a writ of mandate would be considered as an argument presented by counsel as *amici curiæ*. That argument will be thus considered by the court in disposing of this case.

The petition for writ of mandate in the paragraph thereof showing reasons for making the application to this court, and not to the superior court of the county of San Diego, states that in an action entitled *Tocque v. City of San Diego et al.*, now pending in said superior court, a judge of that court, without jurisdiction and contrary to the provisions of subdivision 4 of section 3423 of the Civil Code and the provisions of the second subdivision 4 of section 526, Code of Civil Procedure, has issued an order restraining the city clerk of the city of San Diego, respondent herein, "from so performing his duties under the statute hereinabove described."

[4] Assuming that said restraining order was issued by reason of some alleged illegality of said annexation proceedings, nevertheless we are of the opinion that said court was without power to restrain said city clerk from performing the acts demanded of him by petitioner for the writ of mandate in this proceeding. Therefore the existence of such restraining order does not affect the obligation of the clerk to file said documents and statement, or the right of petitioner to a writ of mandate compelling the performance of said duty. "An injunction cannot be granted: * * * Fourth. To prevent the execution of a public statute, by officers of the law, for the public benefit." Civ. Code, § 3423.

We think that our conclusion on this question is in accordance with the law as set forth in *People v. Board of Supervisors*, 75 Cal. 179, 16 Pac. 776. In that action it was sought to enjoin the defendants from declaring the result of an election and from giving notice thereof as provided by law upon the

question of removal of a county seat. It was alleged that the election was illegally ordered by the board when it had no jurisdiction so to do. The question as stated by the court was:

"Did or did not the court below have any right to grant an injunction to prevent the board of supervisors from announcing and publishing the result of an election?"

First setting out the provisions of the statute under which the duties of the board were declared with reference to announcing the result of such an election, the court observed that the board of supervisors had acted upon what appeared to them a legal petition as prescribed by law, and had ordered the election, which was held in due form of law. "The board of supervisors, whose good faith is nowhere questioned, believe they legally ordered the election; it was held under all the requisite forms of law, but the appellants seek to enjoin them from announcing the result of such election, which was ordered and held in good faith; and to do this they seek, in effect, to have determined the question as to whether the old county seat is to remain such, or another place has been duly elected to be such county seat. * * * The board of supervisors are simply endeavoring to perform a duty enjoined on them by law to announce the result of an election, which in good faith they believe to have been duly ordered and legally held, and we think it would be a most dangerous interference by the courts to prevent them from performing a legal duty, and in effect, to determine the result of a contested election, in this action for an injunction." It was therefore determined that the superior court was right in refusing the injunction. See, also, *Reclamation District v. Superior Court*, 171 Cal. 672, 681, 154 Pac. 845; *Randolph v. County of Stanislaus*, 44 Cal. App. 322, 326, 186 Pac. 625.

The demurrer to the petition herein is overruled. There being no further answer, the relief demanded should be granted.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 433

WOODS v. HYDE, City Treasurer.
(Civ. 2639.)

(District Court of Appeal, Third District, California. Nov. 17, 1923.)

I. Appeal and error §664(1)—Reversal of judgment on demurrer held unwarranted.

That the file mark on defendant's demurrer as it appeared in the transcript bore a later date than the judgment based thereon held not to warrant a reversal of the judgment on the theory that the demurrer was oral and not written as required by law, where the judgment

itself recited the fact of filing and sustaining of the demurrer; there being no other evidence as to the date of filing.

2. Judgment §279—Minute order no part of judgment roll.

A minute order is no part of the judgment roll.

3. Records §7—Placing file mark on paper ministerial act not affecting date of filing.

The placing of a file mark on a paper is a ministerial act, delay in which does not change the time of filing, a paper being deemed filed when presented at the proper office, especially when deposited with directions to file.

4. Judgment §525—Recitals presumed correct.

In a direct attack, a judgment and its recitals will be presumed correct in absence of any showing as to what the true facts are.

5. Mandamus §143(1)—Proceeding one at law subject to bar by limitations.

Mandamus is an action at law subject to the rules applicable to common-law proceedings and within the statute of limitations. Code Civ. Proc. § 343.

6. Limitation of actions §34(7), 39(10), 66(15), 167(1)—Mandamus to compel sale of property in satisfaction of bond held barred by limitations.

An action to compel a city treasurer to make a sale of a particular lot and apply the proceeds to the satisfaction of a bond covering the cost of street improvement work, and made a lien upon that particular lot, held barred by the statute of limitations (Code Civ. Proc. §§ 337, 338, 343), where more than six years had elapsed after the maturity of the bond before making demand for the sale, notwithstanding the act in accordance with which the bond was issued (St. 1893, p. 36, § 4) provided that the assessment should be a lien on the property until fully paid; the lien being deemed still to exist though the remedy for its enforcement was lost.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Mary Woods for writ of mandamus to be directed against L. C. Hyde, City Treasurer of the City of Visalia. Judgment for defendant, on demurrer, and plaintiff appeals. Affirmed.

Earl A. Bagby, of Bakersfield, for appellant.

E. I. Feemster, of Visalia, for respondent.

PLUMMER, J. The plaintiff and appellant in this action is the owner and holder of a certain street improvement bond No. 5, series No. 2 of the city of Visalia, of the par value of \$117.76, bearing interest at the rate of 8 per cent. per annum, issued by the city of Visalia, on the 12th day of April, 1911, covering street improvement work in the city of Visalia under the provisions of an act providing a system of street improvement and

issuance of bonds therefor, approved February 27, 1893. The bond in question was given to cover the expenses for street improvement chargeable to lot No. 5 of block No. 92 in the city of Visalia. The term of the bond was fixed at 5 years. It was further provided that an even annual proportion of the whole amount due should become payable on the 2d day of January of each year after date until the whole bond should be paid with all accrued interest. Interest coupon called for semiannual payment. The bond further provided that should default be made in the annual payment upon the principal or in any payment of interest, the holder of said bond should be entitled to declare the whole amount remaining unpaid due and payable and to have said lot advertised and sold as provided by law. Only one payment was ever made on said bond, to wit, the sum of \$23.55, covering interest from the 12th day of April, 1911, until the 2d day of January, 1912. On the 16th day of May, 1922, the plaintiff demanded in writing that the city treasurer, the defendant in this action, proceed to advertise and sell said lot and apply the proceeds of such sale toward the payment of the principal and interest due on the bond held by the plaintiff. The defendant refused to comply with the demand of the plaintiff, and thereupon the plaintiff filed her complaint herein praying for an order of the court directing and commanding the defendant to make sale of said property or to show cause upon a certain date why a writ of mandate should not be issued compelling him so to do.

[1] To the plaintiff's petition the defendant demurred on the ground that the plaintiff's cause of action was barred by the provisions of sections 337, 338, and 343 of the Code of Civil Procedure. The trial court sustained the defendant's demurrer without leave to amend. The first point made for reversal in this action is that the demurrer interposed by the defendant was oral and not a written pleading as provided by law. The transcript on appeal shows the following file marks on the records in said action: Complaint indorsed filed May 22, 1922; order for alternative writ of mandate indorsed filed May 22, 1922; writ of mandate with return indorsed filed June 5, 1922; judgment of dismissal indorsed filed November 1, 1922; certificate of judgment roll dated November 20, 1922; notice of appeal indorsed filed November 21, 1922; demurrer indorsed filed November 22, 1922. From this recital it appears that the file mark indorsed upon the paper denominated defendant's demurrer bears the date subsequent to the notice of appeal in this action, and upon this fact the appellant contends a showing is made from which this court must conclude that there was no demurrer interposed by the defendant at the time the hearing was had in the court below, and that the order of the court sus-

taining the defendant's demurrer was made at a time when it had no jurisdiction so to do, and that the judgment based thereon has no foundation in law upon which to rest and should be reversed.

The judgment itself bearing the signature of the trial court is as follows:

"Whereas this cause was regularly heard by the court on the 5th day of June, 1922, upon the issues of law made and joined by plaintiff's petition for writ of mandate and the defendant's demurrer thereto; and whereas the court by its order duly made and entered upon the minutes on said 5th day of June, 1922, sustained the said defendant's demurrer on the ground that it appears on the face of said petition that the cause of action sought to be alleged therein is barred by the provisions of sections 337 and 343 of the Code of Civil Procedure.

"Now, therefore, it is ordered by the court that the said cause be, and the same is hereby, dismissed."

[2, 3] The minute order referred to in the judgment recites that the demurrer of the defendant to plaintiff's petition having come on regularly for hearing, etc., the court proceeded to hear the same and then made its order as recited in the judgment. The minute order is no part of the judgment roll (see *De Pedrarena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787), and for just what purpose this minute order was inserted in the record does not appear. The judgment of the court as herein set forth recites the fact of the defendant's demurrer being before it upon the hearing and that such demurrer was sustained. Whether the demurrer was in fact or was not in fact before the court has not otherwise been made to appear. Appellant apparently relies upon the file mark of the clerk hereinbefore referred to. This court, however, has held that—

"A paper is deemed to be filed when presented at the proper office, especially when there deposited with directions to file it." *Dillon v. Superior Court*, 24 Cal. App. 760, 142 Pac. 503.

The placing of the file mark on the paper is a ministerial act to be performed by the clerk, and the fact that such file mark is not indorsed on the paper until a subsequent date does not change the time of filing.

Outside of the judgment itself there is no other evidence of the date of filing of the defendant's demurrer. The judgment itself recites the fact of filing, and, there being nothing to contradict such recital, it will be presumed to be correct. This principle was enunciated in the early case of *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and has been followed ever since.

[4] This is a direct attack upon the judgment, but in the absence of any showing as to what the true facts are the judgment and its recitals will be presumed to be correct. *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698;

Perry v. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128.

Has the statute of limitations run in this case? Section 4 of the Act of 1893, in accordance with which the bond in this case was issued, contains the following provision:

"The assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid." St. 1893, p. 36.

Relying upon this provision of section 4 of the Act of 1893 and the case of Lantz v. Fishburn, 17 Cal. App. 583, 120 Pac. 1068, counsel for appellant argues that the statute has not run and that this proceeding in mandamus may be maintained. An examination of the case of Lantz v. Fishburn, supra, discloses that the question of whether the bar of the statute had arisen in a case similar to this was not before the court and therefore was not decided. The action in Lantz v. Fishburn was one to quiet title and followed the equitable rule that where a lien exists the owner of the property is not entitled to have a decree of the court entered quieting title to his property until he has done equity by paying off all liens which in good conscience should be discharged. It is also held that section 2911, Civil Code, relating to the extinguishment of liens by the lapse of time, was inapplicable by reason of the wording of the statute which continued the lien until actual payment. Under such circumstances, there could, of course, be no judgment entered quieting title as against such lien until it had been extinguished in the manner provided by section 4 of the Act of 1893.

The rule established in this state, however, makes a distinction between the existence of a right and the exercise of a remedy. In other words, a person may be possessed of a right and by reason of inaction or failure to proceed lose his remedy. The provision of section 4 of the act referred to is very similar in purpose and expression to section 3716 of the Political Code relating to liens created by taxes. That section reads:

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

The right of a city or county or state to its taxes under this section would seem to be extinguishable only by actual payment, and such seems to be the rule. But the existence of the remedy has no such indefinite period of time and is not made to rest upon the fact of actual payment. The leading case upon this question and the one followed by the Supreme Court of this state is that of the State of Nevada v. Yellow Jacket Silver Mining Co., 14 Nev. 220. All phases of the running of the statute as against the

remedy or proceedings for enforcing their collection were thoroughly considered. The Nevada statute is practically identical with that of this state, and it was there held that while the lien continued the remedy by action was barred. In San Francisco v. Luning, 73 Cal. 610, 15 Pac. 311, in an action brought to recover judgment for delinquent taxes, it was held that such an action was barred by the statute of limitations; that such an action was not an action to foreclose the lien. The distinction was drawn between an action to foreclose the lien and an action to collect the taxes. In Lewis v. Rothchild, 92 Cal. 625, 28 Pac. 805, in an action involving a contract of sale, it was held that tax liens were not extinguished by mere lapse of time; but the question of the existence of a remedy by action was not considered. The only question before the court and the one really decided was that the liens created a cloud upon the title and the purchaser could not be required to accept title and make payment while the liens remained undischarged. The next case upon the subject which has come to our attention is that of San Diego City v. Higgins, 115 Cal. 170, 46 Pac. 923. The court there squarely met and decided the question which is presented to us in this case. It is there held that an action to recover municipal taxes and to enforce the lien thereof is subject to the limitation of subdivision 1 of section 338 of the Code of Civil Procedure respecting an action upon a liability created by statute and is barred by the statute of limitations. The case of Lewis v. Rothchild, supra, was taken up and considered, and it was said that the language used in that case was to be read in the light of the facts thereof. The Nevada case to which we have referred was also considered and the reasoning therein contained approved. The court in the case of San Diego City v. Higgins also refers to the case of San Francisco v. Jones (C. C.) 20 Fed. 188, and adopts the following language as its own:

"Under these and other provisions of the Political Code no action is necessary to collect a valid tax. But it is claimed that these provisions take the case of an action under the statute to recover a tax out of the statute of limitations. In the case already cited the Supreme Court of Nevada, on a similar statute, decided otherwise, and we think correctly. * * * The lien is but an incident to the tax—the money due—and, like the case of a mortgage, when an action to recover the debt is barred, the suit to enforce the lien is also barred. This has long been the settled doctrine in this state in relation to a mortgage. Neither the debt nor the lien is extinguished in the case of a mortgage, in any other sense than in the case of a tax, and the statutory lien incident to it. The remedy by action is barred, whatever the case may be as to other remedies. * * * We see no good reason, at this day, and under our laws for the levy and collection of taxes, for allowing the state to vex parties

with suits for taxes after the lapse of many years that is not equally applicable to private parties. The state has officers specially appointed to attend to these particular duties, and no others, and if they neglect their duties the state which appoints them, if anyone, should be the party to suffer."

The case of *San Diego City v. Higgins* was followed by the case of *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153, where the plaintiff sought by mandamus to compel the trustees of the swamp land district to levy a tax to pay warrants issued 14 years before the commencement of the proceeding. It was held that the action was barred. It was also held in that case that where an officer's duty to take a prescribed action was dependent upon a demand being made, a party entitled to make the demand cannot by failure so to do prevent the running of the statute. In *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273, it is held:

"That where an actual demand is essential as a condition precedent to a complete right of action for the recovery of money, such demand must be made within a reasonable time after it can lawfully be made, or within a reasonable time after the contract by its terms contemplates that it should be made, and that, unless there are peculiar circumstances affecting the question, a time coincident with that of the statute of limitations, will be deemed reasonable." *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Williams v. Bergin*, 116 Cal. 60, 47 Pac. 877.

[5] It is also held in this state that an action in mandamus is barred by the provisions of section 343, Code of Civil Procedure. *Dodge v. Police Com.*, 1 Cal. App. 608, 82 Pac. 699; *Jones v. Police Com.*, 141 Cal. 96, 74 Pac. 696; *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. The rule appears to be also that mandamus is an action of law subject to the rules applicable to the common-law proceedings. 18 R. C. L. 89; *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153.

[6] The transcript shows that more than six years elapsed after the maturity of the bond upon which this action is based and the date of making demand upon the treasurer of the city of Visalia for sale of the property upon which the bond constituted a lien and also before the beginning of this action. Under the authorities which we have cited, there is but one conclusion to be reached. The statute of limitations had run at the time of the institution of the plaintiff's action, and even though the lien for the amount of the bond may still exist upon the property the remedy by mandamus to enforce sale is now barred by the provisions of the Code to which we have referred.

The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

84 Cal. App. 390

PEOPLE v. WALLER. (Cr. 707.)

(District Court of Appeal, Third District, California. Nov. 15, 1923.)

1. Criminal law $\S$ 1167(1)—Conviction of one offense under information charging two offenses held not to require reversal.

Where an information based on Pen. Code, $\S$ 154, charged first that accused sold property with intent to defraud, hinder, and delay creditors, and then that he fraudulently removed the proceeds of and receipts from sales to defraud, hinder, and delay his creditors, and the jury found him guilty under the first charge as alleged, the alleged defect in the information held not ground for reversal, where all of the evidence tending to show a fraudulent removal of the proceeds and receipts from sales was admissible to prove the first charge.

2. Indictment and information $\S$ 110(59)—Averment of means employed in committing crime held not necessary.

Where, in a prosecution under Pen. Code, $\S$ 154, the offense is charged in the language of the statute, section 952, requiring a statement of the particular circumstances of the offense charged, when they are necessary to constitute a complete offense, does not make it necessary to allege the manner or means employed to perpetrate the crime.

3. Indictment and information $\S$ 110(3)—Allegations describing offense in statutory language sufficient when statute describes offense.

When a statute defines or describes the acts constituting a particular offense, an indictment describing those acts in the language employed in the statute, by applying them concretely to the person charged, is sufficient.

4. Fraudulent conveyances $\S$ 329—Pen. Code, $\S$ 154, held to completely define offense sought to be prevented.

An act which is done with intent to defraud creditors is necessarily fraudulent, and hence, if the word "fraudulently" were omitted from Pen. Code, $\S$ 154, prescribing the punishment for one "fraudulently" removing, selling, conveying, assigning, or concealing property with intent to defraud, hinder, or delay his creditors, the remaining parts of the section would completely define the offense sought to be prevented.

5. Indictment and information $\S$ 110(59)—Information charging offense in language of statute held sufficient.

An information charging, in the language of Pen. Code, $\S$ 154, the offense of fraudulently selling and conveying property with intent to defraud, hinder, and delay creditors, as prohibited by that section, held sufficient in view of the rule applicable to charging embezzlement, which may be charged in the language of the statute (section 503).

6. Witnesses $\S$ 337(5)—Not proper for district attorney to ask accused if he had been charged with commission of felony.

District attorney, if acting in good faith, had the right, under Code Civ. Proc. $\S$ 2051, to

ask accused on cross-examination if he had been convicted of a felony, but it was not proper to ask him if he had been charged with the commission of a felony.

7. Criminal law ⚡1170½(2)—Question whether accused had been charged and convicted of felony held not prejudicial in view of negative answer.

Since one cannot be convicted of a felony without first having been charged with the commission, the charge is implied by the question whether he had been so convicted, and, where accused answered in the negative both parts of the double question as to whether he had been charged and convicted of a felony, no prejudice could have resulted from the question.

8. Criminal law ⚡728(1)—Accused held to waive district attorney's alleged misconduct in asking improper question.

Accused must be deemed to have waived the alleged misconduct of the district attorney in asking him an improper question, where accused's counsel previously withdrew his objection to a like question after the court had sustained it, and thereafter permitted, without objection, a line of similar questions.

9. Criminal law ⚡1037(1)—Alleged misconduct of prosecuting attorney not assignable as error for first time on appeal.

The alleged misconduct of the district attorney not having been assigned as such at the trial, it could not be assigned as error on appeal.

10. Witnesses ⚡277(2)—Cross-examining accused with reference to aliases held proper.

Where on his direct examination accused testified he had never assumed the various aliases set forth in the information, the district attorney's questioning of accused on cross-examination along the same line held not improper.

11. Constitutional law ⚡48—Invalidity of statute must be clear before it will be declared void.

To justify a court in declaring a law unconstitutional, its invalidity should appear with the greatest clearness and certainty.

12. Criminal law ⚡304(2)—That stock in trade may be removed or sold without observance is common knowledge.

The facility with which a part of a stock in trade may be removed or sold without attracting attention is a matter of common knowledge.

13. Constitutional law ⚡205(1), 250—Fraudulent conveyances ⚡329—Statutes ⚡74(1)—Statute making it a felony under some circumstances and under others a misdemeanor held not discriminatory.

Contention that the proviso in Pen. Code, § 154, making it a felony fraudulently to sell or remove a part of a stock of trade of a value exceeding \$100 while the fraudulent sale or removal of other property is made a misdemeanor only, violates Const. Cal. art. 1, §§ 11, 21, and Const. U. S. Amend. 14, held without merit, because the circumstances attending the com-

mission of the offense constitute a reasonable basis for the classification made in Pen. Code, § 154.

14. Criminal law ⚡885—Function of jury is to determine guilt or innocence without regard to punishment.

The sole function of a jury is to determine the guilt or innocence of accused independently of the extent of the punishment to be imposed.

15. Criminal law ⚡1144(16)—Not presumed that jurors convicted accused without sufficient proof on theory he would receive light sentence.

It will not be presumed that jurors violated their oaths by convicting accused without sufficient proof of guilt in the belief that he would receive a light sentence or that they would have violated their oaths by voting for an acquittal, when satisfied of defendant's guilt, merely because of the severity of punishment provided for the offense.

16. Criminal law ⚡1175—Accused not entitled to reversal because jurors misunderstood extent of or duty of determining punishment.

One convicted of a felony is not entitled to a reversal on the ground jurors were mistaken as to the extent of the punishment provided or mistaken as to whose official duty it was to determine the punishment; as where the jury, not apprehending that under the indeterminable sentence law the court did not fix the term of imprisonment, appended to the verdict a recommendation to leniency.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

George Waller was convicted of fraud, and he appeals from the judgment and the order denying his motion for a new trial. Affirmed.

R. R. Fowler and T. B. Scott, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant has appealed from the judgment herein and the order denying his motion for a new trial. The parts of the information material here are as follows:

"J. Waller, alias Wallen, alias Wallach, alias Wallenstein, is accused * * * of the crime of fraudulently selling and conveying part of a stock in trade of a value exceeding \$100 with intent to defraud, hinder, and delay his creditors of their rights, claims, and demands, a felony, committed as follows: That the said J. Waller, alias Wallen, alias Wallach, alias Wallenstein, on or about the 3d day of December, A. D. 1922, at and in said county of Stanislaus, * * * was then and there the owner of and was in possession of a large stock in trade, consisting principally of men's furnishings, goods, shoes, hats, caps, clothing, suit cases, and leather goods, * * * and was then and there indebted to a large number of persons in an amount exceeding \$7,000, the purchase price of said stock in trade (naming the creditors

and stating the respective sums owing to them), and he * * * did then and there * * * willfully, wrongfully, unlawfully, feloniously, and fraudulently sell and convey a large part of said stock in trade, to wit, a part thereof of a value exceeding \$100, * * * and of the value of approximately \$4,000, * * * to various and sundry persons and customers, with the felonious and fraudulent intent then and there and thereby to defraud, hinder, and delay his said creditors * * * of their rights, claims, and demands, *and did then and there and thereupon, willfully, wrongfully, unlawfully, fraudulently, and feloniously, and with the fraudulent and felonious intent then and there and thereby to defraud, hinder, and delay his said creditors * * * of their rights, claims, and demands, flee, abscond, and depart from the state of California with and did take with him, and remove from said state of California, the proceeds of and receipts from said sales."*

Though there are some contradictions, the evidence sufficiently shows the following facts. August 5, 1922, the defendant opened a store at Modesto for the sale of merchandise of the character described in the information. He deposited \$5,400 in a bank in that city. In order to purchase goods on credit, the defendant exhibited his bank book, showing such deposit to a large number of wholesale merchants in San Francisco and Los Angeles, and, on the strength thereof, they sold him merchandise on credit to the value of many thousands of dollars. He continued to make purchases on credit for about three months after he commenced business, making partial payments from time to time on some purchases, but generally putting off payment on various pretexts. In the latter part of September the defendant placed a large sign in front of his store, reading as follows: "Everything being sold at factory prices. You will save 50 per cent. on all purchases." One witness testified that before opening his store the defendant put up a sign reading: "Will sell merchandise fifty cents on the dollar." There is direct evidence to the effect that defendant sold some articles below wholesale cost, and that he kept on display certain articles marked below cost. The defendant purchased goods from wholesale merchants of the approximate value of \$12,000 and paid on the purchase price thereof about \$4,000. The goods on hand in his store when he ceased to do business were of a value under \$4,000. The defendant testified that he sold goods on credit to the value of about \$1,500, but he was unable to give the name of a single person to whom he had sold on credit, and hence the jury was justified in treating his testimony as unworthy of belief. Defendant left about the first of December, and went to Montreal, Canada, where his family resided. It seems that he informed no one of his intention to leave or of the place to which he intended to go. He mailed the key of his store to the board of trade in San Francisco,

stating in an accompanying letter: "I regret to state that it has been impossible for me to continue business." No books or accounts were found in the store after the departure of defendant. He had from time to time drawn on his bank account to such an extent that only a few dollars remained therein when he closed his store and left. It thus appears that during the three months he conducted the business, on the assumption that he sold goods at wholesale cost, his receipts, together with his original bank deposit, were approximately \$9,000 in excess of the amount he actually paid to the wholesale merchants. There is no contention that the evidence is not sufficient to justify the verdict.

Appellant urges five grounds for reversal:

(1) That two offenses are charged in a single count of the information; (2) that the acts constituting the fraud charged are not specifically alleged; (3) that the district attorney was guilty of prejudicial misconduct; (4) that the provision of section 154 of the Penal Code making certain acts a felony is unconstitutional; (5) that the verdict of the jury was returned under a misapprehension of the law.

[1] Section 154 of the Penal Code reads:

"Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns or conceals his property with intent to defraud, hinder or delay his creditors of their rights, claims or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both; provided, however, that where the property so removed or sold or conveyed or assigned or concealed, consists of a stock in trade or a part thereof, of a value exceeding one hundred dollars, the offense shall be a felony and punishable as such."

If it be conceded that the language of the information herein italicized states facts which constitute a different offense from that charged in the preceding parts of the information, it is clear that the defendant was not prejudiced by its inclusion in the information. The jury did not convict the defendant of the crime of fraudulently removing his property from the state, but found him "guilty of fraudulently selling and conveying part of a stock in trade of a value exceeding \$100 with intent to defraud, hinder, and delay his creditors of their rights, claims, and demands, a felony, as charged in the information." All evidence tending to show that the defendant fraudulently removed "the proceeds of and receipts from said sales" was admissible to prove that he sold the property with intent to defraud, hinder, and delay his creditors. Under such circumstances the alleged defect in the information is not ground for reversal. *People v. Barrios*, 52 Cal. App. 528, 199 Pac. 58. It is at least doubtful whether the demurrer to the information is sufficient to present the objection here urged. The demurrer, rela-

tive to the question under consideration, is "that more than one offense is charged." It is permissible to charge more than one offense in an indictment or information. Pen. Code, § 954. The statutory ground of demurrer in such a case is "that more than one offense is charged, except as provided in section nine hundred and fifty-four." Pen. Code, § 1004.

[2-5] The offense is charged in the language of the statute. Appellant contends that the particular facts constituting the alleged fraudulent conduct should have been set forth, citing *People v. McKenna*, 81 Cal. 158, 22 Pac. 488, and similar cases. In that case the defendant was charged with obtaining property by false representations, and it was held that such representations should have been alleged. Any one of innumerable false representations may constitute the basis of such an action, and it is elementary that a defendant is entitled to be informed of the particular representations with which he is charged in order that he may prepare his defense. They are among "the acts constituting the offense" required by section 950 of the Penal Code to be alleged "in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 952 requires a statement of "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." No circumstances other than those charged are necessary to constitute the complete offense alleged in the information. It is not necessary to set forth the manner or means employed to perpetrate the crime. Section 154 sets forth all the elements necessary to constitute the offense therein defined.

"When the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged." *People v. Ward*, 110 Cal. 369, 372, 42 Pac. 894; *People v. Mahony*, 145 Cal. 104, 78 Pac. 354.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503.

It has been held that such "fraudulent appropriation" may be charged in the language of the statute. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 509; *People v. Gordon*, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; *People v. Holder*, 53 Cal. App. 45, 199 Pac. 832. No reason appears why the same rule should not apply here. If the word "fraudulently" were omitted from section 154, as it is in a number of similar statutes of other states, the remaining parts of the section would completely define the offense sought to be prevented, because an act which is done with intent to defraud creditors is necessarily a fraudulent act. Where a statute denounces as criminal an act which is done with in-

tent to defraud, the authorities all agree that it is sufficient to allege the intent to defraud in the language of the statute.

[6-8] The district attorney asked the defendant a number of improper questions on cross-examination, without objection, and finally asked him if he had not been indicted on account of a certain business transaction. To this last question the defendant objected, and the court promptly sustained the objection. Counsel for defendant then withdrew the objection, and the defendant answered that he had not been so indicted. The district attorney then, after further questions along the same line, asked the defendant if he had not been charged with grand larceny and convicted. While this last question was least objectionable of any asked, counsel for defendant made objection to it, assigned the asking thereof as prejudicial misconduct, and asked the court to instruct the jury to disregard it. The court declined to so instruct. The defendant had answered the question in the negative before the objection was made. The district attorney, if acting in good faith, had the right to ask the defendant on cross-examination if he had been convicted of a felony. Code Civ. Proc. § 2051. The question, however, was double. It was not proper to ask the defendant if he had been charged with the commission of a felony. If the defendant had answered that he had been charged with the offense of grand larceny but not convicted, then it might reasonably be argued that he was prejudiced by the mere asking of the question. But since one cannot be convicted of a felony without first having been charged with its commission, the charge is implied by the question whether he had been so convicted, and, the defendant having answered both parts of the double question in the negative, it does not appear that any prejudice resulted from the question. Besides, by withdrawing his objection to a like question after the court had sustained it, and by thereafter permitting, without objection, a line of similar questions, the defendant must be held to have waived the alleged misconduct.

[9, 10] On his direct examination the defendant testified that he had never assumed the various aliases set forth in the information. On cross-examination the district attorney questioned him along the same line. It is urged that this was prejudicial misconduct. It was not assigned as misconduct during the trial. Neither were the questions improper.

[11-13] It is contended that the proviso contained in section 154, making it a felony fraudulently to sell or remove a part of a stock in trade of a value exceeding \$100, while the fraudulent sale or removal of other property is made a misdemeanor only, is violative of section 11 of article 1 of the Constitution, providing that "all laws of a general nature shall have a uniform operation," and

section 21 of the same article, providing that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," and of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws." In *Selowsky v. Superior Court of Napa County*, 180 Cal. 404, 409, 181 Pac. 652, 655, in discussing section 11 of article 1 of the Constitution, it is said:

"This provision only requires a law to operate uniformly upon all persons in the same category. * * * It is satisfied if the statute applies alike to all persons or objects within a class founded upon some natural and intrinsic distinction. * * * Operation differently upon different classes is proper if there is a reasonable basis for the distinction. * * * The application of these principles to the particular legislation here involved has been correctly stated by Mr. Justice Hart as follows: 'We know of no constitutional limitation upon the right of the Legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject-matter of the adjudication violated and the consequences of such violation to the public or to individual rights.' * * * The Legislature has power to classify with respect to the penalty to be imposed, not only upon the basis of the inherent nature of the offense, but also upon the basis of the nature of the circumstances attending the commission of the offense considered in their relation to the public welfare."

To justify a court in declaring a law unconstitutional, its invalidity should appear with the greatest clearness and certainty. It cannot be said that the classification relative to the punishments provided for in section 154 is not founded upon natural and intrinsic distinctions. The facility with which a part of a stock in trade may be removed or sold without attracting attention is a matter of common knowledge. The discovery of such removal or sale would generally require an inventory of the remaining stock. It is a common practice for retail merchants to purchase their stocks of goods on credit and from those engaged in the wholesale trade at places far distant from the retailers' places of business, thus enabling the unscrupulous retailer to defraud such creditors with a minimum likelihood of detection. These are among the "circumstances attending the commission of the offense" defined in section 154 which constitute a reasonable basis for the classification therein made.

[14-16] The jury appended to the verdict a recommendation "to the leniency of the court." After the verdict had been returned

and the court had fixed the time for sentence, the trial judge referred to the recommendation, and informed the jury that under the indeterminate sentence law he had no discretion to determine the length of imprisonment. One of the jurors replied that they had been under the impression that the court determined the sentence. Based on this reply, appellant argues that the verdict was returned under a misapprehension of the law. The sole function of the jury was to determine the guilt or innocence of the defendant, without giving any consideration to the extent of punishment to be imposed. It is not to be presumed that the jurors violated their oaths by convicting the defendant, without sufficient proof of guilt, in the belief that he would receive a light sentence, or that they would have violated their oaths by voting for an acquittal, when satisfied of the defendant's guilt, because of the severity of punishment provided for the offense. Courts have frequently and properly refused to instruct juries as to the punishments which the law imposes for the commission of offenses being tried, and it would be anomalous to hold that a defendant is entitled to a reversal on the ground that jurors were mistaken as to the extent of punishment provided or the official whose duty it was to determine the same.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

64 Cal. App. 508

ELLIOTT v. TITLE INS. & TRUST CO. et al.
(Civ. 3931.)

(District Court of Appeal, Second District,
California, Division 1. Nov. 26,
1923.)

1. Frauds, statute of —71—Contract for sale of land invalid unless same or some note or memorandum thereof is in writing.

A contract for the sale of land is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, in view of Civ. Code, § 1624.

2. Escrows —1—Validity of proposed escrow dependent upon binding contract.

The validity of a proposed escrow is dependent upon the existence of a binding contract between the parties to such escrow.

3. Escrows —1—Escrow held invalid where no binding contract ever consummated.

Where, at the time the parties to a proposed contract for the sale of land orally agreed that certain bonds should be deposited in escrow to be forfeited to vendor if the sale should not be consummated, the parties had not agreed on the terms of the proposed contract and did not thereafter reach an agreement, held, that the agreement of escrow was invalid.

4. Escrows →5—Written agreement held conclusive of rights of parties.

Where written instructions in regard to a deposit of bonds in escrow were silent as to any forfeiture thereof and contained the only written agreement between the parties, under the rule that all prior oral negotiations were merged in the written document, it was conclusive with reference to the ownership of the bonds.

5. Damages →79(5)—Agreement fixing damages for breach of proposed contract of sale of land held void.

Under Civ. Code, §§ 1670, 1671, prohibiting contracts by which the amount of damages for breach of an obligation is determined in anticipation thereof, except where it would be impracticable or extremely difficult to fix the actual damage, *held*, that an agreement fixing the damages to which a vendor would be entitled if the purchaser defaulted was void; there being no difficulty in fixing the vendor's damage, in view of Civ. Code, § 3334, providing that such damage is the value of the use and occupation of the land for the time that the vendor is deprived of its possession.

6. Damages →81—Deposit of bonds in escrow held to provide for penalty rather than compensation.

Where the purchaser in a proposed contract for the sale of land deposited certain bonds in escrow to secure the performance of the agreement, if the bonds were to be considered as rent for use of the land if sale was not completed, the agreement *held* one for a penalty within Civ. Code, § 1671, rather than for actual reasonable compensation in view of the uncertainty as to the time of occupancy.

Appeal from Superior Court, Los Angeles county; John M. York, Judge.

Action by Harry William Elliott against the Title Insurance & Trust Company, a corporation, in which the Title Company interpleaded Arthur F. Levitt, and W. J. Conner. From a judgment in favor of Arthur F. Levitt, plaintiff and W. J. Conner, respectively, appeal. Appeal of W. J. Conner dismissed, and judgment reversed.

Harry William Elliott and Gerald F. H. Delamer, both of Los Angeles, for appellant Elliott.

Ward Chapman and L. M. Chapman, both of Los Angeles, for respondent Levitt.

HOUSER, J. Early in the month of July, 1920, as a result of oral negotiations between W. J. Conner and Arthur F. Levitt regarding the sale of certain real property, the latter, in an attempt to create an escrow agreement between him and Conner, deposited certain instructions with the Title Insurance & Trust Company. No action having been taken thereon by Conner, either by way of written acceptance or by filing independent instructions with the title company, on August 24, 1920, Levitt canceled the instructions which had theretofore been given by

him. Two days later—that is, on August 26, 1920—a conference was held between Levitt, Conner, and J. Moores Jones, as a result of which and on the same day Levitt gave new instructions to the title company, which were followed four days later by Conner's instructions to the same company. Pending the negotiations between Levitt and Conner, it appears that Conner had taken physical possession of a part of the property and had erected some temporary structures thereon which were used by Conner in making some moving pictures. At the conference on August 26, 1920, it was orally agreed between Levitt and Conner (and to which Jones assented) that Conner would deposit with the title company two Liberty bonds of \$500 each to cover any damages that theretofore might have been or might thereafter be caused by Conner's use and occupation of the property, to be forfeited to Levitt as liquidated damages in case the sale was not finally consummated. Accordingly the two bonds were so deposited. Aside from a possible understanding of the parties, as shown by their respective written instructions as to the forfeiture to Levitt of the two Liberty bonds in case of the failure to carry the sale to completion, there was no "meeting of the minds" of the contracting parties on any other essential part of the proposed agreement; and during the month of September, 1920, Levitt gave to the title company several instructions, the effect of each of which was to cancel the transaction. On October 15, 1920, the parties held a second conference at which they agreed to "wipe the slate clean and start again"—immediately following which Conner gave written orders to the title company to cancel the prior instructions. Consequently new written instructions to the title company were signed by each of the parties. These new instructions, while referring to the Liberty bonds as figuring in the transaction in the way of part compensation for the property proposed to be conveyed, contained no mention of them in connection with their forfeiture to Levitt as liquidated damages or otherwise. The terms of these instructions (and being the only ones on which the parties had agreed in writing) not having been carried out, on April 14, 1921, Levitt again caused the transaction to be canceled. It appears in evidence that the two Liberty bonds deposited by Conner were not his property, but that, unknown to Levitt, they belonged to J. Moores Jones, who was present at the conference on August 26th, and assented to their deposit with the title company, and which bonds were agreed to be and were deposited with the title company to be forfeited to Levitt in the event that no sale was finally consummated. On December 17, 1920, Jones assigned and transferred whatever interest he had in the two bonds to the plaintiff herein. After the final cancellation of the matter, plaintiff brought

an action in claim and delivery against the title company for the two bonds. The title company interpleaded Levitt and Conner. From a judgment in favor of Levitt both plaintiff and Conner have filed separate appeals; but as Conner has failed to perfect his appeal, this court is concerned only with the appeal of plaintiff.

[1, 2] That a contract for the sale of land is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged is settled not only by statute (Civ. Code, § 1624), but as well by a long line of decisions. It is equally well established in this state that before a proposed escrow may have any validity there must be a binding contract in existence between the parties to such escrow. *Fitch v. Bunch*, 30 Cal. 209; *Miller v. Sears*, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176; *Holland v. McCarthy*, 173 Cal. 597, 160 Pac. 1069; *Thomas v. Birch*, 178 Cal. 489, 173 Pac. 1102.

[3-5] Tested by such rules, it is clear that, in view of the fact that no valid contract for the sale of the land ever had been entered into between the parties, no valid escrow ever existed between them. At the time the parties orally agreed that the bonds in question should be deposited with the title company, to be forfeited to Levitt if the sale should not be consummated, Levitt was the only one who had even attempted to create an escrow; and after such oral forfeiture agreement came into existence and the deposit of such bonds with the title company there was no "meeting of the minds" of the parties on the question of the terms of the proposed contract of sale of the property, or otherwise than an inchoate agreement as to the forfeiture of the bonds to Levitt in case the deal was not completed. Neither was there any valid contract for the sale of the land in existence between the parties at the time the final instructions were signed by them. But even if a valid contract had been operative at that time, such instructions were silent as to any forfeiture of the bonds; and such instructions being the only instrument which contained any agreement in writing between the parties which under any circumstances might be considered as binding upon them, under the rule that all prior oral negotiations were merged in the written document, the agreement which they both signed is conclusive and must be the measure of the rights of the respective parties with reference to the ownership of the bonds. But considering the existence of a legal foundation for the escrow as being established and, in addition thereto, that the instructions, documents, etc., composing the attempted escrow, were sufficient in form to warrant the conclusion that a forfeiture of the bonds was provided therein, as against such forfeiture becoming effective, another insuperable obstacle exists in Civil Code, §§ 1670 and 1671, where the law is laid down that—

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except" that "the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

There was neither pleading by either of the parties nor finding by the court which would bring the case within the exception of the statute. Moreover, the adjudicated cases of this state are to the effect that in circumstances such as are shown by the facts of this case a contract which provides for liquidated damages is void. In the case of *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872, the facts as stated by the court were:

"On the 15th day of August, 1883, the defendant sold and conveyed to the plaintiff a tract of land in Contra Costa county, described as containing about 200 acres. On the same day, defendants executed and delivered to plaintiff an agreement called 'Exhibit A,' by which it was stipulated that they might remain in possession of the premises until the first day of October, 1883, and that if they should fail or neglect to surrender to the plaintiff the possession of the described premises on that day, then they would pay to him all costs, charges, and expenses to which he might be put to gain such possession, including a reasonable attorney fee, and would also pay the further sum of \$200 per month for such time as plaintiff might be deprived of or prevented from gaining possession of the premises, by reason of any act or thing done, suffered, or committed by the defendants while in possession thereof."

The court said:

"From these facts the court found as a conclusion of law: 'That from the nature of the case it was neither impracticable nor difficult to fix the actual damages which would arise from the failure of either of the parties interested to perform any of the terms or conditions of the contract on their part to be performed, and for that reason that part of the stipulation contained in Exhibit A providing for damages for the breach of other provisions therein contained is void.' This conclusion is in accord with the provisions of sections 1670 and 1671 of the Civil Code, and if warranted by the facts, is decisive of the case. It is assailed by appellant, but we think it must be sustained. We see no difficulty in fixing the actual damages which one sustains by being deprived of the use of the land to which he is entitled. Ordinarily the damage is the value of the use and occupation of the land for the time he is deprived of its possession. Civ. Code, § 3334. There are exceptions to this rule, provided for in other sections of the Code, but they do not affect the result. Here the plaintiff had sustained no damage at all, and it would seem to violate all rules of honesty and fair dealing to allow him to take from the defendants the large sum claimed."

And see, also, *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257.

[6] It is contended by respondent that the bonds were not to be taken as a forfeiture for failure on the part of Conner to carry the deal through to completion, but that they were to be considered as rental for the property. It is true that one of the witnesses did state that the bonds were to be "put up to cover any damages that might have been done to the land," and that another witness testified that during the negotiations he "volunteered the statement that if Mr. Conner would pay Mr. Levitt a sufficient amount of money to compensate him for the use of his property in the event the escrow did not go through, that we would reopen the escrow"; but in every other of the many references to the matter—in the testimony of witnesses, as well as in the pleadings, the instructions to the title company, and even in the findings by the court—the subject is treated as liquidated damages and as a forfeiture for failure on the part of Conner to consummate the sale. But even assuming as against the law and the facts that there was a contract between the parties and that the intention was that the bonds were to be considered as rent for the use of the property in the event the sale was not completed, under the rule laid down in the case of *Eva v. McMahon*, 77 Cal. 467, 19 Pac. 872, Levitt would not be entitled to recover the bonds. After the final cancellation of the transaction by Levitt on April 14, 1921, it would have been a comparatively easy matter to determine what was the value of the use of the property for the time it had been occupied by Conner; but to attempt to determine in advance what it was worth in a lump sum when the time the property would be occupied by Conner was wholly uncertain and problematical, demonstrates that the intention was to provide for a penalty rather than for actual reasonable compensation. To paraphrase the language of the statute (Civ. Code, § 1671), from the nature of the case it would have been neither impracticable nor extremely difficult to fix the actual damage.

From the foregoing it follows that the appeal of W. J. Conner should be dismissed, and the judgment should be reversed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 621

COX v. DAUGHERTY, State Commissioner of Corporations. (Civ. 4784.)

(District Court of Appeal, First District, Division 1, California. Dec. 5, 1923.)

Brokers — Evidence held to authorize revocation of license as broker.

Evidence that after the termination of his connection with his employer, a broker continued to transact business in his employer's

name without authority, thereby committing a fraud on his former employer, held to authorize the commissioner of corporations, in view of Code and General Laws Supp. 1917-21, Act No. 1700, § 6, and section 2, subd. 8, to revoke his license as a broker.

Application for certiorari by Harry P. Cox against Edwin M. Daugherty, as Commissioner of Corporations of the State of California, to review an order of the Commissioner revoking petitioner's license as a broker. Writ denied.

Arnold C. Lackenbach, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondent.

TYLER, P. J. Petition for writ of review to determine the lawfulness of an order of the commissioner of corporations revoking petitioner's license as a broker.

The petition recites that on the 19th day of January, 1923, in accordance with the terms of the Corporate Securities Act, respondent as commissioner duly issued to said petitioner, Harry P. Cox, a certificate authorizing him to offer for sale, negotiate for the sale of, and otherwise deal in, securities in the state of California, and generally to carry on the business of a broker in said state for and during the period ending the 31st day of December, 1923; that on the 29th day of April, 1923, petitioner was served with an order dated the 28th day of April, 1923, by the commissioner of corporations at the city and county of San Francisco, directing him to show cause why his said license should not be revoked on the grounds charged in the complaint attached to said order to show cause; that a hearing was had by said commissioner of corporations in the city and county of San Francisco, the petitioner appearing in person and by his attorney; that at said hearing evidence was adduced on behalf of said complainant and the matter submitted to the respondent herein for consideration and decision; that thereafter on the 2d day of July, 1923, the said respondent, as such commissioner, duly made and filed its findings of fact and conclusions of law; that in pursuance of said findings of fact and conclusions of law an order was duly made by respondent, as such commissioner, on the 2d day of July, 1923, revoking petitioner's broker's certificate theretofore duly issued to him.

Petitioner claims that said findings of fact upon which said conclusions of law and said order of revocation were predicated are, and each of them is, totally unsupported by the evidence adduced at said hearing, and that said respondent in making the said findings of fact and order of revocation acted without and in excess of his powers.

Under certain provisions of the Corporate Securities Act, which were designed to pre-

vent fraud in the sale of securities, a broker is required to have a license in order to conduct his business. This license may be revoked by the commissioner of corporations. The grounds for revocation are three in number. The act in relation thereto reads in part as follows:

"The commissioner may at any time revoke any broker's or agent's certificate issued by him if he shall find that the holder thereof is of bad business repute, or has violated any provisions of this act, or has engaged, or is about to engage in any fraudulent transaction." Code and General Laws 1917-21, p. 1451.

The complaint against petitioner filed with the state corporation department charged him with all three of the offenses mentioned in the act. The matter came on regularly for hearing. Oral and documentary evidence was introduced and the matter was submitted for decision, and the following findings were made by the commissioner:

"(1) That on the 19th day of January, 1923, in accordance with the authority vested in the commissioner of corporations of the state of California, under and by virtue of the Corporate Securities Act of the state of California and amendments thereto, said commissioner of corporations issued to Harry P. Cox a certificate, authorizing him to offer for sale, negotiate for the sale of and otherwise deal in securities in the state of California, and generally to carry on the business of a broker in said state for and during the period ending the 31st day of December, 1923; that prior to said date, to wit, the 19th day of January, 1923, and at all times hereinafter mentioned, said Harry P. Cox did not hold a broker's certificate and was without authority to engage in the brokerage business in the state of California.

"(2) That the defendant, Harry P. Cox, did on or about November 16, 1922, in the county of Alameda, state of California, violate section 5 of the Corporate Securities Act of the state of California in that the defendant did then and there act as a broker without having first obtained a broker's certificate authorizing him so to do as required by said act, and did offer for sale, negotiate for the sale of and sell to Mrs. Mary Stewart Smith, 2711 Ashby street, Berkeley, California, one \$1,000 Ochocho irrigation district 6 per cent. bond at par for cash, and 30 shares of the common capital stock of the California Ink Company at par for cash.

"(3) That the defendant, Harry P. Cox, did on or about the 12th day of December, 1922, in the county of Alameda, state of California, violate section 5 of the Corporate Securities Act of the state of California in that the defendant did then and there act as a broker without having first obtained a broker's certificate authorizing him so to do as required by said act, and did offer for sale, negotiate for the sale of and sell to Mrs. Katherine A. Roach, Regillus Apartments, Oakland, California, 50 shares of the preferred capital stock of Stephens & Co., receiving in exchange therefor 50 shares of the common capital stock of the California Ink Company and \$1,500 cash.

"(4) That the defendant, Harry P. Cox, did on or about the 9th day of January, 1923, in

the county of Alameda, state of California, violate section 5 of the Corporate Securities Act of the state of California in that the defendant did then and there act as a broker without having first obtained a broker's certificate authorizing him so to do as required by said act, and did enter into an agreement with Mrs. Rosa Wrangham, 1421 Arch street, Berkeley, California, wherein and whereby said defendant received from Mrs. Rosa Wrangham 300 shares of the capital stock of Elk Hills Consolidated Oil Company, said stock to be exchanged by said defendant for either common stock of United Cigar Stores or a bond.

"(5) That the defendant, Harry P. Cox, did on or about the 10th day of January, 1923, in the county of Alameda, state of California, violate section 5 of the Corporate Securities Act of the state of California, in that the defendant did then and there act as a broker without having first obtained a broker's certificate authorizing him so to do as required by said act, and did enter into an agreement with Mrs. Auguste W. Laidlaw, 540 Boulevard Way, Oakland, California, wherein and whereby said defendant received from Mrs. Auguste W. Laidlaw 100 shares of the capital stock of Elk Hills Consolidated Oil Company, said stock to be exchanged by said defendant for either common stock of United Cigar Stores or a bond.

"(6) That for some months prior to October 1, 1922, said defendant Harry P. Cox was employed by Stephens & Co., investment brokers, as its agent, and that during said time and in the scope of said employment he met and became acquainted with Mrs. Mart Stewart, 2711 Ashby street, Berkeley, California; Mrs. Katherine A. Roach, Regillus Apartments, Oakland, California; Mrs. Rosa Wrangham, 1421 Arch street, Berkeley, California, and Mrs. Auguste W. Laidlaw, 540 Boulevard Way, Oakland, California, and that at said times all of said persons knew that he was an agent of Stephens & Co. and dealt with him as such agent.

"(7) That the defendant, Harry P. Cox, did on or about November 16, 1922, engage in a fraudulent transaction in that on or about said date and in consummating the transaction hereinabove described in paragraph 2 hereof, the defendant issued and delivered to Mrs. Mary Stewart Smith a receipt in words and figures as follows, to wit:

"'Stephens & Company, Investment Securities, Merchants' National Bank Building.

"'San Francisco, Nov. 16th, 1922.

"'Mrs. Mary Stewart Smith:

"'This day we credit your account with \$2,-017.50 covering balance due on purchase of 1000 Ochocho Irr. District 6% bond and thirty (30) shares Calif. Ink Co. com. stock.

"'Stephens & Company,

"'By H. P. Cox.'

"That the employment of defendant by Stephens & Company as its agent terminated October 1, 1922. That on the date the above described receipt was issued, to wit, November 16, 1922, defendant was without authority to issue and/or deliver said receipt for and/or on behalf of Stephens & Co.

"That Mrs. Mary Stewart Smith at the time hereinabove stated, to wit, November 16, 1922, was without knowledge of the termination of the employment of the defendant by Stephens

& Co., but, on the contrary, she was led to believe by the conduct of said Harry P. Cox that he was still employed by said Stephens & Co., and she consummated said transaction believing that the defendant was an employee of Stephens & Co. That Mrs. Mary Stewart Smith relied upon the business reputation of Stephens & Co., and would not have consummated the transaction with the defendant had she known that he was no longer an employee of Stephens & Co. That the defendant did not inform Mrs. Mary Stewart Smith that he was no longer in the employ of Stephens & Co., but on the contrary, and without authority, he issued and delivered the above-described receipt to her, thereby inducing and causing said Mary Stewart Smith to transact the above mentioned business with him.

"(8) That the defendant, Harry P. Cox, did on or about the 14th day of December, 1922, engage in a fraudulent transaction in that on or about said date he executed and delivered to Mrs. E. M. Appa, Sunnyside Apartments, Oakland, California, a receipt in words and figures as follows, to wit:

"Stephens & Company, Investment Securities.

"San Francisco, Dec. 14th, 1922.

"Mrs. E. M. Appa:

"This day we credit your account with \$2,-650 Buenos Aires 3½s as per list of 9/25/22 Cert. #B6344 for exchange into Brazil 4½s '88 on basis of 2140 L of latter for Buenos Aires 3½s and full interest on B-A Pan. 1st coupon against BRAZIL interest flat.

"Stephens & Company,

"By H. P. Cox."

"That the employment of defendant by Stephens & Co. as its agent terminated October 1, 1922; that on the date the above described receipt was issued, to wit, December 14, 1922, defendant was without authority to issue and/or deliver said receipt for and/or on behalf of Stephens & Company.

"(9) That at the time of the issuance of the broker's certificate to Harry P. Cox as herein described in paragraph marked 1 said commissioner of corporations of the state of California was without knowledge of all of the facts hereinabove set forth, and that all of said facts have been brought to his attention since the date of the issuance of said certificate, to wit, January 19, 1923."

From the foregoing facts the Commissioner of Corporations of the state of California found as conclusions of law:

(1) That the defendant, Harry P. Cox, did on or about each of the following dates, to wit, November 16, 1922, December 12, 1922, January 9, 1923, and January 10, 1923, violate section 5 of the Corporate Securities Act of the state of California.

(2) That the defendant, Harry P. Cox, did on or about November 16, 1922, and December 14, 1922, engaged in fraudulent transactions.

By virtue of the facts found and the conclusions of law hereinabove given, an order revoking the broker's certificate theretofore

issued to said defendant on the 19th day of January, 1923, was entered, and said certificate was revoked.

Petitioner here claims that all the findings except No. 1 are unsupported by the evidence. This contention is based principally upon his construction of certain provisions of the Corporate Securities Act. It is his claim that when he made the sales of securities he did so merely as an agent or salesman of a broker, for which reason no license was required of him.

The provision of the act with reference to agents in force at the time the sales were made read as follows:

"The word 'agent' as used in this act means and includes every person or company employed or appointed by a company or a broker who shall, within this state, either as an employee or otherwise, for a compensation, sell, offer for sale, negotiate for the sale of, or take subscriptions for any security of any company of its own issue offered for sale by it." Section 2, subd. 8, General Laws, p. 1448.

By an amendment in 1923 this subdivision was changed by omitting therefrom the words "of its own issue" (Stats. 1923, p. 89), so that since this change an employee or appointee of a broker who sells securities, whether they are the broker's own issue or otherwise, is an agent as defined by the act, and under section 5 thereof is required to have a certificate.

This being so, we do not consider a discussion of the question as to whether a person selling securities for and on behalf of a duly licensed broker prior to the amendment of 1923 required a license or not, for there is sufficient evidence in the record to support the findings that after the employment of petitioner with Stephens & Co. as its agent had terminated he transacted business in the name of that company without its authority, and that he issued receipts in the company's name for securities received by him in such transactions. While it is true that the persons dealing with him were not defrauded and that one of them made a profit in her transactions, still the evidence shows that Mrs. Smith (mentioned in finding 7) would not have employed petitioner in the transactions had she known that he was not then acting as a salesman for Stephens & Co. In pretending to act for Stephens & Co. when his employment with that firm had terminated, petitioner committed a fraud upon his former employer which justified the Commissioner in revoking his license. Findings 7 and 8, with reference to these acts, find full support in the evidence.

The writ is denied.

We concur: RICHARDS, J.; ST. SURE, J.

64 Cal. App. 494

**TOCQUE v. SUPERIOR COURT IN AND
FOR SAN DIEGO COUNTY et al.**
(Civ. 4613.)

(District Court of Appeal, Second District, Division 1, California. Nov. 23, 1923.)

Judges 44—Judge not disqualified by residence therein from sitting in pending action against municipal corporation; "public agency."

A city being a municipal corporation of general powers and not an agency organized for a special purpose similar to those mentioned in Code Civ. Proc. § 170, subd. 5, it is not included therein as a "public agency," and hence, in action to restrain a city from performing certain acts necessary to complete consolidation with another city, residence within such city did not disqualify judges.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Agency.]

Original application for writ of prohibition by Arthur Tocque against the Superior Court of the State of California in and for the County of San Diego and another. Writ denied.

Crouch & Sanders, Sloane & Sloane, and F. G. Blood, all of San Diego, for petitioner.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for respondents.

CONREY, P. J. It appears that there is pending in the superior court of the county of San Diego an action wherein Arthur Tocque is plaintiff and the city of San Diego and certain of its officers are defendants. In that action plaintiff questions the validity of certain proceedings for the consolidation of the city of San Diego with the city of East San Diego, and seeks to obtain an injunction to restrain and prevent the city of San Diego and its officers from performing certain acts necessary to complete the consolidation proceedings, and from in any manner assuming jurisdiction over the city of East San Diego or hindering or obstructing the present constituted officers and employees of the city of East San Diego in the discharge of their respective functions. It is alleged in the complaint in that action that the consolidation election in the city of East San Diego and the consolidation election in the city of San Diego were illegal and defective for various reasons, one of which was that at the time when the board of trustees of the city of East San Diego adopted its ordinance calling the election, the petition on which said ordinance was founded did not contain the names of one-fourth of the registered voters of said city of East San Diego. It was further alleged in said complaint that by reason of various facts alleged, the city of East San Diego

and the plaintiff and other residents or citizens thereof will lose their property and property rights by reason of the threatened acts of the defendants.

The object of the present proceeding is to prohibit each and all of the judges of the superior court of the county of San Diego from sitting or acting in said action pending therein, and it is claimed that each and all of said judges are disqualified under the provisions of subdivisions 1 and 5 of section 170 of the Code of Civil Procedure. Respondents have demurred to the petition on the ground that it does not state facts sufficient to constitute a cause of action or to entitle the petitioner to any relief.

No facts are alleged which would disqualify a judge of that court under subdivision 1. It is not made to appear that either of them is a party to or interested in said action.

Subdivision 5 of said section 170 reads as follows:

"In an action or proceeding brought in the superior court or justices' court by or against the reclamation board of the state of California, or any reclamation, levee, swamp land or drainage district, or any public agency, or trustee, officer or employee thereof, affecting or relating to any real property or an easement or right of way, levee, embankment, canal, or any work provided for or approved by the reclamation board of the state of California, the judge of the superior court of the county, or justice of the peace of the township in which such real property, or any part thereof, or such easement or right of way, levee, embankment, canal or work, or any part thereof is situated shall be disqualified to sit or act, and such action, if brought in the superior court, shall be heard and tried by some other judge of the superior court requested to sit therein by the Governor, or if brought in the justices' court, by some other justice of the peace requested to sit therein by the Governor; unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge or justice of the peace may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation agreeing upon some other judge of the superior court or justice of the peace to sit or act in place of the judge or justice disqualified under the provisions of this subdivision, the judge or justice agreed upon shall be called by the judge or justice of the peace so disqualified to hear and try such action or proceeding; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated by the Governor as herein provided."

It is evident that the disqualification relied upon by petitioner does not exist unless

the clause "or any public agency," near the beginning of subdivision 5, was intended to include a city as a public agency within the meaning of said subdivision. We are of the opinion that a city, being a municipal corporation of general powers and not an agency organized for a special purpose similar to any of those mentioned in the subdivision, is not included therein; and that a judge of the superior court of the county in which such city is located is not thereby disqualified in an action by or against such city, notwithstanding that the action may affect or relate to real property. While this question has not been directly decided, the conclusion at which we have arrived has been indicated by the Supreme Court in *Lindsay-Strathmore Irrigation District v. Superior Court*, 182 Cal. 315, 187 Pac. 1056. At page 335 of 182 Cal., at page 1064 of 187 Pac., referring to subdivision 5 of section 170 of the Code of Civil Procedure, the court held that irrigation districts are included within the meaning of the phrase "or any public agency," although they are not specifically mentioned. The court said:

"They are public agencies of the same character as those particularly named, and they are organized for the same general purposes to accomplish similar objects. There is no essential difference in these respects between an irrigation district and a reclamation district or a swamp-land or drainage district. The latter are organized to reclaim land by draining off the surplus water. Irrigation districts are organized to reclaim land by supplying water thereto. In the desert land regions the word 'reclamation' is in common use to indicate the bringing of water on the land for the irrigation thereof. If we apply the ejusdem generis rule of interpretation as is proper in such cases, we must hold that the above phrase was intended to include irrigation districts, although it may not include public corporations in general."

We do not think that the said phrase was intended to include cities and other public corporations in general. If such had been the intention, it would not have been necessary with such particular care to limit and define the particular kinds of public agencies, boards, or districts to which the subdivision was intended to refer. In the principal case wherein the validity of said subdivision 5 was sustained, it was evidently understood by the Supreme Court that the Legislature made a separate class of the corporations mentioned in the subdivision, and it was held that for the reasons there stated by the court there was sufficient justification for the legislation whereby that classification was made. *Sacramento, etc., Drainage Dist. v. Rector*, 172 Cal. 385, 156 Pac. 506.

The petition for a writ of prohibition is denied.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 605

RADICH v. RADICH. (Civ. 4681.)

(District Court of Appeal, First District, Division 2, California. Dec. 4, 1923.)

1. Divorce ⇨169, 249(1)—No actual disposition of homestead and community property to be made until actual dissolution of marriage.

A marriage is not dissolved by an interlocutory decree of divorce, and therefore, on granting such a decree the court could not, under Civ. Code, § 146, make any actual disposition of the homestead and community property of the parties, but must wait until the marriage was dissolved absolutely by the final decree of divorce.

2. Divorce ⇨249(1)—Court may on interlocutory decree provide for disposition of property in case of marriage dissolution.

The court has power upon the entry of an interlocutory decree of divorce to provide for the disposition of the homestead and community property of the parties to the action in case of the dissolution of the marriage by final decree.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action for divorce by Katie Radich against Martin Radich. Judgment for plaintiff, and defendant appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant.

William H. Schooler, of San Francisco, for respondent.

LANGDON, P. J. Plaintiff was granted an interlocutory decree of divorce from the defendant upon the ground of his extreme cruelty, and no objection is made by the appellant to the findings upon this issue. The only question raised upon the appeal is the correctness of the trial court's conclusions of law regarding certain real property. The court made a finding that said real property, situated in the city and county of San Francisco and more particularly described in said findings, stands of record in the names of plaintiff and defendant jointly; that the defendant has an interest therein in the sum of \$1,000 as his separate property; that the community interest in said property is \$700 and that said property is now subject to a mortgage on which there is a balance due and unpaid of \$1,500; that a declaration of homestead was made upon said property by the plaintiff who selected said property as a homestead and made such declaration of homestead for the joint benefit of herself and the defendant.

The trial court did not make any disposition of this property, but entered herein the following conclusions of law respecting the future disposition of the same and also

included in the interlocutory decree of divorce a similar statement:

"That in case of the dissolution of the marriage now existing between the plaintiff and the defendant by the decree of this court, the community property and the homestead, ought to be and should be, assigned as follows:

"(a) The proportion of the community property which should be assigned to the plaintiff Katie Radich is all of the community property;

"(b) The homestead of the parties to this action, which is all of the real property hereinbefore described, and which was selected by the plaintiff Katie Radich, as a homestead and which stands of record jointly in the name of plaintiff, Katie Radich, and the defendant, Martin Radich, and in which the said defendant, Martin Radich, has an interest therein of the value and in the sum of \$1,000, as his separate property, and of which the community interest in said property is in the sum and of the value of \$700, ought to be and should be assigned to Katie Radich, the innocent party, in the manner following:

"The community interest in said described real property to the value of \$700 to the said Katie Radich absolutely to have and to hold the same thereafter as and for her separate property; the separate property interest of the defendant Martin Radich in said homestead to the value of \$1,000 ought to be and should be, assigned to Katie Radich, the innocent party, for a limited period, to wit, for a period of 12 years, and thereafter, and when said limited period of 12 years will have expired, the separate property interest of said defendant Martin Radich in and to said above-described real property ought to be and should be assigned to the defendant, Martin Radich."

[1, 2] The contention of the appellant is that while section 146 of the Civil Code provides what may be done with community property and what may be done with a homestead selected from either the community property or the separate property of the spouses upon the dissolution of a marriage, the property contemplated thereby must be entirely community or entirely separate property, and that the trial court had no power to make disposition of property which was in part community and in part separate property. No actual disposition of the property was made by the trial court. The marriage was not dissolved by the interlocutory decree of divorce (London G. & A. Co. v. Ind. Acc. Com., 181 Cal. 460, 463, 184 Pac. 864), and consequently the court could not assign or dispose of the community property or homestead until such time as the marriage was dissolved absolutely by the final decree of divorce. *Remley v. Remley*, 49 Cal. App. 489, 193 Pac. 604; *Strupelle v. Strupelle* (Cal. App.) 211 Pac. 248.

The case last cited is authority for the disposition of the property in the manner suggested by the trial court in its conclusions of law in the instant case. The property involved in the *Strupelle* Case consisted of two parcels of land in the city of Santa Bar-

bara, one of which had been purchased by the husband with his separate property and the other with community funds. A homestead had been declared which covered both lots. The trial court assigned the homestead to the plaintiff as the innocent party in the divorce action. Upon appeal it was said:

"In its findings, and likewise in its interlocutory decree, the trial court properly determined the status of the property and properly determined how it ought to be assigned. But the actual assignment of the property should have been left for the final decree of divorce. A court may assign to the innocent party the community property or the homestead 'in case of a dissolution of the marriage.' Civ. Code, § 146. * * * The interlocutory judgment is not a decree of divorce, nor does it dissolve the marriage. The court therefore should not assign or dispose of the community property or homestead until such time as the marriage is absolutely dissolved by the final decree of divorce. * * * Upon entering its final decree of divorce the trial court will assign the property according to the determination expressed in the interlocutory decree."

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 623

PEOPLE v. HAINES. (Cr. 1081.)

(District Court of Appeal, First District, Division 2, California. Dec. 5, 1923. Hearing Denied by Supreme Court Jan. 31, 1924.)

1. Criminal law $\S$ 1186(4)—Failure to impose sentence within statutory time is procedural error; "miscarriage of justice."

Failure to impose sentence within the time specified by Pen. Code, § 1191, held an error of procedure not resulting in a "miscarriage of justice," within Const. art. 6, § 4½.

2. Criminal law $\S$ 1186(4)—Reversal for new trial not granted for failure to impose sentence in time unless resulting in "miscarriage of justice."

A new trial will not be granted because of failure to impose sentence within the time specified by Pen. Code, § 1191, since the error occurred after verdict and did not result in "miscarriage of justice," within Const. art. 6, § 4½.

3. Criminal law $\S$ 1160—Supreme Court will not review rulings on credibility of prosecuting witness.

The trial court's ruling upon the credibility of the prosecuting witness in denying a new trial is not reviewable on appeal.

4. Criminal law $\S$ 824(1)—Defendant could not complain of failure to give instructions not requested.

Where defendant did not request certain instructions, he could not complain that they were not given.

5. Criminal law ⚡698(1)—**Failure to object to admission of evidence waived objection.**

In a rape case defendant waived objection to reception of evidence of other offenses against prosecutrix by failing to object when the evidence was admitted.

6. Criminal law ⚡940—**Affidavits containing evidence to impeach prosecutrix and disprove chastity held not to require new trial.**

Affidavits disclosing matters which would impeach the prosecuting witness and affect her chastity, the latter not being an issue, did not require a new trial.

7. Rape ⚡54(3)—**Prosecutrix's testimony, corroborated by father, as to age, held sufficient.**

Prosecutrix's testimony, corroborated by father, that she was 15 on November 13, 1921, and the offense was committed on October 8, 1921, when she was 14, held sufficient to establish her age.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Thomas Haines was convicted of rape, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of rape. Objection is strongly urged against the ruling of the trial court in denying defendant's motion for a new trial. Defendant urged his motion for a new trial upon the ground that judgment had not been pronounced within the time provided by section 1191, and therefore he was entitled to a new trial under the provisions of section 1202 of the Penal Code.

[1, 2] The verdict of the jury was rendered on March 24th; sentence was continued until March 28th. At that time notice of motion for new trial was given, and the court continued the matter until April 6th, the period allowed by statute. Upon April 6th the matter came up for hearing and after argument by counsel was continued until April 7th. Upon this last-named date the matter was referred to the probation officer for his report and continued until April 20th. At the request of the defendant, continuances were had to May 4th, May 25th, June 8th, June 22d, July 6th, July 13th, July 20th, upon which latter date defendant's request for probation was denied and sentence was pronounced. This was 118 days after the date of the verdict, and 3 days later than the maximum time allowed by section 1191 within which sentence should have been pronounced. It is urged that because of this delay the defendant was entitled to a new trial and that the judgment should be reversed. This contention is met by the recent case of *People v.*

Zuvela (Cal. Sup.) 215 Pac. 907, wherein it was held that the failure to impose sentence within the time specified by section 1191 of the Penal Code is clearly an error of procedure within the meaning of section 4½ of article 6 of the Constitution, and that a new trial would not be granted because of such error unless an examination of the entire record disclosed that the error complained of had resulted in a miscarriage of justice.

[3] As pointed out by the respondent, the error complained of occurred after the verdict of the jury and could not have changed the verdict in any way. The verdict is supported by substantial evidence in the record. If the testimony of the prosecutrix was believed, and there is nothing about it to arouse the suspicion of falsity, the defendant was guilty as charged. The trial court passed upon the credibility of the prosecuting witness in denying the motion for a new trial and that matter is not subject to our review. *People v. White*, 5 Cal. App. 329, 90 Pac. 471. Indeed, it appears that the trial court in an effort to see that no injustice was done in this case, after the verdict of the jury and before passing upon the motion for a new trial, sent for the prosecutrix and talked with her alone in his chambers, explaining to her that she would be doing great wrong if she unjustly accused the defendant and pleaded with her to tell him the truth, assuring her that no harm would come to her and that justice would be done the defendant. The trial judge stated, at the time of pronouncing sentence upon the defendant, that he had had this conversation with the prosecuting witness and that the child had reiterated word for word her story as the absolute truth.

[4] Some complaint is made that the instructions of the court were not sufficiently full and complete in that no instruction was given to the jury that the uncorroborated testimony of the prosecutrix must be viewed with caution and that her testimony of what she told her sister was not evidence of the facts themselves and other similar matters. We think there is no merit in this contention. The defendant did not request instructions upon any of the matters now urged upon our attention, so far as the record discloses, and, consequently, is in no position to complain that they were not given. *People v. Stirgios*, 23 Cal. App. 48, 136 Pac. 957; *People v. White*, 5 Cal. App. 329, 335, 90 Pac. 471. We have examined the instructions as a whole and find no error therein requiring a reversal of this judgment.

[5] Objection is made to the reception of evidence of other offenses against the prosecutrix by the defendant. All of this testimony was admitted without objection and cannot now be made the subject of attack upon the record. As was said in *People v. White*, supra, a defendant is entitled "to

have only competent evidence introduced upon the trial," but "failing to assert his right, he is deemed to have waived it."

[6] The contention is also made that a new trial should have been granted upon the affidavits filed showing newly discovered evidence. These affidavits disclose matters which would impeach the prosecuting witness and also matters which affect her chastity. The latter is not an issue in this case, and newly discovered evidence affecting the former does not form the basis for a motion for a new trial. *People v. Loui Tung*, 90 Cal. 377, 379, 27 Pac. 295; *People v. Goldenson*, 76 Cal. 328, 352, 19 Pac. 161; *People v. Anthony*, 56 Cal. 397, 399; *Stoakes v. Monroe*, 36 Cal. 383, 388.

[7] A contention is made that the evidence is insufficient to support the verdict; the particular in which the insufficiency is charged is that the age of the prosecutrix was not clearly proven. She testified that she was 15 years of age on November 13, 1921, and that the offense was committed on October 8, 1921, when she was 14 years of age. This testimony was corroborated by her father, who testified at the trial that the girl was 15 years of age on November 13, 1921, which was previous to the time of the trial. This is certainly sufficient upon that element of the case.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 590

BAR ASS'N OF SAN DIEGO v. SUPERIOR COURT OF SAN DIEGO COUNTY.
(Civ. 4575.)

(District Court of Appeal, Second District, Division 1, California. Nov. 30, 1923.)

1. Attorney and client — 54—Accused in disbarment proceeding has no absolute right to be present.

In disbarment proceedings, accused has no absolute right to be present and be confronted by the witnesses.

2. Depositions — 9—Trial court's order, in proceedings to take deposition, not assailable, in absence of limitation on court's power.

A proceeding to take the deposition of a witness, being a proceeding of the court in which the action is pending, is subject to the control of such court, whose order in the exercise of his discretion, in law or equity, cannot be assailed, unless his power is limited by statute or otherwise.

3. Depositions — 55—Court's power to extend time for taking held not limited by statute.

Code Civ. Proc. § 2031, authorizing the taking of depositions after service of five days' notice of the time and place, with a copy of the affidavit that the case is within section 2021, simply prescribes the minimum notice

as in the case of the hearing of motions noticed under section 1005, and does not limit the court's general powers to control the proceedings and extend or continue the time fixed in the notice.

4. Depositions — 49—Officer taking and proceedings subject to control of court.

A notary public or other officer, before whom a deposition is noticed to be taken, is an ex officio officer of the court for such purpose, and he and all proceedings before him are subject to the control of the court. Code Civ. Proc. § 128, subd. 5.

Certiorari by the Bar Association of San Diego, to review an order of the Superior Court of San Diego County, continuing the taking of depositions in disbarment proceedings. Order affirmed.

Lewis J. Utt and Stephen Connell, both of San Diego, for petitioner.

Wright & McKee, of San Diego, for respondent.

CURTIS, J. On September 12, 1923, the petitioner filed, in the superior court of said county, an accusation against Abram Rosenthal, an attorney at law, charging said Rosenthal with a violation of his duty as such attorney, and praying for an order of said court that his name be stricken from the roll of attorneys and counselors of said court. The said Rosenthal appeared and filed his answer to said accusation. Thereafter the said Bar Association served a notice upon the attorneys of the said Rosenthal that it would on October 16, 1923, before a notary public named therein, take the depositions of certain witnesses. With said notice there was served an affidavit by the attorney of the said Bar Association, complying in all respects with section 2031 of the Code of Civil Procedure. After said notice was served as aforesaid, and on October 11, 1923, said Rosenthal served upon the attorney of petitioner a notice of motion to continue and postpone the taking of said deposition, on the ground that said Rosenthal was physically unable to be present and confront said witnesses, that he was entitled to be present for the purpose of consulting and advising with his counsel in the cross-examination of said witnesses, and that he could not, with safety to his health, proceed with the taking of said deposition on said 16th day of October, 1923. With said notice said Rosenthal served and filed affidavits of himself and two physicians as to the state of his health. On the hearing of said motion the said superior court made an order continuing the taking of said depositions from October 16, 1923, to November 22, 1923; whereupon petitioner instituted this proceeding for the purpose of reviewing said last named order, and to have the same annulled by this court.

[1] We do not understand that it is seriously contended that in a proceeding of disbarment it is the absolute right of the accused to be present and be confronted by the witnesses. It was held to the contrary in a recent decision rendered by this court. In *re Morganstern* (Cal. App.) 215 Pac. 721-725.

[2] It is contended, however, by respondent that a proceeding in an action to take the testimony of a witness before a notary public or other officer authorized to take the same is a proceeding in the court in which said action is pending, and therefore, like all other proceedings therein, is subject to the reasonable control of said court.

On the other hand it is claimed by petitioner that the procedure for taking depositions is definitely prescribed by sections 2020 to 2038, inclusive, of the Code of Civil Procedure, and having complied with all the requirements of these code provisions applicable to taking depositions within the state, it has the absolute right to have said deposition taken at the time and place fixed in its notice of motion to take the same, and that there is no authority vested in respondent to vary said procedure by extending the time or fixing a different date on which said deposition should be taken. It is admitted by all parties that this precise question has never been before the appellate courts of this state.

In the case of *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597, the Supreme Court held that the superior court in which an action was pending had jurisdiction, upon proper showing, to punish as a contempt the disobedience of a witness to a subpoena requiring him to attend and give his deposition before a notary public. In this case the court traces the legal history of the taking of depositions, showing that originally they were used only in courts of equity, and in such courts they were the only means whereby the testimony of a witness could be obtained or produced at the trial. For the purpose of taking depositions in a court of equity, a commissioner, usually styled an examiner or master, was appointed by the court to take the answers of witnesses to certain interrogatories settled by the court. These examiners or masters were, of course, under the jurisdiction of the courts appointing them, and subject to their orders. With the establishment of the superior courts of this state, they succeeded to all the powers and rights of both courts of law and equity.

"Instead of requiring a court order (always given of course), and leaving the appointment of the examiner to the court, the law authorizes the depositions, alike in law as in equity, and itself provides the examiners, by giving that authority to any officer authorized to administer oaths; that is, in effect, constituting such officers ex officio officers of the court for the purpose of taking such depositions as they may be called upon to take."

Finally the court says, in the *Burns Case*:

"The taking of a deposition is as clearly one of the proceedings of the court as was the taking of testimony before the master or examiner in a suit in equity."

[3] Being a proceeding of the trial court in which the action is pending, it is subject to the control of such court, and any order of the trial court, made therein in the exercise of the legal discretion with which said court is vested, cannot be assailed unless there is a limitation placed upon the powers of said court by statute or otherwise. Do the sections of the Code of Civil Procedure, above cited, constitute any limitation upon the powers of the court to postpone the time of the taking of the deposition fixed in the notice for the taking of the same? Section 2031 provides that either party may have the deposition taken of a witness in this state, by serving upon the adverse party previous notice of the time and place of examination, together with a copy of the affidavit showing that the case comes within the provisions of section 2021. Said notice must be at least five days, unless for good cause shown a judge, by order, prescribe a shorter time, except in cases where the place of examination is a greater distance than 25 miles from the residence of the person to whom the notice is given. There is nothing peculiar in the phraseology of this section prescribing the notice to be given to the opposite party. There are instances without number prescribed by the Code of Civil Procedure and other statutes of the state whereby notices are required to be given in different proceedings, wherein the wording of the statute is very similar to the language used in section 2031. For instance, section 1005, Code of Civil Procedure, prescribes in regard to motions generally, that notice of the hearing thereof must be given if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise ten days. We have never heard questioned the power of the court, for good cause shown, to continue or postpone the hearing of motions noticed under the above section. In fact, it is the universal practice of courts to grant continuances of motions when the ends of justice would seem to require such continuances, and a failure to do so under such circumstances would be an abuse of discretion.

Section 2031 of the Code of Civil Procedure simply prescribes the minimum notice that must be given to the adverse party upon the taking of a deposition, and is no limitation upon the general powers of the court to control proceedings to take depositions and to extend or continue the time fixed in said notice for the taking of the same.

[4] Furthermore, as was held in *Burns v.*

Superior Court, *supra*, the notary public or other officer before whom the deposition was noticed to be taken is by the law of the state constituted an *ex officio* officer of the court for the purpose of taking such deposition. As such officer he and all proceedings before him are subject to the control of the court. Subdivision 5, § 128, Code Civ. Proc.

We are of the opinion, therefore, that the superior court of San Diego county had jurisdiction over the proceeding to take such deposition, that its order continuing the hearing thereof was valid, and should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 503

GOLDEN STATE REALTY CO. v. GOLDWATER. (Civ. 4419.)

(District Court of Appeal, Second District, Division 2, California. Nov. 23, 1923.)

1. Appeal and error $\S$ 1011(1)—Finding on substantially conflicting evidence not disturbed.

Trial court's finding on substantially conflicting evidence will not be disturbed on appeal.

2. Money lent $\S$ 7(3)—Evidence held to sustain finding that transaction constituted a loan and not merely an exchange of checks.

In an action to recover money loaned, in which the defendant claimed that the transaction was not a loan but was merely an exchange of checks, evidence *held* to sustain finding that the transaction was a loan.

3. Corporations $\S$ 186—Corporation's failure to apply money to discharge of obligations, as provided by a contract, did not justify stock purchaser's refusal to repay money borrowed from corporation.

Where contract provided for the sale by certain stockholders of specified shares of stock and for the payment by the stockholders of debts due from them to the corporation and the application by the corporation of the money so received to the discharge of its outstanding obligations, and where the money was paid to the corporation pursuant to the contract and the corporation thereafter made a loan to the purchaser, the corporation's failure to apply the money received from the former stockholders to payment of debts did not justify the purchaser's refusal to repay the money borrowed.

Appeal from Superior Court, Los Angeles County; Frank S. Finlayson, Judge.

Action by the Golden State Realty Company against S. W. Goldwater. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank E. Dominguez and Milton M. Cohen, both of Los Angeles, for appellant.

Fred W. Heatherly, of Los Angeles, for respondent.

SHENK, Justice pro tem. This is an action to recover the sum of \$2,026.50 alleged to have been loaned by the plaintiff to the defendant. Plaintiff obtained judgment for the full amount, and defendant has appealed.

Under date of March 1, 1916, the defendant became obligated to purchase certain shares of stock. The offer and acceptance constituting the agreement are as follows:

"Los Angeles, Cal., March 1, 1916.

"To Mr. S. W. Goldwater—Dear Sir: We hereby agree to sell and deliver to you stocks of the Golden State Realty Co., California Agricultural & Farm Lands Ass'n, and Anaheim Land Syndicate, in amounts hereinafter set opposite our respective names, upon payment to us of the several amounts set opposite said names, to wit:

	G. S. R. Co.	A. L. Synd.	C. A. & F. Ass'n.	Amts.
Sol Davis	33,825	7,588	23,271	\$3,700.01
Alfred W. Allen....	11,702	1,795	8,045	1,479.00
Leon Kornfeld	4,473	105	3,069	547.50
	50,000	9,488	34,385	\$5,726.51

"Said stock is to be sold with the understanding that we will, with said moneys, immediately pay to the Golden State Realty Company all indebtedness owing by us to said company as shown by its books of account; and further that when said moneys are so paid in by us same shall be disbursed forthwith toward discharging outstanding obligations of said Golden State Realty Company.

"If this proposal meets with your approval kindly sign acceptance hereon and the same shall constitute our agreement.

"Yours very truly,

Sol Davis.

"Alfred W. Allen.

"Leon Kornfeld."

"Above proposal accepted this 1st day of March, 1916. S. W. Goldwater."

Pursuant to the foregoing agreement, the defendant, by checks dated March 6, 1916, paid to Sol. Davis, Alfred W. Allen, and Leon Kornfeld the several amounts to which they were entitled. These checks were forthwith indorsed by the payees and deposited in the bank to the credit of the Golden State Realty Company; and the defendant received certificates for the stock specified in the agreement showing the same to stand in his name on the books of the several corporations. On March 7, 1916, the plaintiff issued its corporate check for \$2,026.50, payable to the defendant, and he deposited the same to his credit in the bank. To recover the amount so paid to the defendant is the subject of this action.

It is the contention of the defendant that the transaction whereby he obtained the money sought to be recovered was one for the mutual exchange of checks. The evidence on this point was sharply conflicting. The secretary of the plaintiff corporation testified that the defendant stated to him that his bank account was depleted, that he

was short of money, and that he desired the use of the money only temporarily. He further testified that the defendant received the money as a loan and has never repaid the same. Mr. Allen was vice president of and attorney for the plaintiff corporation at the time. He testified that he assisted in conducting the negotiations for the sale of the stock to the defendant; that these negotiations extended over a period of three or four weeks; that several forms of contract were discussed before an arrangement satisfactory to the defendant was concluded; that so far as he knew there was no understanding whereby any of the payments made by the defendant for the stock was to be returned to him; and that prior to the commencement of this action the defendant caused a portion of the stock purchased from Davis and himself to be transferred on the books of the company to a purchaser not a party to the contract of March 1st.

[1, 2] The defendant testified that the deal was not a money transaction at all, but was one merely for the exchange of checks. But his explanation of the details was vague and uncertain. He admitted that he had received the stock and did not deny that he had deposited the amount of the check for \$2,026.50 to his credit in the bank. The trial court found that the transaction was a loan as alleged in the complaint. The conflict in the evidence was substantial, and a finding on such a state of the record is conclusive and may not be disturbed on appeal. This rule is so well settled that it is unnecessary to cite authorities in support thereof. Furthermore, the contention of the defendant that the transaction was one for the exchange of checks is not in harmony with the terms of the contract to which he was a party and was unquestionably bound.

[3] During the cross-examination of Mr. Kornfeld, defendant's counsel referring to the money which had been paid to the witness by the defendant pursuant to the contract, propounded the following question:

"Do you know that that particular money, which you received from Mr. Goldwater, went to pay any debts?"

Objection to this question was sustained by the court, and the ruling is assigned as error.

It seems to be the position of defendant's counsel that the language of the contract of March 1st, to wit, "And further that when said moneys are so paid in by us same shall be disbursed forthwith toward discharging the outstanding obligations of the Golden State Realty Company," would justify the defendant in refusing to repay the money he had received from the plaintiff if he could show that the plaintiff had not devoted the funds it received from Davis, Allen, and

Kornfeld toward the discharge of its outstanding obligations. But the Golden State Realty Company was not a party to the contract of March 1st. The evidence showed that one of the main purposes of the contract was that the defendant acquire control of the plaintiff corporation and by it Davis, Allen, and Kornfeld surrendered their entire interests in the corporation. The defendant obtained such control. He was bound by the contract, and if any one were aggrieved by a breach of the provision of the contract referred to, it would be Davis, Allen, and Kornfeld for the reason that a failure of the plaintiff or of the defendant, who presumptively was in control of the plaintiff after March 6, to see that the moneys received by the plaintiff under the contract were disbursed in accordance therewith might subject them to a stockholder's liability. But in no event could such a breach constitute a defense to this action on the part of the plaintiff, a stranger to the contract, to recover from the defendant money to which it claimed to be entitled under the circumstances here shown. There was no error in the ruling complained of.

Judgment affirmed.

We concur: WORKS, Acting P. J.; CRAIG, J.

64 Cal. App. 651

PEOPLE v. RUBBATTINO. (Cr. 733.)

(District Court of Appeal, Third District, California. Dec. 5, 1923.)

1. Criminal law $\S$ 868 — Disqualification of sheriff to take charge of jury waived by failure to object.

Disqualification of sheriff to take charge of the jury during deliberations because he swore to the complaint in the cause was waived by failure to object thereto.

2. Intoxicating liquors $\S$ 236(11) — Evidence held to sustain conviction of selling intoxicating liquor.

In prosecution for selling intoxicating liquor, evidence held to prove unlawful sales of liquor to persons named as purchasers.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Louis Rubbattino was convicted of selling intoxicating liquor, and from judgment of conviction and order denying his motion for a new trial, he appeals. Affirmed.

E. S. Bell, of Oakland, and John Delaney, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. By separate counts in the information the defendant was charged with three unlawful sales of intoxicating liquor.

He was convicted on all of the three counts and his motion for a new trial was denied. This appeal is from the judgment and the order denying a new trial. The appeal is submitted upon the appellant's opening brief, filed after the cause was called for oral argument.

Appellant contends that the court "committed prejudicial error in placing the jury in the custody of the sheriff and his deputy after said sheriff had been disqualified in the case." The record does not show that the jurors were placed in charge of the sheriff or his deputy. All that appears in that connection is the following, taken from the clerk's and the reporter's transcripts, respectively:

"The court now reads its instructions to the jury, and the jury now retire in charge of two sworn officers." "The clerk swears two officers to take charge of the jury, and the jury then retires to deliberate."

[1] During the impanelment of the jury, the sheriff, on the order of the court, summoned 10 persons as a special venire. The clerk's transcript contains the following record of proceedings when these 10 persons appeared in court:

"The court orders that C. E. Brown be excused. * * * The defendant now interposes a challenge to the special venire of jurors summoned by the sheriff on the ground the sheriff of Napa county swore to the complaint in the cause. The court orders that the challenge be allowed and that the nine persons summoned on the special venire be discharged."

A special venire was thereafter summoned by an elisor appointed by the court with the consent of both parties. There is no further reference in the record to the disqualification of the sheriff. If he was one of the officers placed in charge of the jurors during their deliberations, the record does not show that defendant made any objection thereto. Under such circumstances it must be held that the disqualification was waived. In *People v. Le Doux*, 155 Cal. 535, 544, 102 Pac. 517, it was held that where a sheriff is disqualified to summon a jury his deputy is likewise disqualified. In *People v. Nakis*, 184 Cal. 105, 193 Pac. 92, where the defendant was convicted of murder and sentenced to death, the sheriff of the county was admittedly disqualified and an elisor was appointed to summon two special venires of jurors. The jurors were placed in charge of a deputy sheriff on their retirement without objection by defendant. It was held that the disqualifica-

tion was waived by failure to object. The decision in *People v. Stennett*, 51 Cal. App. 370, 197 Pac. 372, is to the same effect.

[2] The first count of the information charges an unlawful sale of liquor to C. P. Usher. Appellant contends that the evidence shows the sale was made to one McIsaacs. It is charged that the sale was made May 14, 1923. McIsaacs accompanied Usher to the defendant's home on that day. Usher testified:

"I purchased from Mr. Rubbattino one quart or one-fifth of intoxicating liquor. * * * I obtained this bottle of liquor from Mr. Rubbattino, himself, for the consideration of \$2. * * * I believe Mr. McIsaacs asked him if we could get another bottle. * * * He told Mr. McIsaacs he could. * * * He gave a bottle to Mr. McIsaacs and I paid for it. * * * It was obtained by Mr. McIsaacs and paid for by me."

This evidence is certainly sufficient to show a sale to Usher.

Count 3 charges a sale to Harry Jones. Appellant urges that the evidence shows that the sale was made to Usher and not to Jones. Relative to that sale, Usher testified:

"I said: 'Good evening, Mr. Rubbattino. I wonder if it would be possible for us to get a quart of liquor.' And he answered that it would, and he brought out this bottle. * * * Q. Did he hand it to you? A. He handed it to me; yes, sir. Q. Did you thereupon pay him for it? A. I did not. I handed the bottle to Mr. Jones. * * * Q. Who did pay him for it, if anybody? A. Mr. Jones handed me the money and I gave it to Mr. Rubbattino. Q. So then you paid Mr. Rubbattino, you say, for this bottle? A. I paid Mr. Rubbattino with Mr. Jones' money. * * * Q. Did Mr. Jones get out of the car? A. He did not, no. Q. How far away from the car were you and Mr. Rubbattino? * * * A. I was standing about a yard from the car, talking to Mr. Jones, and Mr. Rubbattino came up and handed me the bottle. * * * Q. What did you do with the bottle the very next thing? A. I handed it to Mr. Jones. * * * He handed me \$2. * * * Q. And you then gave the \$2 to Mr. Rubbattino? A. I did."

The jury was justified in concluding from the foregoing evidence that the sale was made to Jones as alleged.

Appellant does not suggest any other errors, and there is nothing to warrant a reversal on any of the grounds urged or on any ground appearing in the record.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; HART, J.

64 Cal. App. 587

WALSH v. SWANSON. (Civ. 4644.)

(District Court of Appeal, First District, Division 1, California. Nov. 30, 1923.)

1. Municipal corporations ⇨293(2)—Description of street improvement in resolution of intention held sufficient.

Description of proposed improvement in resolution of intention as "the improvement of northerly side of Twenty-Second street, between Hampshire street and Potrero avenue, by the construction of an artificial stone sidewalk of the full official width, where not already constructed, at least six feet wide," held sufficient.

2. Municipal corporations ⇨293(2)—Description of improvement in resolution of intention read with plans and specifications.

The general description of the street improvement to be made in the resolution of intention is to be read with the plans and specifications adopted for the improvement and referred to therein.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Thomas G. Walsh against Gustava Swanson. Judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant.

R. M. F. Soto, of San Francisco, for respondent.

NEEDHAM, Justice pro tem. This is an action to foreclose a street assessment lien. The work performed was the construction of a sidewalk in front of the defendant's property. The assessment was a public assessment and not by private contract.

In the court below the plaintiff obtained a decree of foreclosure and order of sale, which decree and order is dated the 10th day of January, 1918. Findings of fact were waived by stipulation of the parties. The defendant made a motion for a new trial, which was denied March 2, 1918, and thereafter in due time the defendant appealed from the whole of said judgment and in pursuance of sections 941a, 941b, and 941c of the Code of Civil Procedure.

The defendant presents two grounds of appeal, namely: A. The work and materials, to be performed and furnished, were not sufficiently described in the resolution of intention. B. The public proceedings, leading up to the contract for the doing of the work and the furnishing of the materials, were abandoned by the board of public works, one year prior to the contract with the plaintiff in this action.

As stated by the appellant, the proceedings in this case were taken under the "Street Im-

provement Ordinance" of the city and county of San Francisco, known as No. 2439 (new series) bill No. 2685. This ordinance has been before the appellate courts in several cases, including the following: *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225; *Federal Construction Co. v. Wolfson*, 186 Cal. 267, 199 Pac. 512; *Church v. Grady*, 40 Cal. App. 194, 180 Pac. 548; *Flynn v. Chiappari* (Cal. Sup.) 215 Pac. 682; and *Fay Improvement Co. v. Nelson*, 55 Cal. App. 359, 203 Pac. 417.

[1] As to the first point, that is, that the work and materials to be performed and furnished were not sufficiently described in the resolution of intention, the description given is as follows:

"The improvement of the northerly side of Twenty-Second street, between Hampshire street and Potrero avenue, by the construction of an artificial stone sidewalk of the full official width where not already constructed, at least six (6) feet wide."

[2] According to the allegation of the complaint, the improvement described in the resolution of expediency is the same as that contained in the resolution of intention. The resolution of intention was introduced in evidence and is the same as that given in the complaint. This general description is sufficient. The meaning of artificial stone is well known. 12 Corpus Juris, 391. Furthermore, this general description is to be read with the plans and specifications adopted for the improvement and referred to in the resolution of intention. That part of the resolution of intention reads:

"The said improvements are to be made * * * in accordance with the specifications, or plans and specifications prepared therefor and on file in the office of said board and to which reference is hereby made."

The argument by the appellant that the following language: "Where not already constructed, at least six (6) feet wide" is insufficient is without merit. The only cases cited by appellant to sustain her contention are *Lambert v. Cummings*, 2 Cal. App. 642, 84 Pac. 266, and *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927. Neither is in point. The case of *Lambert v. Cummings*, supra, was an action to foreclose a lien of a street assessment alleged to exist by virtue of proceedings instituted by the council of Berkeley. The resolution of intention recited, "the macadam shall be class 'C' as classified in Ordinance No. 62A." Ordinance No. 62A provided a classification of rock used in macadamizing, designated as "Class A," "Class B," and "Class C." The rock was specifically described in "Class A" and "Class B." "Class C" was defined as "such rock as shall be approved by the board of trustees from time to time." No rock was ever approved by the board as "Class C" rock. Hence, of course,

the resolution of intention was insufficient to give the board jurisdiction and did not sufficiently describe the work to be done by specifying the kind or quality of rock to be used.

The case of *Fay v. Reed*, supra, was a case to foreclose an assessment for street improvement in the city of San Jose. The resolution of intention included as part of the proposed work that—

"Suitable drains and inlets are to be constructed at all intersecting crossings, to carry the surface water of intersecting streets and of Market street into the main branch sewer running along said Market street."

This resolution did not specify the number of drains and inlets, or the size of the drains, or the materials of which they were to be constructed, or the kind or character of the inlets, and was therefore held fatally defective.

The second and last point urged by appellant is that—

"The public proceedings, leading up to the contract for doing of the work and the furnishing of the materials, were abandoned by the board of public works one year prior to the contract with the plaintiff in this action."

This proposition of appellant is, we think, fully met and answered by the case of *Fay Improvement Co. v. Nelson*, 55 Cal. App. 359, 203 Pac. 417, decided by this court in an opinion by Mr. Justice Richards in November, 1921. The decision is a recent one, and the reason for the decision need not be restated.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

44 Cal. App. 567

PEOPLE v. SPADY. (Cr. 1123.)

(District Court of Appeal, First District, Division 1, California. Nov. 28, 1923.)

1. Criminal law $\S$ 1174(2)—Action of juror in leaving seat to adjust window while witness was being questioned held not ground for reversal.

The action of a juror in leaving his seat to adjust a courtroom window while a witness was being questioned held not ground for reversal where the court immediately admonished the juror and directed the reporter to read the question, and thereafter sustained an objection to the question.

2. Indictment and information $\S$ 189(5)—Rape $\S$ 16(1)—No degrees of assault to rape, and defendant charged therewith cannot be convicted of simple assault.

In a prosecution for assault with intent to commit rape on a girl under the age of consent, under Pen. Code, $\S$ 220, defendant could not be convicted of simple assault notwithstanding section 1157, requiring the jury to find the de-

gree of crime, and section 1159, authorizing verdict for any offense necessarily included in that charged, since assault to commit rape is not divided into degrees.

3. Criminal law $\S$ 824(3)—Defendant who presented no instructions on lesser crime could not complain of failure to instruct.

A defendant who presented no instructions authorizing the jury to find him guilty of a lesser crime could not complain on appeal of court's failure to give such instruction.

4. Criminal law $\S$ 742(3)—Credibility of prosecutrix held question for jury.

In a prosecution for assault with intent to commit rape, the credibility of the prosecutrix was a question for the jury, though there were discrepancies and variations in her testimony on preliminary hearings and on the trial.

5. Criminal law $\S$ 1159(2)—Verdict not disturbed if there is evidence from which a rational inference of guilt can be drawn.

The appellate court will not disturb the verdict of guilty if there is any evidence from which a rational inference of guilt can be drawn.

6. Criminal law $\S$ 1037(1)—Defendant could not complain of argument in absence of assignment of remark as error or request for action by court.

Where the defendant's attorney did not assign the argument of the prosecuting attorney as error, or request the court to take any action relative thereto, the defendant could not complain of such argument on appeal.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Abraham Spady was convicted of an assault with intent to commit rape, and from the judgment of conviction and an order denying his motion for a new trial, he appeals. Affirmed.

Geo. Ingraham, of Oakland, for appellant. U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NEEDHAM, Justice pro tem. The defendant was charged by information with the crime of assault with intent to commit rape. He was convicted of that crime, and now appeals from the final judgment and from the order denying his motion for a new trial. The prosecuting witness is the defendant's daughter, 14 years of age.

[1] The first point presented by the defendant is the alleged misconduct of a juror, who, during the course of the trial, and while a witness was on the stand, left his seat for the purpose of adjusting one of the courtroom windows. The court immediately admonished the juror, and said, "Mr. Reporter, will you turn back and read that question again?" The question was re-read by the reporter. The court thereupon sustained an objection to the question. It is evident from the record that if in fact the juror did not

hear the question while he was adjusting the window the court had the question re-read, for the evident purpose so that the juror should not miss whatever he possibly may not have heard while he was adjusting the window. The fact that the question was not allowed makes it manifest that the action of the juror in leaving his seat and adjusting the window was in no wise prejudicial to the rights of the defendant.

[2] The next point made by the defendant is that the court erred by not instructing the jury that they might find the defendant guilty of simple assault, and the defendant in support of that contention cites sections 1157 and 1159 of the Penal Code. Section 1157 of the Penal Code reads as follows:

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The crime of assault to commit rape (section 220 of the Penal Code) is not divided into degrees, and therefore section 1157 of the Penal Code cannot apply to this case. Neither does section 1159 of the Penal Code apply, and it is so decided in the case of *People v. Gomez*, 118 Cal. 326, 50 Pac. 427. It is therein held that assault is not an element of "assault with intent to commit rape" where the prosecuting witness is under the age of consent. It is stated in that case:

"It is claimed that the court committed an error in charging the jury that their verdict should be either guilty of the offense charged, or not guilty. It is insisted that by such charge the court in effect told the jury that the offense of 'assault' was not included in the information. We assume that such was the effect of the instruction, and yet upon such assumption the charge given was the only proper one. The prosecutrix was a girl under the age of consent. Whatever occurred between her and the defendant took place with her entire free will. * * * Under such circumstances the offense of 'assault' is not in the case. The evidence in no way points toward it; for an attempt to use force is a necessary element of every assault. Here there is no pretense of such an attempt."

[3] Furthermore, it appears that the appellant presented no instructions to the court directing the jury that they might find the defendant guilty of a lesser crime. The appellant, therefore, cannot complain. *People v. Worden*, 113 Cal. 569, 45 Pac. 844; *People v. Bailey*, 142 Cal. 434, 76 Pac. 49.

[4] The defendant presents as his next point for a reversal that the verdict of the jury is contrary to law and the evidence in the case. The counsel for the defendant shows great industry in the briefs which he has filed upon this branch of the case. After a most careful examination of the entire record, including a painstaking consideration of the argument of counsel for defendant, it amounts to little more, as we view it, than

a reargument of the facts adduced before the jury, and is a plea, in effect, that the jury should not have given credence to the testimony of the prosecuting witness because of some variations in her testimony. It appears that there were two preliminary examinations held in the case, and there are some discrepancies and variations between the testimony given by the prosecuting witness in the preliminary examinations as compared with her testimony given upon the trial in the superior court. These are questions, however, for the jury, as has been repeatedly held by the appellate courts of this state.

In the case of *People v. Cesena*, 90 Cal. 381, 27 Pac. 300, the following language appears from the decision:

"The defendant, having been convicted of an assault with intent to commit rape, appeals from the judgment and an order refusing him a new trial. * * * He contends that the testimony of the main witnesses against him is contradictory, and so improbable that they are not to be believed; that it furnishes proof of a conspiracy, and that the charge is a pure fabrication. But it does not strike us in that way. * * * We do not attribute very much importance to the testimony as to time. It is easy to be mistaken in such matters. And then the value of the evidence depends largely upon the credibility of the witnesses—a matter peculiarly for the jury."

[5] We do not consider it necessary to review the testimony given upon the stand in this case. It is of a sordid nature, and no useful purpose will be served thereby. It is well established in this state that, if this court finds any evidence from which a rational inference is drawn that the defendant is guilty, the court's inquiry can go no further. *People v. Bond*, 13 Cal. App. 182, 109 Pac. 150.

[6] The last and concluding ground which the defendant urges is that the district attorney committed error in his closing argument to the jury. We have carefully examined the entire argument of the district attorney, and we are of the opinion that the district attorney did not commit prejudicial error. Furthermore, it appears from the record that the attorney for defendant interrupted the district attorney's closing argument but twice. The record shows that upon the first interruption the following proceedings took place:

"Mr. Ingraham: If your honor please, I don't think the district attorney ought to make that kind of a remark.

"The Court: Do you desire it stricken from the record?

"Mr. Ingraham: I do.

"The Court: It is stricken from the record and the jury instructed to disregard it."

Upon the second interruption, the record shows that a colloquy took place between

the attorney for the defendant and the district attorney, but it nowhere appears that the attorney for the defendant assigned the remark of the district attorney as error, or requested the court to take any action. Under these circumstances, the defendant cannot complain. See *People v. Warr*, 22 Cal. App. 663, 136 Pac. 304, and *People v. Mancuso*, 23 Cal. App. 146, 137 Pac. 278.

In the case of *People v. Panagoit*, 25 Cal. App. 158, on page 165, 143 Pac. 70, 73, appears the following:

"It was the duty of the counsel for the defendant to call the attention of the court to improper remarks then and there, so that the court might have advised the jury to disregard them. It is too late to raise such question for the first time on appeal," citing authorities.

Again, in the case of *People v. Vaughn*, 25 Cal. App. on pages 737 and 738, 147 Pac. 116, we quote the following:

"In regard to the alleged misconduct of the district attorney, we think that, while the comment of that officer upon the conduct and character of the defendant may have been somewhat harsh, nevertheless it was apparently but a deduction from the evidence. * * * Moreover there was no request to the trial court to admonish the jury to pay no heed to the alleged misconduct. It has been the rule of this court—and we think the settled rule generally—that, even though misconduct be conceded, in the absence of a request to the court to admonish the jury to pay no heed to it, complaint of the same will not be heard in this court."

Furthermore, in the general instructions given by the court to the jury as to the law of the case, we quote the following:

"While it was your duty to listen to and consider the arguments of counsel, I instruct you that such arguments are not evidence; that the only legitimate purpose of argument is to assist you in arriving at a proper verdict from the evidence in the case, applying to such evidence the law as given you by the court. Your duty is to decide this case upon the evidence introduced upon this trial, applying to such evidence the law as given you by the court and in so doing you have no right to be controlled by the opinion of an attorney in the case either for the prosecution or the defendant."

The court also instructed the jury as follows:

"The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice. A verdict founded upon sentiments of pity for the accused or upon public opinion or public feeling or upon passion or prejudice or upon conjecture would be a false verdict."

For the reasons herein given we believe that the defendant was fairly tried and le-

gally convicted, and the judgment and order denying the motion for a new trial are affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

64 Cal. App. 488

CALIFORNIA PACKING CORPORATION v. STONE et al. (Civ. 2550.)

(District Court of Appeal, Third District, California. Nov. 22, 1923. Hearing Denied by Supreme Court Jan. 21, 1924.)

1. Chattel mortgages $\S$ 117—Mortgage held to cover barley grown on land described therein.

Where granting clause conveyed to chattel mortgagee all growing crops or those to be grown during seasons 1921-1925, inclusive, on described property, on which barley was grown during a year covered by the mortgage, the mortgage covered the barley crop, though reciting that it was to secure performance of a contract covering fruit crops.

2. Chattel mortgages $\S$ 136—Tortious removal of mortgaged barley crop did not defeat lien.

Where the removal of mortgaged barley from premises on which grown was tortious, Civ. Code, §§ 2888, 2972, providing that the lien of a mortgage on a growing crop continues after severance, so long as it remains on mortgagor's land, are inapplicable.

3. Chattel mortgages $\S$ 172(1)—Replevin or claim and delivery lies to obtain possession of mortgaged chattels.

Replevin or claim and delivery will lie to obtain possession of property covered by chattel mortgage, where such mortgage provides for delivery of the chattels to the mortgagee.

4. Replevin $\S$ 10—Possession must be in defendant at commencement of action.

In action in replevin or claim and delivery, to sustain judgment for plaintiff, it must be shown that possession was in defendant at time of the beginning of the action, or that he had power to make delivery of the personal property, recovery of which is asked.

5. Replevin $\S$ 10 — Judgment unwarranted against defendants not having possession at beginning of action.

In replevin, a judgment against certain defendants was unwarranted, where possession of the barley at commencement of the action was shown to be in other defendants, and that the defendants first mentioned were in no position to make delivery.

6. Replevin $\S$ 117—Plaintiff in replevin held entitled to costs, though defendant not in possession of property at commencement of action.

Although certain defendants in replevin were not in possession of the property at commencement of the action, where their answer put in issue the title and right of possession of plaintiff, plaintiff was entitled to its costs against such defendants.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the California Packing Corporation against Casper P. Stone and others. Judgment for plaintiff, and defendant named and Elizabeth N. Alexandrian appeal. Modified and affirmed.

Geo. D. Collins, Jr., of San Francisco, for appellants.

J. Oscar Goldstein, of Chico, for respondent.

PLUMMER, J. [1] This is an appeal in an action brought by the plaintiff to recover from the defendants and appellants the possession of 2,600 sacks of barley and 400 sacks of oats or the value thereof in the sum of \$3,750. The plaintiff had judgment against the appellants and against Garrette & Agnew, a copartnership, for the recovery of 1,918 sacks of barley or the value thereof in the sum of \$1,918, in the event that recovery could not be had. The defendants Garrette & Agnew have not appealed. It appears from the transcript that the barley in question was raised upon a certain tract of land situated in the county of Butte, farmed and operated by the appellants; that on or about the 16th day of June, 1920, the appellants executed a certain crop mortgage and delivered the same to the plaintiff and respondent herein, covering all crops to be grown upon the premises hereinbefore referred to and described in said mortgage, including all crops growing or to be grown on said premises during the seasons of 1921-1925, inclusive. The points made by appellants for reversal are: First, that the mortgage does not cover the barley crop grown upon said premises; second, that the plaintiff was not entitled under the terms of the mortgage to the possession of the barley; and, third, that this is an action in claim and delivery or replevin, and that the appellants were not in possession of the barley crop at the time of the commencement of this action. That the first contention has no merit is readily perceived by the mere reading of the mortgage. The granting clause of the mortgage is as follows:

"Does by these presents grant, bargain, sell, and convey to the mortgagee, and its successors and assigns forever, all the crops now growing or to be grown during the seasons 1921-1925, inclusive, on the following described real property."

Then follows a description of the property upon which the barley in question was grown during a year covered by the mortgage. Then further along, after providing for the right of the mortgagee to enter upon the premises, it is further specified that upon "harvesting thereof it (plaintiff) shall be entitled to the possession of the same and may haul, store and ship the same at the expense of the said mortgagor." It is also provided in said mortgage that, in case of any default

on the part of the mortgagors, the mortgagee is authorized to take possession of the crops and sell the same. It is also provided in said mortgage that upon harvesting the crops grown on said premises the mortgagor will deliver the same immediately into the possession of the mortgagee or its successors. It is further covenanted that the mortgage is intended to secure, not only the principal sum mentioned in the mortgage, but also advances that might be made thereunder. The last clause of the mortgage is as follows:

"This mortgage is also intended to secure the performance of the term fruit contract between the mortgagors and the mortgagee, covering the sale of the crops of fruit on said premises for the years 1921 to 1925, inclusive."

It is upon this last provision that appellants base their argument that the mortgage did not cover the barley crop and hence that the plaintiff was not entitled to possession thereof. The foregoing recital disposes completely of the appellants' first contention.

[2] The court found that default had been made by the mortgagors; that the crops had been harvested; that the plaintiff made demand upon the mortgagors for the possession of the barley in accordance with the terms of the mortgage at a time when the appellants were in possession of the crop of barley grown on the mortgaged premises. The court further finds that the crop of barley was wrongfully and tortiously removed from the mortgaged premises upon which it was grown, and that the lien of the plaintiff upon the barley by reason of the mortgage was not extinguished. The crop having been removed from the mortgaged premises by the mortgagors, it is claimed by the appellants that, under the provisions of sections 2888 and 2972 of the Civil Code, plaintiff's lien thereon was extinguished.

[3] The court having found, however, that the removal was tortious, this case comes under the rule frequently announced by the Supreme Court of this state that under such circumstances the sections referred to are inapplicable and the lien still continues. *Wilson v. Prouty*, 70 Cal. 196, 11 Pac. 608; *Benson v. Nunan*, 63 Cal. 550. That replevin or an action in claim and delivery will lie to obtain possession of property covered by chattel mortgage, where such chattel mortgage provides for delivery of the chattels to the mortgagee, is also well settled. *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84.

These and other cases which might be cited clearly establish the right of the plaintiff to possession of the mortgaged crops after harvesting, and the right to maintain an action to obtain such possession where delivery is refused.

[4] The third contention of appellant is more serious. The court found that at the time of the beginning of the action the de-

defendants Garrette & Agnew were in possession of all of the property referred to herein, and for which judgment was awarded the plaintiffs. There is no finding that the appellants had any control over the property or were in any position to make delivery thereof. The finding of the court upon the question of the possession of the barley for which judgment was awarded the plaintiff is as follows:

"That all of the said barley was at the time of the commencement of the action in the possession of the defendants Garrette & Agnew, a copartnership, said property having been delivered to said defendants Garrette & Agnew, a copartnership, in the following manner: 801 sacks of said barley were delivered on a car marked SN 2150; 800 sacks of said barley were delivered on a car marked WP 17655; and 317 sacks of said barley were delivered on a car marked NE 2058."

The court further found that the transportation company or railroad company was the agent of the defendants Garrette & Agnew. The court also found that the plaintiff had, by taking proceedings under the provisions of the Code relating to claim and delivery, obtained possession of all of the 1918 sacks of barley herein just referred to.

[5] In an action in replevin or claim and delivery, being an action for the recovery of specific personal property, in order to sustain a judgment for the plaintiff, it must be shown that possession was in the defendant at the time of the beginning of the action, or that he had the power to make delivery of the personal property for the recovery of which the action is prosecuted. *Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414; *Richards v. Morey*, 133 Cal. 439, 65 Pac. 886. Cases from other states follow the same general rule. A distinction, however, is made in actions where the complaint, though entitled a "complaint in claim and delivery," in truth and in fact a cause of action in detinue or trover is alleged. This distinction is pointed out in *Faulkner v. First National Bank*, 130 Cal. 258, 62 Pac. 463. If it appears that the action is really one for the conversion of personal property, a judgment awarding the plaintiff the value of the property converted will be upheld, even though plaintiff entitles his action one in "claim and delivery." The facts pleaded and not the name given to the complaint determine whether it is one in claim or delivery or one in trover for the conversion of the property. As stated in the case of *Riciotto v. Clement*, supra, the complaint in claim and delivery might be amended so as to support a judgment for the value of the property in the event the testimony shows conversion on the part of the defendant. In the case at bar no application was made to amend the pleadings, and, whatever the testimony may show upon this subject,

there are no allegations in the complaint and no findings made by the court on the subject of conversion by the defendants. It thus appears the judgment for the recovery of the property against the appellants was unwarranted, by reason of the fact that the possession of the property at the time of the institution of the action was shown to be in others than the appellants, and it further not being shown that the appellants were in a position to make delivery of the barley sought to be recovered.

[6] It appears in the answer filed by the appellants that they put in issue the title of the plaintiff to the mortgaged barley and the right of the plaintiff to possession thereof. This entitled the plaintiff to a judgment for its costs against the appellants herein.

It necessarily follows from what has been said that the appellants are entitled to have and it is ordered that the judgment against them be modified to the extent of striking out that portion thereof which awards to the plaintiff as against appellants judgment for a recovery of the property or the value thereof in the sum of \$1,918, in the event that the recovery cannot be had. In all other respects the judgment is hereby affirmed. We think the respondent is entitled to recover its costs on appeal, and it is ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 577

BROCK v. NEWMARK GRAIN CO., Inc.
(Civ. 4290.)

(District Court of Appeal, Second District, Division 2, California. Nov. 28, 1923. Hearing Denied by Supreme Court Jan. 24, 1924.)

1. Sales §44(3)—Evidence held to sustain findings as to breach of warranty to furnish "Sonora seed wheat."

In buyer's action for breach of warranty to furnish "Sonora seed wheat," evidence held to sustain findings that there was a variety of wheat known as Sonora wheat, that buyer and seller so understood at the time the order was taken, and that the wheat actually delivered did not belong to such variety.

2. Sales §44(2)—Finding that seller warranted that wheat would be of particular variety held warranted.

Where seller accepted orders for "Sonora seed wheat," and all parties understood the wheat sold was to be Sonora wheat, a finding that the seller warranted that the wheat delivered would be of such variety held warranted.

3. Sales §251—Fraud not essential to implied or express warranty of commodity sold by name or character.

Fraud on the part of the seller is not essential to implied or express warranty of a commodity sold by name or character.

4. Appeal and error ☞1010(1)—Findings supported by evidence not reviewable.

Findings of fact supported by evidence are not reviewable on appeal.

5. Sales ☞262—That buyers saw seed wheat held not to justify sale as particular variety.

Sales of an inferior grade of seed wheat as "Sonora wheat" by an agent unskilled in distinguishing it in the kernel from similar varieties to farmers unable to detect the difference until near harvest time *held* not justified because the buyers saw the wheat in the warehouse.

6. Sales ☞284(1)—Seller not authorized to deliver different seed wheat of same general class.

That "Sonora wheat" belonged to the general class known as "club wheat" did not authorize seller to fill an order for Sonora seed wheat with any club wheat.

7. Sales ☞445(1)—Damages sustained because of seller's delivery and buyer's use of seed inferior to the grade ordered held for jury.

In buyer's action for breach of warranty to deliver Sonora seed wheat, the damages sustained because of the delivery by seller and the planting by buyer of wheat of an inferior quality *held* a question for the jury.

8. Sales ☞440(3)—Testimony as to difference in yield of wheat and comparison of samples held admissible.

In buyer's action for breach of warranty to deliver Sonora seed wheat where there was evidence of features distinguishing Sonora wheat from club wheat, comparisons of samples by witnesses and testimony as to the difference in yield *held* admissible.

9. Evidence ☞417(12)—Parol evidence admissible to prove sales agreement where only documents admitted were sales slips or receipts.

In buyer's action for breach of warranty to deliver a particular variety of wheat, in which the only documents received in evidence were sales slips or receipts obviously not intended as complete evidences of agreement, parol evidence was admissible to prove the agreement between the parties.

10. Appeal and error ☞1051(1)—Admission of testimony held harmless in view of other testimony.

The admission of opinion testimony without proper foundation *held* harmless in view of other ample testimony as to same facts.

Appeal from Superior Court, Imperial County; Phil. D. Swing, Judge.

Action by W. M. Brock against the Newmark Grain Company, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

E. R. Simon, of El Centro, for respondent.

CRAIG, J. This action is one brought to recover damages for alleged breach of contracts of warranty to furnish "Sonora seed wheat." There are seven causes of action, the respondent suing upon one contract entered into with the Newmark Grain Company by himself, and six other contracts received by him through assignments from other farmers. The cases were tried before the court without a jury, and judgment was rendered in favor of plaintiff for \$6,005.90, from which judgment this appeal is taken.

The facts involved in the seven causes of action are substantially the same. The complaint alleges, and the evidence shows, that W. M. Brock applied to the agent of the Newmark Grain Company, at Brawley, Cal., to purchase Sonora wheat to be used as seed. M. O. White was appellant's agent at Brawley, and he sold seed wheat to Brock which he represented to be Sonora wheat; neither Brock nor any of the other six farmers whose claims are involved, nor White, had sufficient knowledge of Sonora wheat to be able to distinguish it from other wheat with any degree of certainty by merely examining the kernels, although Brock and White and some of the others were well enough acquainted with that variety to know its appearance when growing.

It is also in evidence that the Imperial valley is naturally arid, so that irrigation is necessary to produce crops; that the climate is very warm during the month of June, and that the time to sow this spring wheat is during the months of January and February, in order that it may mature before the extreme heat of the summer. On January 28, 1919, Brock purchased the seed wheat as above stated, and in the early part of the following month he sowed it on 32 acres of land which he had prepared for that purpose. The soil was well adapted to raising the variety of spring wheat known as Sonora; he irrigated it and cared for it in the customary manner, and did not discover that the wheat was not Sonora wheat until it began to head. In due time the crop was harvested. It appears that the seed which was furnished Brock and his assignors was a variety known as "club wheat" other than Sonora wheat. The former is a hard wheat, requiring two or three weeks longer to mature than Sonora wheat, which is classed as a soft milling wheat. From this it results that the club wheat, if sown when this was, is not adapted to being grown in Imperial county for milling purposes. The court found from evidence to which we shall refer later that Brock's land, if sown to Sonora wheat, would have produced 22,500 pounds in addition to the quantity of wheat which he did produce from the Newmark seed, and that, allowing for the expense of harvesting the additional yield, he was damaged in the

sum of \$652.50. It was also found that plaintiff's assignors thereby lost, in production and revenue, respectively, 12,200 pounds, \$353.80; 30,300 pounds, \$878.70; 38,600 pounds, \$1,119.40; 78,750 pounds, \$2,283.75; 18,750 pounds, \$543.75; 6,000 pounds, \$174.

[1] Appellant relies principally upon the contention that the evidence does not warrant the findings in a number of essentials. The court found generally that the allegations contained in the complaint were true, and that none of the allegations contained in the answer were true or were sustained by the evidence. Appellant avers that there is "no evidence" that there is a wheat classified as Sonora wheat; that there is "a total failure of proof" that the defendant sold to plaintiff and his assignors a wheat of different classification than actually ordered; and that there is "no evidence" to sustain numerous other elements necessary to the plaintiff's case. It will serve no good purpose to quote extensively from the testimony of the witnesses, but we find substantial evidence to sustain each of the material allegations of the complaint, and, consequently, the findings of the court that these allegations are true.

Upon the issue as to whether or not there is a wheat commonly known in the Imperial valley as Sonora wheat, Brock testified that he raised it in 1918 and 1920, and distinguished it from his 1919 crop produced by the seed here in controversy; that the wheat which bore the earlier, heavier crop he knew as the type "Sonora wheat." Hertel, a graduate from a college of agriculture, and former farm adviser of Imperial county, testified that he made a study of special wheat conditions in that locality, as to the better varieties for Imperial county, and that there is a wheat in said county commonly known as Sonora wheat which grows more compactly and closer together than other varieties, and with a golden color, which is not characteristic of them, and that he would know this type and be able to distinguish it at a distance of 100 to 300 yards. The witness testified that the exhibits from plaintiff's 1919 crop had no Sonora wheat among them. Caldwell, one of plaintiff's assignors, and Kaylor, another of plaintiff's witnesses, testified that there was wheat in the Imperial valley known as Sonora, and described it, identifying heads which they knew as "White Sonora," among other exhibits upon the trial.

Concerning appellant's claim that there was no evidence that the wheat sold by the defendant was not that which plaintiff and his assignors requested, the record discloses that White, defendant's agent, and the various purchasers testified that they asked for Sonora wheat, and that the product from the seed which they received was not Sonora wheat.

[2] Appellant further argues that there was no express warranty contained in the contract of sale of the seed in question, and that, under the circumstances, as shown by the evidence, no warranty was implied that the seed should be of any particular variety, or would produce any stated quantity. The evidence amply sustains the allegations and the court's findings to the effect that the defendant delivered to plaintiff and his assignors seed wheat, representing and warranting that it was Sonora wheat, and that the plaintiff and the other purchasers accepted the same, relying upon such representations and warranties. There can be no doubt that the defendant's agent and the purchasers all understood that the seed sold was to be Sonora wheat, and, if this was true, it would be immaterial that no warranty was made as to the quantity to be produced. Each one testified that he stated to White at the defendant's place of business that he had come to get Sonora seed wheat, and that White replied that he had it, showed them samples which he stated were Sonora wheat, and in some instances exhibited the billing to his branch of defendant's business, bearing the name "Sonora seed wheat."

But it is urged that, as the several parties who purchased wheat claimed to know what Sonora wheat was, as grown in Imperial valley, and since they saw the seed and knew what they wanted to purchase, there could be no legal reliance upon the representations of defendant's agent that it was Sonora wheat.

[3] The law in California has uniformly implied that, where the circumstances are such as to amount to a representation of fact on the part of the vendor that an article sold is of a particular kind as ordered in terms, he will be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. *Hughes v. Bray*, 60 Cal. 284; *Rauth v. Southwest Warehouse Co.*, 158 Cal. 54, 109 Pac. 839; *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277. Fraud of the vendor is not essential to implied or express warranty of a commodity sold by name or character. In *Polhemus v. Heiman*, 45 Cal. 573, 579, the opinion in *Henshaw v. Robins*, 50 Mass. (9 Met.) 83, 43 Am. Dec. 367, is quoted with approval, wherein it was said that—

"To create an express warranty, the word 'warrant' need not be used, nor is any precise form of expression necessary; but every affirmation, at the time of the sale of personal chattels, amounts to a warranty."

In that case indigo was sold, but subsequently was discovered to consist of Prussian blue, chromate of iron and potash, so prepared as to deceive skillful dealers, but an order for indigo was filled with this preparation, and it was held to constitute a warranty that it was indigo.

[4-6] The facts found by the trial court, and which are supported by evidence, are not reviewable, and it must be regarded as established that these purchasers ordered, and defendant's agent sold, Sonora seed wheat, which was of a character and quality unquestionably understood by all the parties. They had raised it before this transaction, and had sold their crops to appellant, and these sales by an agent unskilled in distinguishing it in the kernel from similar varieties, to farmers admittedly unable to detect the difference until near harvest time, of a grain of inferior grade, could not be satisfactorily justified by the argument that the buyers saw the wheat in the warehouse. It is not contended, nor does the evidence indicate, that there was willful misrepresentation, but it is shown that some of the purchasers questioned the genuineness of the seed, and that appellant's agent said it had been raised in the San Joaquin valley, and that it was perhaps the locality which rendered it a little smoky in appearance, but that it was Sonora wheat. Nor is the mere fact that Sonora seed wheat may belong to a general class known to the trade as "club wheat" a substantial foundation for the argument, as advanced by appellant that any "club wheat" may satisfy the requirements of an order for Sonora seed wheat.

It is insisted by appellant that, if a buyer accepts goods after an examination of them, with knowledge that they do not correspond with the contract, he cannot recover in an action based upon a breach of warranty; and *Rauth v. Southwestern Warehouse Co.*, 158 Cal. 55, 109 Pac. 839, is cited as authority for the rule stated. While we assume that such is the law, this case is distinguished from the instant one, in that there was "absolutely nothing in the evidence to indicate that the difference in yield was not due solely to the fact that the seed barley was grown in a different locality and at a greater altitude," and by the further fact that "the evidence showed without conflict and the jury found in response to special interrogatories that the selling agent told the buyer that the barley was northern barley raised at Tehachapi, but did not tell him that it was bearded barley." On the other hand, it was there held that, in the sale of a chattel as being of a particular kind or description requested, a warranty would be implied. The only other authorities cited by appellant which are here worthy of comment are *Newmark & Co. v. Smith*, 26 Cal. App. 339, 146 Pac. 1064, and *Alexander v. Stone*, 29 Cal. App. 488, 156 Pac. 998. In the former case it was said that the sole question before the court was whether the buyer was entitled to inspection as a condition precedent to the making of payment; and in the latter, certain woolen goods were sold without representation as to kind or

quality, the court saying that "both parties, by reason of their occupation, had expert knowledge of the kinds of cloth in question," so that mere "puffing" of goods by the statement that they were first class amounted to no more than an expression of opinion, and not the representation of a fact. In the case at bar the evidence warrants the inference that the purchasers had no such expert knowledge as that an examination of kernels of Sonora seed wheat would enable them to determine its identity.

Firth v. Richter, 49 Cal. App. 545, 196 Pac. 277, presents facts very similar to those of the instant case. There the purchasers requested Valencia orange trees, whereupon the dealers delivered to them trees represented to be of that variety; that it was impossible to determine whether or not the trees were of the kind ordered, and the buyers accepted them, relying upon the statement that they were Valencia orange trees. When they bore fruit it was for the first time discovered that they were not Valentinas. Upon appeal from a judgment in favor of the purchasers it was said:

"In the case at bar it appears that the buyers definitely limited their request by asking for Valencia orange trees, and the seller not only delivered the trees in direct response to that request, but further, in a written contract agreed to deliver Valencia orange trees. We are aware that, as shown by the evidence to which we have been referred, the particular trees were first selected by the buyers. Appellant had bought from O. M. Bert a quantity of trees, including those delivered to respondents. The trees were growing in rows in Bert's nursery. At the request of appellant, Bert exhibited to respondents certain rows of trees which he said were all Valencia orange trees. Respondents then selected these particular trees from the rows thus designated, and those are the trees that were delivered. No charge of bad faith is made herein, but, on the contrary, the court found and the parties admit that there was no such bad faith or deception; nevertheless appellant assumed the responsibility of selling these trees as Valencia orange trees, and there is nothing in the evidence showing any conduct on the part of respondents which would estop them from claiming the benefit of that warranty. The terms used were sufficient to state an express warranty. *Polhemus v. Heiman*, 45 Cal. 573, 578, 579."

Newhall Co. v. Hogue-Kellogg Co., 56 Cal. App. 90, 204 Pac. 562, held that:

"Where an article of a particular variety or type is ordered by name and the seller purports to furnish the same, with or without any express statement that the article furnished is of the kind ordered, a warranty of the identity of the variety or kind arises. *Flint v. Lyon*, 4 Cal. 17, 21; *Purge v. Albany Nurseries, Inc.*, 176 Cal. 313, 168 Pac. 343; *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277; *Rauth v. Southwestern Warehouse Co.*, 158 Cal. 54, 60, 109 Pac. 839."

[7] Appellant next asserts that there is no evidence to enable the trial court to determine the amount of wheat claimants would have raised on the same ground had the seed been Sonora. Plaintiff and his assignors testified to having raised profitable crops in 1918 and 1920 from Sonora seed, and that their crops in 1919, from the seed in controversy, ran from one to $5\frac{1}{2}$ sacks per acre, weighing from 87 to 128 pounds per sack. Two of the farmers interested in this action, and three of their neighbors, testified that the Sonora seed wheat which they sowed in this same year, some of it at the same time and under identical conditions, produced from $6\frac{1}{2}$ to 18 sacks per acre, weighing from 127 to 140 pounds per sack. Kaylor, one of the assignors, harvested but $6\frac{1}{2}$ sacks per acre of the Sonora wheat, but appellant's seed, which he sowed beside it at the same time, produced but 3 sacks per acre. Some rust appears to have struck these crops, but it was testified that this did not damage them more than 10 per cent. and there were instances where the rust problem was negligible. The evidence was clear and uncontradicted on these amounts, and it is difficult to imagine how a more intelligible comparison could be shown as a basis for computation of damages. It was further testified that portions of the crops from ordinary club wheat were of little or no value, and that Sonora wheat grown in the same and other years was sound and marketable. The court gave judgment for about one-fourth of the amount demanded in the complaint, and it would seem that all of these factors were taken into consideration; at any rate, it is the peculiar province of the trial court to weigh this evidence, and its conclusions will not be reviewed upon appeal.

[8] It was objected consistently throughout the trial, and is here insisted, that the evidence continually reflects the fact that the claimants called a certain kind of wheat which had been raised in Imperial valley "Sonora wheat," but that there is no distinguishing feature when it comes to classifying the so-called Sonora wheat with the only other wheat referred to, i. e., white club, and that the court erred in permitting witnesses to testify to comparisons from identified samples, and to the fact that the former would produce three times as much yield as the latter. The evidence shows that distinguishing features exist; this is true both in appearance before harvest and in quality and quantity of the grain produced. It follows that these facts were material to the determination of the issues before the trial court, and the evidence was properly received and given consideration.

[9] The contention of appellant that evidence was improperly admitted to contradict a written contract between the defendant and the plaintiff, and is erroneous, is without merit. The documents offered and received in evidence were merely sales slips or receipts, and were obviously not intended as complete evidences of agreements.

It is insisted that the poor results obtained from the seed sold by the defendant might have been due to any one of six other causes than the fact that the wrong seed was sold. For instance, it is said that wheat should be planted in November in Imperial valley, whereas this was not planted until February. A complete answer to this is that there is substantial evidence to the fact that a successful crop may be produced by planting in February. This was testified to by witnesses Hertel, Kaylor, Young, Carner, and others. It is also a fair conclusion from the fact that a number of these farmers actually planted Sonora wheat in February, and raised three times as much crop as was obtainable from defendant's seed under similar conditions. Under these circumstances, of course, the findings of the trial court are not subject to review.

[10] Again, the argument that the differences found to exist between the wheat produced from defendant's seed and that ordinarily characterizing Sonora wheat are due to the peculiar climatic conditions of Imperial county and other causes specified is disposed of in the same way, that there is evidence to sustain the court's findings, and it is immaterial that there is also some evidence to the contrary. Likewise the rulings admitting evidence of various witnesses concerning the conditions existing must be sustained. Any error in permitting certain witnesses to give their conclusions without laying proper foundation in connection with this phase of the appeal are harmless, since there is ample testimony not subject to that objection to establish the essential facts, and especially to show that Sonora wheat is a distinct variety which under the conditions shown to exist would produce substantially a greater crop than club wheat, and that the failure to secure a normal return of Sonora wheat was due to the fact that seed of that variety was not supplied by the appellant.

There being no other points of sufficient merit to require a ruling, the judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

193 Cal. 21

Ex parte BOGDEN. (Cr. 2644.)(Supreme Court of California. Jan. 10, 1924.
Rehearing Denied Feb. 6, 1924.)**1. Prisons  15—Credits for good conduct not allowed as matter of right.**

A prisoner is not entitled to credits for good conduct as a matter of right.

2. Habeas corpus  54—Petitioner allowed credits for good conduct under rule of board of prison directors should so state in petition.

On writ of habeas corpus on the ground that credits have been allowed petitioner for good conduct under a rule of the board of prison directors, the petitioner should aver such facts in the petition.

In Bank.

Application by John Bogden for writ of habeas corpus. Denied.

John Bogden, in pro. per.

PER CURIAM. [1, 2] The petitioner seeks relief on a writ of habeas corpus. The facts in connection with his sentence and imprisonment are stated in the opinion heretofore rendered by this court. In re Bogden (Cal.) 218 Pac. 1017. We there held that the effect of the Governor's pardon was that the prisoner should serve the balance of the 10-year term expiring July 6, 1924. He now claims that by reason of good conduct the period has been so far decreased that he is now entitled to release. We have heretofore held that since 1917 credits for good conduct are not allowed as a matter of right. In re Mann, 219 Pac. 71. The petitioner is not entitled to a discharge as a matter of right, and if under a rule of the board of prison directors, he is entitled to credits, and if such credits have been in fact allowed him, the petition should aver the facts in that regard.

Petition denied.

193 Cal. 19

PEOPLE et al. v. DISTRICT COURT OF APPEAL et al. (S. F. 10931.)

(Supreme Court of California. Jan. 10, 1924.)

1. Courts  90(4)—Decision rendered within first year after amendment held entitled to great weight in construing it.

A decision rendered within the first year after organization of the District Court of Appeal, under the amendment of 1904 (St. 1903, p. 737) to Const. art. 6, § 4, is entitled to great weight in construing the amendment.

2. Constitutional law  18—Amendment re-adopting constitutional provision adopted in interpretation theretofore placed thereon; "cause."

The amendment of 1918 (St. 1917, p. 1956) to Const. art. 6, § 4, readopting the provisions of the amendment of 1904 (St. 1903, p.

737), allowing the Supreme Court to order causes transferred from the District Court of Appeal within 30 days after final judgment, thereby adopted the interpretation theretofore placed thereon by the courts, which had construed "cause" to include original proceedings for mandamus.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause.]

3. Appeal and error  1188—District Court of Appeal had no jurisdiction to issue mandate writ until 60 days after judgment.

Under Const. art. 6, § 4, as amended in 1904 and 1918 (St. 1903, p. 737; St. 1917, p. 1956), allowing the Supreme Court to order causes transferred from the District Courts of Appeal within 30 days after final judgment therein, the District Court of Appeal had no jurisdiction to issue its writ of mandate until expiration of 60 days from rendition of its judgment.

Application by the People of the State of California and others for writ of prohibition directed to the District Court of Appeal, and others. Writ granted.

U. S. Webb, Atty. Gen. and Sloane & Sloane, and Crouch & Sanders, all of San Diego, for petitioners.

Jesse George, of San Diego, for respondents.

WILBUR, C. J. The petitioner seeks a writ of prohibition to prevent the District Court of Appeal from issuing its writ of mandate in pursuance of an opinion rendered by that court November 24, 1923. An alternative writ of prohibition was issued, returnable January 8, 1924. The only question which this court considered worthy of consideration upon the application for the writ of prohibition was the question as to whether or not the District Court of Appeal should issue its writ of mandate before the expiration of 60 days from the rendition of its opinion and judgment. The respondents concede that under the opinion of the District Court of Appeal in Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167, in which a rehearing was denied by this court, and under dicta in the decisions of this court (In re Wells, 174 Cal. 467, 163 Pac. 657; In re McCowan, 175 Cal. 511), the respondents should not issue their writ of mandate until after the expiration of 60 days; but it is contended that these decisions are in conflict with the case of In re Zany, 164 Cal. 724, 130 Pac. 710, and it is therefore urged that we reconsider the question in the light of the argument advanced by respondents. We do not, however, consider the question an open one in this state.

[1, 2] The decisions above referred to merely state the general rule of practice which has been followed in a multitude of cases since the adoption of the amendment to the

Constitution and is the settled rule of practice in this court. The decision of *Noel v. Smith*, supra, was rendered within the first year after the organization of the District Courts of Appeal under the constitutional amendment of 1904 to article 6, § 4 (Stats. 1903, p. 737), and is therefore entitled to great weight in the construction of that amendment (*Knowles v. Yates*, 31 Cal. 82; 5 Cal. Jur. p. 603, § 36). The decision of this court in denying a rehearing in *Noel v. Smith*, supra, and *In re Wells*, 174 Cal. 467, 163 Pac. 657, were rendered before the amendment of 1918 to article 6, § 4 (Stats. 1917, p. 1956), to the Constitution readopting the same provisions with reference to the power and jurisdiction of District Courts of Appeal. The readoption of these provisions without change in effect adopted the interpretation theretofore placed thereon by the courts, which had construed the word "cause" to include original proceedings for mandamus. *People v. Webb*, 38 Cal. 467; *Hyatt v. Allen*, 54 Cal. 353; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; 5 Cal. Jur. p. 600, § 35.

[3] It follows that the District Court of Appeal had no jurisdiction to issue its writ of mandate until the expiration of 60 days from the judgment.

The demurrer to the petition is overruled, and the alternate writ of prohibition will remain in force until and including January 23, 1924.

We concur: **LAWLOR, J.; KERRIGAN, J.; LENNON, J.; SEAWELL, J.; WASTE, J.; MYERS, J.**

193 Cal. 17

WILBUR v. SUPERIOR COURT OF SUTTER COUNTY et al. (S. F. 10898.)

(Supreme Court of California. Jan. 9, 1924.)

1. Exceptions, bill of $\S$ 40(4)—Trial court may certify bill of exceptions after period fixed by statute.

The trial court had jurisdiction to certify engrossed bill of exceptions, though the orders of extensions granted by it extended the period of engrossment more than 30 days beyond the period fixed by the statute.

2. Exceptions, bill of $\S$ 59(1)—Court may direct incorporation of portion of record omitted from engrossed bill.

If it appears on hearing on settlement of proposed bill of exceptions that something has been omitted from the bill as engrossed, the trial judge, instead of dismissing the proceedings, should direct the incorporation therein of the portion of the record so omitted, and if

the order settling the bill of exception is uncertain, it should remedy the defect by order directing the addition of omitted portions of the record to the engrossed bill.

In Bank.

Mandamus by *Elmira J. Wilbur* against the Superior Court of Sutter County, and *K. S. Mahon*, Judge thereof, requiring the court to certify engrossed bill of exceptions. Writ granted.

Keyes & Erskine, of San Francisco, for petitioner.

Frank McGowan and *Blaine McGowan*, both of San Francisco, *Lawrence Schillig* and *A. H. Hewitt*, both of Yuba City, for respondents.

PER CURIAM. [1, 2] The bill of exceptions herein was settled and ordered engrossed in pursuance of a stipulation between the parties. The time for the engrossment of the bill of exceptions was extended from time to time, and was presented for certification to the trial judge more than 40 days after the order settling the bill. Upon application to the trial judge for certification of the engrossed bill of exceptions, objection to such certification was made by the opposing party, upon the ground that the engrossed bill did not conform to the order settling the proposed bill, for the reason that certain matter referred to in the order was not incorporated in the engrossed bill. The trial judge declined to certify to the bill, and made an order dismissing the proceedings for a bill of exceptions. The trial court had jurisdiction to settle the bill of exceptions, notwithstanding that the orders of extensions granted by it extended the period for engrossment more than 30 days beyond the period fixed by the statute. *McCarty v. Wilson*, 184 Cal. 194, 193 Pac. 578. Upon the hearing, if there was anything omitted from the bill as engrossed, the trial judge, instead of dismissing the proceedings, should have directed the petitioner to incorporate therein the portion of the record so omitted, and, if the order settling the bill of exceptions was uncertain, should have remedied the defect by its order directing the addition of omitted portions of the record to the engrossed bill tendered by the petitioner.

We have not passed upon the contentions of the parties with relation to what should be included in the engrossed bill of exceptions, but will leave that matter solely to the determination of the trial judge. A writ of mandamus will be issued, requiring the respondent judge to settle and certify the bill of exceptions.

$\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

193 Cal. 1

SPENCER v. ANDERSON et al.
(L. A. 7106.)

(Supreme Court of California. Jan. 9, 1924.)

1. Corporations ⚡259(1)—**Action by creditor for unpaid subscriptions rests in contract.**

An action by a creditor to recover unpaid subscriptions to corporate stock rests in contract and is in the nature of an equitable garnishment in aid of execution.

2. Corporations ⚡259(8)—**Creditor's bill to recover against holder of bonus or watered stock predicated on tort.**

The gist of an action in the form of a creditor's bill against the holder of watered or bonus stock of a corporation is the fraud and deceit of the corporation in falsely representing its corporate capital to have been paid in full, it being essential to recovery that plaintiff shall actually have been deceived and injured, and the amount of the recovery being the difference between the amount actually paid by the stockholder and that which would have been paid had the representations been true.

3. Corporations ⚡243(6)—**Creditor deceived and misled may recover against holder of bonus or watered stock, though corporation could not.**

The creditor of a corporation, who has been deceived and misled by false representations of the corporation that its stock had been paid in full, may recover against the holders of bonus or watered stock, though the corporation itself could not.

4. Corporations ⚡243(6)—**Holder of bonus or watered stock not liable unless he has participated in fraud.**

A creditor of a corporation cannot recover against the holder of bonus or watered stock unless the latter has participated in the fraud practiced by the corporation or has ratified it by accepting the stock with knowledge thereof.

5. Corporations ⚡243(6)—**Injury to creditor prerequisite to recovery against holder of bonus or watered stock.**

The creditor of a corporation cannot recover against the holder of bonus or watered stock until he has established actual injury from the fraud practiced by the corporation.

6. Fraud ⚡25—**Injury from fraud essential.**

Wrongful misrepresentations are not actionable unless they result in injury.

7. Corporations ⚡80(1)—**Purchaser of stock on false representations is injured as soon as purchase consummated.**

One induced to purchase corporate stock by misrepresentation of material facts is injured thereby as soon as the purchase is consummated.

8. Limitation of actions ⚡58(4)—**Limitations do not run against creditor's right of action against holder of watered stock until judgment against corporation returned unsatisfied.**

One extending credit to a corporation upon false representations does not suffer injury until he has been prevented from recovering his

debt or some portion thereof, and consequently his cause of action against the holder of watered or bonus stock does not accrue or the statute of limitations commence to run against it until a judgment has been recovered against the corporation and an execution returned nulla bona.

9. Limitation of actions ⚡58(4)—**Creditor's action for subscriptions does not accrue or limitations run against until judgment had against corporation and execution returned unsatisfied.**

A creditor's right of action against a stockholder for corporate subscriptions does not accrue, or the statute of limitations, Code Civ. Proc. § 343, begin to run against it, until judgment against the corporation has been had and an execution thereon returned unsatisfied.

10. Corporations ⚡262(2)—**Creditor may not recover on subscription contract where corporation barred from enforcing payment by limitations.**

Though an action by a creditor against stockholders for unpaid subscriptions may not be barred by limitations, recovery is precluded where the stockholders' contract prescribes particular dates for payment and such time has elapsed that the corporation's right to enforce payment under the subscription contract has been barred by limitations, since the creditor sues in the corporation's right by equitable assignment or subrogation.

11. Limitation of actions ⚡58(4)—**Where subscription contract silent as to terms of payment, call is necessary to set limitations in running.**

Where subscription contracts are silent as to the terms of payment, a call is necessary to fix the time of payment and set in running the statute of limitations in favor of the subscriber.

12. Limitation of actions ⚡58(4)—**Effect of call for subscriptions on running of limitations, stated.**

The sole purpose and effect of a call upon a stockholder for corporate subscriptions is to make absolute and fix the time for performance of his contract, and where same already contains an absolute promise to pay at a certain date, a call would add nothing to the obligation thereof nor serve to toll the statute of limitations already running in favor of the stockholder.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. B. Spencer against Alice H. Anderson, Francis L. Anton, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Dana R. Weller and C. F. Culver, both of Los Angeles, for appellant.

W. E. Lady, Leander O. Hatch, Henry O. Wackerbarth, Stutsman & Stutsman, Harry B. Washburn, Clarence L. Variel, William F. Adams, W. T. Craig, Denis Evarts Bowman, Muhleman & Crump, H. T. Morrow, A. R. T. Truex, S. F. Macfarlane, Henry Schaefer,

Jr., Roland H. Mulford, Mattison B. Jones, Overton, Lyman & Plumb, D. H. Laubersheimer, and Williams & Williams, all of Los Angeles, John B. Nichols, of Santa Ana, and John B. Haas, Flint & MacKay, H. S. MacKay, Jr., and Emery & Rehart, all of Los Angeles, for respondents.

MYERS, J. This is a creditor's action to recover on unpaid subscriptions to the stock of the Medical Building Corporation. The plaintiff alleged and proved himself to be a judgment creditor of the corporation, he having commenced an action against the corporation on July 12, 1915, and secured a judgment thereon on December 31, 1917, against the corporation, upon which judgment an execution was taken out and returned unsatisfied. The present action was begun April 25, 1918. The contract upon which the plaintiff's claim arose was entered into on March 12, 1912, upon which last-named date and prior to the execution of the contract the corporation was formed. The services were rendered pursuant to the contract, from the date of its execution until November 1, 1914. The plaintiff was at all times after the incorporation a director, vice president, and general manager of the concern, and his duties included assisting in the sale of stock and bonds. Although this proposition is disputed, we think that for the purposes of this appeal the defendants must all be regarded as having subscribed for stock and bonds, having placed their subscriptions between the 12th of July, 1912, and the 1st of February, 1913. They each signed an instrument consenting to the creation of a bonded indebtedness of the corporation of \$1,500,000, which instrument recited that the signers were stockholders. With a few exceptions, they made payments to the Medical Building Corporation upon their subscriptions after March 12, 1913. The corporation was organized to erect a building for the use of members of the medical profession, to cost about \$800,000. They signed contracts providing for the payment of a certain sum down and installments thereafter until the whole amount should be paid. The subscription contracts executed by the several defendants respectively differed somewhat in terms, but they all provided for the payment of the purchase price in specified installments at specified times, and the latest installment to mature under any of the contracts here in question fell due not later than November, 1913, which was more than four years prior to the commencement of this action. The following copy is fairly illustrative of all of the subscription contracts involved herein:

"Los Angeles, Cal., Feb. 20, 1913.

"Medical Building Corporation, 230 Consolidated Realty Bldg., Los Angeles, Cal.

"I here subscribe for \$500.00 par value of 6 per cent., second mortgage gold bonds, and

\$500.00 par value of the stock of the Medical Building Corporation, for which I agree to pay \$50 cash and \$50 each month for the next 9 months.

"Name: Randall Hutchinson.

"Address: 330 Bradbury Bldg., L. A. Cal.

"Make all checks or drafts payable to Medical Building Corporation.

"Note: Terms may be changed to 10 per cent. cash and balance April 1st."

The subscription in each instance called for not less than one share of stock and an equal number of bonds at a unit price of \$100 for each share of stock and one bond. None of the defendants had completed payments under their agreements, although the installments were long past due. At the close of the plaintiff's case a motion for nonsuit was made by the defendants and granted, and judgment entered pursuant thereto.

The respondents maintain that the trial court was justified in its ruling for the following reasons: That the action is barred by the statute of limitations; that the plaintiff's case was incomplete without proof of tender of stock and bonds; that the plaintiff had knowledge of the circumstances existing and surrounding the making of all the subscriptions, and therefore cannot avail himself of the right of an ordinary creditor against stockholders for whose stock the corporation has not received full value; that many of these defendants were not in fact subscribers of the Medical Building Corporation, but of the Los Angeles Medical Association Building Company, which preceded the former corporation, and that such as subscribed for Medical Building Corporation stock did so after the issuance of the stock; that the judgment against the Medical Building Corporation is void because its charter had been forfeited through nonpayment of its corporation tax.

[1] In considering the questions presented by the defense of the statute of limitations, it is important to keep in mind essential differences between actions by a creditor of a corporation to recover upon the stockholders' unpaid subscriptions, on the one hand, and actions by such a creditor to recover from stockholders who have received bonus or watered stock, upon the other hand. Some of these differences are clearly pointed out in *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 194 Pac. 11, 12 A. L. R. 437. Actions of the first class sound exclusively in contract, while the gist of the actions of the second class is tort. The two classes of actions present many points of similarity, and the failure to distinguish between them has led to unfortunate confusion, particularly in the earlier cases. Both are creditors' bills in equity, both are actions by a creditor of a corporation, seeking the aid of equity for the satisfaction of his claim out of assets not reachable by the ordinary processes of the law, and in both (but for different reasons) the plaintiff is re-

quired to allege and prove the recovery of a judgment against the corporation and the return of execution nulla bona (or that the corporation has become insolvent). But here the similarity ceases.

The cause of action to recover upon unpaid subscriptions rests in contract as to every element thereof. It is in the nature of an equitable garnishment in aid of execution. By it the creditor seeks to recover, not upon a debt due to him, but upon a debt due to his debtor. He seeks the interposition of equity to aid in the execution of his judgment by applying to the satisfaction thereof assets of the judgment debtor which consist of debts owing from third persons to such judgment debtor. In so doing he places himself in the shoes of the judgment debtor and prosecutes the action against the debtors of the latter, not in his own right, but in the right of the judgment debtor—the corporation.

[2-8] The creditor's bill against the holder of watered stock, on the other hand (i. e., one who has received stock from the corporation and paid therefor ostensibly in full, but in property at a fraudulently excessive valuation), proceeds upon entirely different principles. Here, though the creditor's claim against the corporation may rest in contract, his claim as against the stockholder rests in tort. The gist of his action against the latter is the fraud and deceit of the corporation in falsely representing its corporate capital to have been paid in full when it was not. *Harrison v. Armour*, 169 Cal. 787, 790, 147 Pac. 1166; *Rhode v. Dock-Hop Co.*, supra. In this action the creditor does not stand in the shoes of the corporation and he is not suing to recover upon a claim of the corporation against the stockholder. He may recover, though the corporation have no such claim. His action is not upon a debt due from the stockholder to the corporation. It is to recover compensation for a wrong done directly to him by the corporation acting for the stockholder and participated in by the latter. The gist of the creditor's action is that he was induced to extend credit to the corporation by the false representations of the corporation respecting the amount paid in by the stockholder to the corporate capital, and the measure of his recovery is the same as in ordinary actions for damages for deceit, namely, the difference between the amount which has actually been paid in by the stockholder to the corporate capital and the amount which would have been paid in had the representations been true. It follows that the creditor cannot recover in this class of cases unless he was actually deceived by the misrepresentations. If he in fact knew that the stock was watered at the time he extended credit to the corporation, he cannot claim to have been misled by the misrepresentations, and therefore cannot recover. *Sherman v. Harley*, 178 Cal. 584, 174 Pac.

901, 7 A. L. R. 950; *Sherman v. S. K. D. Oil Co.*, 185 Cal. 534 546, 197 Pac. 799. It also follows that a creditor who has been so deceived and misled may recover in this class of cases against the stockholders, even though the corporation itself could not. *Rhode v. Dock-Hop Co.*, supra, at page 379 of 184 Cal. It also follows that a creditor cannot recover against the holder of bonus or watered stock unless the latter has participated in the fraud, or has ratified it by accepting the stock with knowledge thereof. *Rhode v. Dock-Hop Co.*, supra; *Sherman v. S. K. D. Oil Co.*, supra. It also follows that a creditor cannot recover in this class of cases unless and until he has been actually injured. No matter how wrongful a misrepresentation may be, it is not actionable unless and until it results in injury. One who is induced to purchase stock in a corporation by misrepresentation of material facts is injured thereby as soon as the purchase is consummated, because the stock which he has received in return for his money or property is worth less than it would have been had the representations been true. But one who merely extends credit to a corporation upon the faith of such misrepresentations, does not thereby become interested in the assets or welfare of the corporation or the value of its shares. He is interested only in the collection of his debt when due. It matters not how culpable the misrepresentations may have been by which he was induced to extend credit, nevertheless, if his claim is paid in full at maturity, he is not injured thereby, and therefore has no right of action thereon. It follows that such a creditor suffers no injury, and therefore has no cause of action unless and until he is prevented from recovering his debt or some portion thereof. If and when that occurs, his cause of action against the stockholder comes into being. That time occurs, in contemplation of law and under the rules of equity jurisprudence, when a judgment has been recovered against the corporation and execution returned nulla bona (or when the corporation has become insolvent and thus unable to pay its debts). Therefore the statute of limitations does not commence to run against the right of action of a corporate creditor to recover from the holder of bonus or watered stock until he has recovered judgment against the corporation and finds no corporate assets from which to satisfy it. In some states the insolvency of the corporation will also start this statute running, but such seems not to be the rule in California. *Sherman v. S. K. D. Oil Co.*, supra.

[9] Returning now to the case wherein, as at bar, the corporate creditor is seeking to recover upon an unpaid subscription of a stockholder, we find an entirely different situation. "The foundation of this cause of action was defendant's contract to pay the

residue of his subscription [as required] * * * " (as specified in his contract). *Glenn v. Saxton*, 68 Cal. 353, 358, 9 Pac. 420. It is clearly an action upon contract. *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741. "The object of this suit is to compel the corporation against whom the judgment was recovered to satisfy the same out of its assets. * * * " *Baines v. Babcock*, 95 Cal. 581, 591, 27 Pac. 674, 676 (29 Am. St. Rep. 158). "All of the California cases sustaining judgments of foreign tribunals fixing a stockholder's indebtedness for unpaid subscriptions go upon the principle that such subscriptions are part of the assets of the corporation. * * * " *Miller v. Lane*, 160 Cal. 90, 93, 116 Pac. 58, 60. While the obligation thus sought to be enforced rests wholly in contract, there is no privity between the corporate creditor and the stockholder (*Matteson, etc., Co. v. Conley*, 144 Cal. 483), and the creditor must therefore resort to equity for the enforcement of the obligation. But equity will not intervene until the creditor has exhausted his remedies at law, so he is required to first obtain a judgment against the corporation and the issuance of an execution thereon which remains unsatisfied. His right of action in equity therefore does not arise until the recovery of such judgment and the return of such execution, and the statute of limitations thereon (Code Civ. Proc., § 343) runs from that time. *Sherman v. S. K. D. Oil Co.*, supra, 185 Cal. at page 545, 197 Pac. 799.

[10] The present action was commenced within less than a year after judgment was obtained against the corporation; therefore the statute of limitations has not run against the right of the plaintiff to commence and maintain this action. But this conclusion does not dispose of the contention made by the defendants herein. The plaintiff is here seeking to apply to the satisfaction of his judgment certain corporate assets consisting of choses in action of the corporation against its stockholders. Briefly put, he is seeking to collect certain debts alleged to be owing from the defendants to the corporation. This raises the question whether or not such debts exist. If they never existed, or if they once existed but have been satisfied, of course the creditor cannot recover upon them, even though his right to maintain his creditor's bill be unchallenged. *San Bernardino Co. S. Bk. v. Denman*, 186 Cal. 710, 200 Pac. 606. The creditor sues as the equitable assignee of the judgment debtor, and it would seem to follow that any defense which would be good as against the latter should be equally good against the former. This, in effect, is the contention of the respondents herein. They assert that the statute of limitations has run—not against the right of action of the plaintiff to maintain this creditor's bill—but against the right of the corporation to collect upon their subscription contracts,

which is the right the plaintiff is here seeking to enforce. We think this contention must be upheld. Each of the subscription contracts upon which the plaintiff is seeking to recover was an express written contract to pay money at times certain, and each had been in default more than four years at the time this action was commenced. This fact would afford a complete defense to an action by the corporation upon these contracts, and we see no good reason why it should not be equally available as against the plaintiff who sues in the corporation's right by equitable assignment or subrogation.

This precise question does not appear to have been decided in this state, but there are decisions which foreshadow its solution. In *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70, it was held that the rights of a judgment creditor seeking to enforce the subscription of stockholders to the corporation as its debtors cannot in general be greater than those of the corporation if there is no fraud, actual or constructive, and no facts showing an estoppel of the stockholders as against the creditor. In *San Bernardino Co. S. Bk. v. Denman*, supra, 186 Cal. at page 716, 200 Pac. at page 609 this court said:

"The suit of a creditor to have the stock subscriptions applied on his debt is merely one instance of a resort to the equitable remedy of a creditor's bill; a proceeding in equity to reach assets of the debtor which cannot be got in an ordinary action at law. The creditor is seeking for assets of the debtor, that is, money or credits due to the debtor. He cannot reach anything that does not constitute assets of such debtor. His standing in the court must always be in the shoes of the debtor, and he can obtain no greater relief than his debtor could obtain, at least to this extent, that he cannot force payment from one who is not the debtor of his debtor. A valid obligation must exist in favor of the debtor against the party sued, or the creditor's bill will not lie against him. Hence, if the obligation once existed, but has lawfully been paid before the proceeding on the creditor's bill attached to it, the bill must fail."

That in a creditor's bill to enforce unpaid subscriptions the defense may be available to a stockholder that the statute has run as against the corporation upon his subscription contract has been repeatedly recognized in this state. *Glenn v. Saxton*, 68 Cal. 353, 358, 9 Pac. 420; *Vermont Marble Co. v. Deelez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441; *Miller v. Lane*, 160 Cal. 90, 93, 116 Pac. 58; *Sherman v. S. K. D. Oil Co.*, supra.

[11] In each of the cases last cited it was held that the statute would not commence to run in favor of the stockholders until the making of a call either by the directors or by a court of equity upon a creditor's bill. Those were all cases wherein the subscription contracts were silent as to the terms of payment, and a call was therefore necessary to fix the

time of payment and put the subscriber in default. In such case the liability of the subscriber is conditional and becomes absolute only when the call is made. As was said in *Miller v. Lane*, supra:

"The stockholders are bound to pay only when a proper call has been made for the amounts promised by their subscriptions, such call setting the statute of limitations in motion."

Obviously, where the subscription contract itself fixes the time of payment at a time certain and that time has passed, the making of a call thereafter would be but a work of supererogation. See *Horseshoe Pier, etc., Co. v. Sibley*, 157 Cal. 442, 446, 108 Pac. 308.

[12] This last consideration furnishes the answer to appellant's contention that the corporation still possessed the power to levy assessments under sections 331, 332, and 349 of the Civil Code, and that the continued existence of that power prevented the statute from running against it in favor of the stockholders. Respondents reply that the corporation here in question never possessed this power because one-fourth of its stock was never subscribed. But, aside from this, the sole purpose and effect of a call upon the liability of a subscriber for an unpaid subscription is to make absolute that which was conditional and to fix the time for the performance thereof. When the subscription contract contains an absolute promise to pay at a time certain, the making of a call after that time could add nothing to the obligation thereof, and by the same token it would not serve to toll the statute already running thereon.

The decisions of the courts are not in complete accord upon this question, but the overwhelming preponderance of authority is in support of the following conclusions as to the application of statutes of limitation to creditors' bills in equity seeking to enforce the liability of stockholders as upon unpaid subscriptions: (1) That where the liability is predicated upon the issuance of bonus or watered stock, the statute does not begin to run until the recovery of judgment against the corporation and return of execution *nulla bona* (or in some cases upon the notorious insolvency of the corporation); (2) that where the liability is predicated upon the issuance of stock which is only partly paid and does not purport to be otherwise, the statute begins to run in favor of the stockholder, as against the corporation and also as against the corporate creditors (in the absence of circumstances of fraud or estoppel), at the times when the subscription payments fall due; that when the subscription contract is silent as to the times of payment of the balance (or provides that it is payable upon call), the statute does not begin to run until a call is made either by the directors or by a court of equity (or in some cases upon insolvency of the corporation); that when the

subscription contract is express and unconditional and the terms of payment are therein specified, the statute begins to run upon each installment thereof as the same falls due.

"There are some early decisions and some dicta to the effect that subscribers for stock in a corporation cannot oppose the statute of limitations to a claim in equity by creditors to have the stock paid up, on the ground that, before payment, the stockholders are chargeable with a trust in favor of creditors, and this trust 'is a continuing subsisting trust and confidence to which the statute of limitations has no application.' According to the decided weight of authority, however, unpaid subscriptions simply create, as to the amount due thereon, the relation of debtor and creditor between the subscribers and the corporation, and if the statute of limitations runs against an action by the corporation to collect a subscription, as it may, it also runs, in the absence of fraud, against a suit in equity by creditors to compel payment, or an action by a receiver or assignee." *Fletcher, Cyclopaedia Corporations*, vol. 6, p. 7133.

"If the subscription is payable in installments at specified times, so that no call is necessary, the statute commences to run as to each installment from the time when it becomes due.

"In some jurisdictions it is held that the right of action does not accrue, and hence that the statute does not commence to run against it, until the corporation is shown to be insolvent by the recovery of a judgment and a return of *nulla bona*, and that it does begin to run from that time."

Id., p. 7139.

The cases which are relied upon as holding that the statute does not run in such case until judgment and execution against the corporation do not in reality so hold. Upon analysis, they will be found to group themselves into three classes: (1) Cases involving bonus or watered stock and therefore resting in fraud. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Montgomery Iron Works v. Roman*, 147 Ala. 434, 41 South. 811; *Vaughn v. Ala. Nat. Bank*, 143 Ala. 572, 42 South. 64, 5 Ann. Cas. 665; *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 South. 210; *King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Christensen v. Colby*, 43 Hun. 362; *Christensen v. Quintard*, 36 Hun. 334; *Sherman v. S. K. D. Oil Co.*, 185 Cal. 534, 197 Pac. 799; *Rhode v. Dock-Hop Co.*, 184 Cal. 367, 194 Pac. 11, 12 A. L. R. 437; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *J. F. Lucey Co. v. McMullen*, 178 Cal. 425, 173 Pac. 1000; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. (2) Cases involving unpaid subscriptions, where the subscription contract was silent as to the time of payment, or provided for payment upon call and no call had been made. *Curry v. Woodward*, 53 Ala. 376; *Cherry v.*

Lamar, 58 Ga. 541; McGinnis v. Barnes, 23 Mo. App. 413; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 413; Wilkins v. Worthen, 62 Ark. 401, 36 S. W. 21; Washington Sav. Bk. v. Butchers' & Drovers' Bk., 107 Mo. 133, 17 S. W. 644, 28 Am. St. Rep. 405; Appeal of Mack (Pa.) 7 Atl. 481; Union Sav. Bk. v. Leiter, 145 Cal. 697, 79 Pac. 441; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319. (3) Cases involving a peculiar statutory liability and governed by statutory provisions. Barrich v. Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; Leighton v. Leighton Lea Ass'n, 146 App. Div. 255, 130 N. Y. Supp. 935; Miller v. Lane, 160 Cal. 90, 116 Pac. 58.

There are many cases holding that where the subscription is unconditionally payable at specified times the statute runs from those times. See cases cited in note 61 of 6 Fletcher, Cyc. Corp., p. 7139, 14 C. J. 1102, note 84, and 3 Clark & Marshall, Private Corporations, § 802. No case to the contrary has been cited herein, and we have found none to the contrary with the single exception of the case of Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74, decided in 1851. In that case the court concluded, erroneously as we think, that the "trust fund doctrine" was applicable thereto and operated to prevent the statute from running in favor of stockholders as against corporate creditors. In the absence of circumstances of fraud (actual or constructive) or estoppel, there is no real trust relationship between the stockholders of a corporation and its creditors. The trust fund doctrine has been generally rejected in the later decisions. 2 Pomeroy, Eq. Rem. (2d Ed.) § 2319, p. 5142; 3 Clark & Marshall, Private Corporations, § 768, and cases there cited. Whether that doctrine still obtains in this state or not, it is at any rate not now to be regarded as modifying or adding to the established rules of equity jurisprudence for relief upon the ground of fraud. Rhode v. Dock-Hop Co., supra, 184 Cal. at page 377, 194 Pac. 11, 12 A. L. R. 437.

It has been suggested that the conclusions here reached do violence to the spirit and purpose of the law and will have the effect of reducing the rights of corporate creditors to little more than a sophistry. The same suggestion was directed with equal force and with equal validity against the interpretation of section 359 of the Code of Civil Pro-

cedure, which resulted in "an anomalous condition of affairs," whereby the statute might run against the stockholders' liability imposed by the Constitution itself, even before the creditor's right of action thereon could arise. Hunt v. Ward, 99 Cal. 612, 615, 34 Pac. 335, 37 Am. St. Rep. 87. The answer there made was that the situation so complained of "would be the result of the voluntary act of the creditor done in the face of the law." The same answer applies with equal validity to the criticism here made. If a creditor elects to extend long-term credits to a corporation upon the faith of its unpaid subscriptions, knowing them to be unpaid, and neglects to ascertain the terms of the subscription contracts, the result which follows may be justly ascribed to his own act; a fortiori in the case where he extends such credit with actual knowledge of the terms of subscription. The record discloses herein that the plaintiff, who was at all times vice president and manager of the corporation, had an intimate personal knowledge of the contracts here sued upon; that, in fact, he personally participated in procuring many of them from the defendants. It is suggested that the stockholders could interpose delays in the proceedings to obtain a judgment against the corporation, and by appeals to the Supreme Court could delay the entry of final judgment until the statute had run upon their subscriptions, even against the will of the creditor. But the taking of an appeal does not stay the execution of a judgment unless a bond is given which is adequate to secure the judgment creditor.

We conclude that the corporate creditor has four years after the recovery of judgment against the corporation and return of execution thereon within which to commence his action in equity to subject the corporate assets to the payment of his judgment; but in so doing he can (in the absence of fraud or estoppel) realize upon only such assets as would be enforceable at the suit of the corporation itself.

The foregoing conclusions render it unnecessary to give consideration to the various other contentions submitted by respondents in support of the validity of the judgment below.

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

193 Cal. 15

LUCKEHE v. MAHON, Judge. (S. F. 10960.)(Supreme Court of California. Jan. 9, 1924.
Rehearing Denied Feb. 6, 1924.)**1. Appeal and error §571—Mandamus to trial judge to compel certification of transcript on appeal denied.**

Where there was evidence at a hearing to have a transcript certified for appeal justifying the trial judge in believing that attorney for appellant was in fault in perfecting the record, the Supreme Court could not say that the judge abused his discretion in refusing to certify the transcript, and a petition for a writ of mandamus to compel him to certify it was denied.

On Application for Rehearing.**2. Appeal and error §571—Newly discovered letter and affidavit from court reporter not considered on mandamus to compel judge to certify transcript.**

Upon petition for mandamus to trial judge to certify a transcript, a newly discovered letter and affidavit from the court reporter stating that he had filed the transcript and had forgotten that he had so written could not be considered since they should be presented first to respondent judge for action.

In Bank.

Petition for a writ of mandate by Charles J. Luckehe against K. S. Mahon, Judge of the Superior Court of Sutter County, to compel him to certify a reporter's transcript. Writ denied.

Clinton W. Johnson, of Gridley, for petitioner.

A. H. Hewitt, of Yuba City, for respondent.

PER CURIAM. This is a petition for writ of mandamus to compel the respondent to certify to a reporter's transcript of the trial prepared under the provisions of section 953a et seq. of the Code of Civil Procedure. The transcript was prepared and paid for within time and after due and legal notice requiring its preparation. Either two or three copies of the transcript were prepared by the reporter. Two of these were handed to the attorney for the petitioner. The petitioner claims that he relied upon the reporter to file the other copy of the transcript with the clerk, as provided by law. Nothing was done by the respondent in connection with the certification of the record until after a motion to dismiss was made in this court. This motion was at first

granted, but the petitioner, claiming that he had received the notice of motion to dismiss only the day before it came on for hearing, and that there was then pending a proceeding for the settlement of the record, asked for a rehearing, which was granted, and, upon the hearing of the motion to dismiss, it was denied upon the ground that it then appeared there was a proceeding pending for the settlement of the record in the trial court. Subsequently the trial judge considered the matter of the certification of the transcript, and affidavits and testimony were taken upon the question, and after a hearing he dismissed the proceedings for the settlement of the record, and declined to certify to the transcript. This petition was brought to compel the trial judge to certify to the transcript. His order refusing to certify the record requires us to consider that the trial judge resolved all conflicting statements in the testimony and exercised his discretion in favor of the respondent in the appeal. There is evidence which justified the trial court in believing that the reporter furnished the transcript to the attorney upon the promise or expectation that the attorney would file the transcript with the clerk. If this testimony is true, as the court in effect held, of course, the neglect and delay in perfecting the record was the fault of the petitioner. We cannot say that it was an abuse of discretion under the circumstances to refuse to certify the transcript. Petition denied.

On Application for Rehearing.

The petitioner bases his application for a rehearing upon the ground that since our decision he has discovered a letter from the court reporter, the original of which he files with his petition, in which the reporter states under date of May 22, 1923, that he has filed the transcript in Luckehe v. Reclamation District, and supplements this letter with an affidavit of the court reporter that he had forgotten that he had so written. The letter and affidavit cannot be considered by us, for the reason that the petition here is necessarily based upon the proposition that the trial court improperly refused to certify the transcript under the facts as presented to him. The evidence now presented to us should be presented to the respondent for whatever action may be appropriate.

Petition denied.

64 Cal. App. 594

**DANLEY v. SUPERIOR COURT IN AND
FOR MERCED COUNTY et al.**
(Civ. 2763.)

(District Court of Appeal, Third District,
California. Dec. 1, 1923. Hearing Denied
by Supreme Court Jan. 28, 1924.)

**1. Injunction ☞164—Injunction without notice
not vacated or modified by court after losing
jurisdiction.**

Though Code Civ. Proc. § 532, provides that, if an injunction is granted without notice, the person enjoined may on reasonable notice apply for its dissolution or modification; if the court in which it was obtained has lost jurisdiction of the subject-matter, then he is not entitled to hearing.

**2. Appeal and error ☞447—After appeal, trial
court without jurisdiction over injunction.**

In view of Code Civ. Proc. § 946, providing that when appeal is perfected it stays proceedings in the court below, where the purpose of an action was injunctive relief which trial court denied and after an order reinstated an original restraining order appeal was taken from the order denying application for temporary injunction, the trial court was without jurisdiction to entertain a motion to vacate the prior order.

Application for writ of prohibition by L. E. Danley against the Superior Court in and for the County of Merced and others. Writ granted.

James F. Peck and Robert L. McWilliams, both of San Francisco, for petitioner.

Edward F. Treadwell, of San Francisco, for respondents.

PLUMMER, J. This is an application by the petitioner for a writ of prohibition commanding and directing the respondent, the superior court of the county of Merced, J. J. Trabucco, judge presiding, from further proceeding with the hearing of or disposition of a certain motion made by the other respondents above named to vacate, set aside, and annul an order theretofore made reinstating a temporary restraining order pending the determination on appeal of an action prosecuted in said court entitled "L. E. Danley, Plaintiff, v. Merced Irrigation District, C. E. Kocher, L. L. Burchell, E. V. Givens, George Bloss, Jr., C. L. Garvin and E. F. Treadwell, Defendants."

The facts involved are in substance as follows: That on or about the 11th day of September, 1923, the petitioner filed a complaint in the superior court of Merced county having for its purpose the restraining of the Merced irrigation district and its directors from making or entering into certain contracts relating to water and water rights set out in the complaint; that at the time of the filing of the complaint the court issued a temporary restraining order and an order

to show cause why a temporary injunction should not be issued pending the trial of the action; that at the time set for the respondents to show cause the defendants in said action, the respondents in this, appeared and filed demurrers to the plaintiff's complaint, which demurrers were subsequently sustained by the court without leave to the plaintiff to amend his complaint in said action; that the order of the court sustaining the demurrers of the defendants in the action referred to was made and entered on the 28th day of September, 1923. The court also at said time denied the plaintiff's petition for a temporary injunction. On the 29th day of September, 1923, on the application of the plaintiff in said action, the petitioner in this, the court made an order reinstating the original restraining order pending the appeal or appeals by the plaintiff from the order of the court denying the plaintiff's application for a temporary injunction and from any judgment that might be entered in said action following the court's order sustaining the defendants' demurrers to the plaintiff's complaint. Thereafter and on the 29th day of September, 1923, the said superior court made and entered its judgment of dismissal of the action herein referred to, based upon its order theretofore made sustaining the defendants' demurrers to plaintiff's complaint, without leave to amend, immediately after the entry of the judgment herein referred to, and on the same day the plaintiff duly served and filed his notice of appeal from the order denying his application for a temporary injunction and also from the judgment of dismissal entered after sustaining the defendants' demurrers. The order reinstating the restraining order pending the appeals above mentioned was made without notice. On the 9th day of October, 1923, the defendants in the action referred to, the respondents in this, served upon the plaintiff in said action the petitioner in this, a notice of motion to set aside the order reinstating the restraining order herein referred to, and on the 16th day of October, 1923, moved said court to vacate such order. At the time set for the hearing of this latter motion, the petitioner herein appeared by his attorneys and objected to the consideration of said motion on the ground that the court had no jurisdiction to hear the same; that, notwithstanding said objection so interposed, the superior court proceeded to entertain said motion, and will, unless restrained by the order of this court, proceed to pass upon the same.

[1] On the part of the petitioner it is here contended that, immediately upon filing his notice of appeal in the action referred to, the trial court was immediately divested of jurisdiction to entertain or hear any motion pertaining to or to take any proceedings what-

soever in relation to the matters embraced in said action or the orders appealed from. On the part of respondents it is contended that, as the reinstatement order was made without notice, the motion to vacate comes within the provisions of section 532 of the Code of Civil Procedure, which reads:

"If an injunction is granted without notice to the person enjoined, he may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the same."

The literal reading of this section would seem to support the contention of the respondents, but, in order to correctly interpret it, it must be read in the light of the circumstances to which the wording of the section is to be applied. If the court in which the original injunction or restraining order has been obtained or the judge who issued the order has lost jurisdiction over the subject-matter involved, then the fact whether the injunction was or was not issued upon notice cannot be held to entitle the moving party to a hearing. The correct interpretation would seem to be that so long as the court or judge issuing the order has jurisdiction to alter or modify the same, the party against whom the injunction runs, and which was issued without notice, may, upon notice, move that the injunction be dissolved or the restraining order set aside.

[2] Did the trial court on either the 9th or the 16th day of October, 1923, have any jurisdiction over the injunctive matters sought to be litigated in the action theretofore instituted by the petitioner against the respondents in the action hereinbefore referred to? Section 946 of the Code of Civil Procedure, so far as material upon this hearing, reads as follows:

"Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein.
* * *

This language refers specifically to the matters which are embraced in the orders and judgment appealed from, and not merely matters which may appear upon the same sheet of paper; that is, the real substance matter of the action. A reading of the complaint shows that the action heretofore referred to instituted by the petitioner against the respondents had for its purpose injunctive relief. The sole and entire object of the action sought to be attained was to prevent, enjoin, and restrain the respondents, as directors of the Merced irrigation district, from entering into certain contracts involving the Merced irrigation district and placing upon said district certain financial obligations and responsibilities set out in the

complaint. No other relief is sought. It necessarily follows that the whole subject-matter of injunctive relief was embraced in the orders and judgment of the trial court in denying the plaintiff the relief prayed for and in dismissing his complaint. The restraining order, though so called, is but a temporary injunction under another name, and calls into exercise the power of the superior court to maintain the status quo for a specific period.

The whole power of a superior court to reinstate and continue in force a restraining order pending appeal, whether that order be incorporated into a judgment denying either a temporary or perpetual injunction or made in a separate order concurrently with or preceding the entry of the judgment is fully considered in the case of *City of Pasadena v. Superior Court*, 157 Cal. 781, 109 Pac. 620, 21 Ann. Cas. 1355. It is there set forth distinctly that this equitable power exists and may properly be exercised by trial courts whenever in the judgment of the trial court its discretion should be used to maintain the status quo pending an appeal from its judgment in an action where an injunction is sought and denied. In *Mulvey v. Superior Court*, 22 Cal. App. 514, 135 Pac. 53, the same question was considered, and it was again held that such power existed, and it was also further held that, after such restraining order had been made and a notice of appeal filed, the jurisdiction of the trial court to entertain any motion in respect to such injunctive order was suspended; the language of the court being:

"There can be no question but that the court possessed the inherent power, notwithstanding its order and judgment dismissing the action, to make a renewal order the effect of which was to preserve the rights of all the parties until the appeal was determined. When the appeal was perfected the effect thereof was to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to matters embraced therein until the appeal is determined"—citing *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473.

There, as here, the revival order was made previous to the entry of the judgment dismissing the plaintiff's action. No significance was given by the court to this fact. The fact that no specific appeal was taken from the renewal order, and the further fact that the renewal order is not mentioned in the order denying the injunction sought nor in the judgment dismissing the petitioner's action, does not take the renewal order from under the provisions of section 946 of the Code of Civil Procedure relating to appeals. That section relates, in so far as it stays proceedings in the court below, not to the particular orders that may have been made, but to all proceedings in the court below

upon the judgment or order appealed from and the matters embraced therein. It can scarcely be argued that the right of plaintiff to an injunction in the proceeding instituted by him was involved and embraced in the judgment dismissing the same, and the same is true concerning his right to an injunction whether called a restraining order, a temporary injunction, or a perpetual injunction. And while it is true as contended by the respondents, that the opinion and judgment of another department of the District Court of Appeal is not binding upon this court, nevertheless such opinion and judgment has its persuasive effect, and if we agree both in the reasoning advanced and the conclusion reached it is our privilege and our duty to adopt the same. The reasons advanced in the two cases to which we have referred and the application made of the principles involved to the facts in the case of *Mulvey v. Superior Court*, supra, which are identical with those presented to us, we think conclusively disposes of the questions presented to us for consideration. We hold that, after filing of the notices of appeal in the action to which we have referred, the superior court of Merced county was thereupon divested of jurisdiction to entertain a motion made by the respondents in this action to vacate the renewal order referred to in this opinion and that a writ of prohibition should issue; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 600

HATFIELD v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN JOAQUIN COUNTY. (Civ. 2698.)

(District Court of Appeal, Third District, California. Dec. 3, 1923.)

1. Appeal and error §1011(1)—**Determination of conflict of testimony for trial court.**

Where there was conflict in material testimony, its determination was for the trial court.

2. Executors and administrators §315(4)—**Relying on erroneous advice on question of law held excuse for mistake in allowing distribution.**

Where moneys were deposited by decedent and G. in their names, under agreement that the deposits were payable to either, or to the survivor, and on decedent's death there was evidence to support conclusion that G. was misled to his prejudice by erroneous advice of an attorney that the moneys belonged to decedent, G. was excusable for having mistakenly allowed it to be distributed as decedent's estate.

3. Executors and administrators §315(4)—**Client justified in relying on advice of attorney.**

Where moneys deposited in a bank by decedent and G. were payable to either, or to their survivor, and on decedent's death G., in

reliance on advice of his attorney that the moneys belonged to decedent, permitted distribution as part of her estate, G. was justified in relying on such advice until convinced to the contrary.

4. Executors and administrators §315(4)—**Vacating decree of distribution not abuse of discretion.**

Where moneys were deposited by decedent and G. payable to the order of either, or their survivor, and on decedent's death G., relying on advice of attorney, permitted distribution of the moneys as part of decedent's estate, where the fee allowed the attorney from the estate had not been paid, there was no abuse of discretion in setting aside decree of distribution, even though property of the estate had been delivered before motion was made to set decree aside.

In the matter of the estate of Henrietta Kaiser, deceased. Application for writ of review by V. L. Hatfield against the Superior Court of California in and for the County of San Joaquin. Writ denied.

Martin I. Welsh and W. H. Hatfield, both of Sacramento (J. T. McMenamin, of Sacramento, of counsel), for petitioner.

Johnson & Lemmon, of Sacramento, for respondent.

FINCH, P. J. This is an original application for a writ of review whereby petitioner prays for the annulment of an order of the respondent court setting aside its decree settling the final account and distributing the estate of Henrietta Kaiser, deceased.

Petitioner was the attorney for George Kaiser, the executor of decedent's last will. As such attorney, petitioner conducted all the legal proceedings in the administration of the estate and prepared and filed a final account and petition for distribution, which the executor duly verified. The final account credits the executor with \$802.69 as attorney fees and the same amount as commissions of the executor. These commissions and fees were computed upon the value of the estate as set forth in the final account, consisting of cash in the sum of \$27,169.83 and other property of the value of \$100. The court settled the account as presented and distributed the estate, in accordance with the terms of the will, in equal shares to George and Alexander Kaiser, the sons of decedent.

The decree of distribution was entered June 5, 1922. On the 6th day of October, 1922, George Kaiser and Alexander Kaiser filed notice that on the 16th of that month they would move the court for an order setting aside the decree settling the final account and distributing the estate on the ground that the same was made and taken against them "through their mistake, inadvertence, surprise and excusable neglect." Accompanying the notice of motion, there was

filed the affidavit of George Kaiser, stating that the moneys set forth in the final account and petition for distribution as a part of the estate of decedent had been deposited by Henrietta Kaiser and affiant in several banks "in the names of the said Henrietta Kaiser and George Kaiser under agreements entered into between said Henrietta Kaiser and affiant and the said several banking institutions that the said sums of money so deposited and its accumulations were deliverable or payable to either the said Henrietta Kaiser or affiant or to the survivor of them"; that after the death of decedent and prior to the filing of the petition for probate of her will, affiant consulted petitioner herein relative to the property of decedent and fully informed him that said bank accounts "were joint accounts standing in the names of affiant and said decedent and payable to either or to the survivor"; that petitioner herein thereupon "advised affiant that the said bank accounts belonged to the estate of said Henrietta Kaiser, * * * deceased, and must be probated upon in order that the title thereto be finally passed to the heirs of said decedent; that affiant relying upon said advice of said V. L. Hatfield employed and engaged the said V. L. Hatfield as his attorney for the purpose of probating the estate of said decedent"; that in reliance upon said advice affiant included said moneys as a part of said estate in the petition for the probate of the will, the inventory and the final account and petition for distribution; that affiant has not paid the sums allowed as attorney's and executor's fees; and that the moneys deposited in said bank accounts have been the property of affiant at all times since the death of decedent. At the hearing of the motion to set aside the decree, George Kaiser testified: "I placed all my money into a joint tenancy agreement with my mother, so that in case of my death she would be—it would go absolutely to her, and we had the agreement, and she placed hers the same way. * * * She * * * went into this joint tenancy agreement with the sole intent that I became sole possessor of her money at her death;" that all the money which was listed as the property of the estate had been deposited by decedent out of her own funds; that the witness had placed none of his own money into those particular deposits, but that decedent and the witness had other joint bank accounts in which the witness had deposited his own moneys. The testimony of the witness was corroborated by certain deposit cards showing joint accounts in various banks. The evidence was such as to warrant the court in concluding that the moneys in these joint accounts passed to George Kaiser on the death of his mother.

Alexander testified that after his mother's death he and George Kaiser sought the advice of petitioner relative to the inheritance

tax due the state on the moneys in the joint accounts which passed to George upon his mother's death, gave him the deposit books, and stated the facts relative to the deposits; that petitioner advised them that such moneys did not so pass, but that they were a part of the mother's estate; that, having implicit confidence in petitioner, they followed his advice and employed him as attorney for the administration of the estate; that in December, 1921, the witness became convinced that petitioner's advice was erroneous and took the matter up with him; that petitioner informed the witness that the money "could not be withdrawn from the estate"; and that the witness then informed George Kaiser that petitioner said "it could not be taken out, and we might as well let it ride to the end of the term." After the witness had consulted petitioner in December, as stated, the latter wrote the witness relative to the withdrawal of the moneys from the estate, stating what it would be necessary to set forth in the petition therefor, and saying:

"He (George) will have to set forth a declaration that when he filed his petition for letters testamentary, and when he prepared the inventory, that he did so under a misapprehension of facts, and that he had forgotten that when he and his mother signed the joint tenancy agreement deposit cards, that she had told him that upon her death the money was to be absolutely his, and that neither you nor any one else was to participate therein. Such change of face and reversal of attitude on George's part is going to exhibit him to the court as a 'bone-head' and I doubt very much if the court would believe him even though he so testified. * * * That there may be no misunderstanding of the subject under discussion, and that I may know how fully George will testify in support of the petition to be prepared and filed, I am sending him a copy of this letter."

Alexander requested petitioner not to send a copy of the letter to George, and it was not sent to him. George learned in December, 1921, that the money in question was not the property of the estate. He testified:

"I found out in December—that is, we investigated in December, and, as I said, I protested the way it was handled, and asked it be taken out, and Mr. Hatfield informed us that it could not be taken out. Q. Informed you? A. No, sir; not me. * * * Q. You knew your brother was making objections back in December, and had this discussion with Mr. Hatfield? A. Certainly."

He also testified that he did not see the letter herein referred to until after the estate was closed.

In order that the relations of the parties may be the better understood, it may be said that George Kaiser and petitioner were not acquainted with each other prior to the employment of the latter by the former, but Alexander Kaiser and petitioner had been personal friends and George employed peti-

tioner at the solicitation of Alexander. George lived in Lodi while petitioner and Alexander resided in Sacramento. During the administration of the estate, George seems to have given but little personal attention to the matter, but left the details thereof to Alexander and petitioner.

[1-3] The testimony of petitioner is contradictory of that of Alexander and George Kaiser in material respects, but the determination of the conflict thus raised was for the trial court. There is sufficient evidence to support the conclusion that George Kaiser was misled to his prejudice by erroneous advice given him by petitioner, however honestly the advice may have been given, and that he is excusable for having mistakenly allowed the property of the estate to be distributed as it was in reliance upon such advice. Whether, under the facts stated, the moneys in question passed to George upon the death of his mother, was a question of law. When, after stating in the petition for probate of the will and in the inventory that such moneys were a part of decedent's estate, George became convinced that they were not such, then the question whether they could be withdrawn from administration was again one of law. In a controversy arising between an attorney and his client, it certainly must be the law that the client is justified in relying upon the advice of the attorney prior to the time of the controversy. In *Douglass v. Todd*, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247, where the defendant, in reliance upon the advice of his attorney to the effect that he had no defense to the action, had failed to answer the complaint, the court said:

"Section 473 of the Code of Civil Procedure is broad enough to justify the action of the court below in relieving a party from a mistake of law on the part of his attorney, when, by his reliance upon it, he is prevented from making any defense."

See, also, *Mitchell v. California, etc.*, S. S. Co., 156 Cal. 576, 105 Pac. 590, and *Williams v. Thompson* (Cal. App.) 213 Pac. 705.

The instant case is stronger in favor of George Kaiser for relief, in that he was prevented from making his claim to the property, at the time the estate was settled, by relying upon the advice of his attorney who became his adversary on the motion to set the decree aside.

[4] Petitioner contends that the property of the estate had been delivered to the distributees under the decree of distribution before the motion was made to set the decree aside and that therefore the court was without jurisdiction to vacate the decree. Whatever the fact may be in that regard, the fee allowed petitioner has not been paid, and if the moneys in controversy did not belong to the estate, then petitioner is entitled to only

a small part of the amount so allowed and is not entitled to payment out of the moneys mentioned in the decree. In the final settlement of the estate petitioner will be afforded an opportunity to show, if he can, that such moneys were a part of the estate of decedent. On the record here, it cannot be said that the trial court abused its discretion in setting aside the decree of distribution and the order settling the final account.

The petition is denied and the order is affirmed.

We concur: PLUMMER, J.; HART, J.

(64 Cal. App. 572)

Ex parte HUMPHREY. (Crim. 744.)

(District Court of Appeal, Third District, California. November 28, 1923.)

1. Statutes $\S$ 51—Penal provisions of Volstead Act adopted by Wright Act become law of state.

As the Wright Act adopts by reference the penal provisions in section 29 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$ p), such penal provisions became a part of the law to the same effect as if they had been set out at length in the Wright Act.

2. Criminal law $\S$ 27—Term "punishable by imprisonment in the state prison," as found in Penal Code, construed; "felony."

In Pen. Code, § 19, which provides a felony is a crime punishable with death or with imprisonment in the state prison, the term "punishable by imprisonment in the state prison" implies an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense, or by denominating the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not prescribed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Felony; Imprison—Imprisonment.]

3. Criminal law $\S$ 27—Second offense of selling intoxicating liquor held a misdemeanor; "felony."

The second offense of selling intoxicating liquor as prohibited by the Wright Act, which adopts by reference the penal provisions in section 29 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$ p), which, though it permits an imposition of more than one year's imprisonment, does not specify whether the offense is a misdemeanor or a felony, held a misdemeanor under the state law, in view of Pen. Code, § 17, providing that a felony is a crime punishable with death or by imprisonment in the state prison, and that every other crime is a misdemeanor, that being true notwithstanding that under the federal law the offense is a felony by reason of Pen. Code U. S. § 335 (U. S. Comp. St. § 10509), the word "felony" as there used, as is demonstrated by Pen. Code Cal. §§ 18a, 245, and Rev. St. U.

S. § 5541 (U. S. Comp. St. § 10527), meaning something different from the word "felony" as used in the state laws, under the federal law the term of imprisonment which a court is authorized to impose being the test to determine whether a crime not punishable by death is a felony or a misdemeanor, while under the state law the place of imprisonment, and not the term thereof, determines the character of the offense, and it was not intended that the Wright Act should adopt the federal classification of crimes.

4. Statutes ☞149—With respect to punishment for crimes Legislature of 1872 could not tie hands of Legislature of 1921.

With respect to the prescription of punishment for crimes such as the second offense of selling intoxicating liquor, as prohibited by the Wright Act, which is a misdemeanor for which a punishment by imprisonment for over a year may be imposed, the Legislature of 1872, in which year section 19 of the Penal Code was adopted, and which provides as a punishment for a misdemeanor imprisonment in county jail not more than six months, unless otherwise prescribed, could not tie the hands of the Legislature of 1921, in which the Wright Act was enacted; and hence it cannot be successfully contended that section 19 limits imprisonment to six months in the county jail for a second offense of selling liquor in violation of the Wright Act.

5. Criminal law ☞991(2)—Court, in imposing sentence, part of which was valid and part invalid, exhausted its powers.

Where the court's sentence imposed on petitioner for a second offense of selling intoxicating liquor, in violation of the Wright Act, was void as to that part of the sentence which imposed imprisonment in the state prison, but was valid as to that part which imposed a fine of \$1,000, the court's power to sentence petitioner was exhausted, and he was entitled to be released from prison.

Original application by O. N. Humphrey for writ of habeas corpus. Writ granted.

Ray T. Coughlin, G. J. Raymond, S. Luke Howe, R. B. Hibbitt, and Markham Johnston, all of Sacramento, for petitioner.

J. J. Henderson, Dist. Atty., and Ben P. Tabor, Deputy Dist. Atty., both of Sacramento, for respondent.

FINCH, P. J. This is an application for a writ of habeas corpus. Petitioner was charged with the unlawful sale of intoxicating liquor, and with a prior conviction of a like sale. He admitted the prior conviction, and was convicted of the unlawful sale charged. The court sentenced him to pay a fine of \$1,000 and to be imprisoned in the state prison "for the term provided by law." Petitioner contends that the court exceeded its jurisdiction in sentencing him to imprisonment in the state prison.

[1-3] The Wright Act adopts by reference "the penal provisions of the Volstead Act." Stats. 1921, p. 79. Such provisions thereby

became a part of the law of this state to the same effect as if they had been set out at length in the adopting act. Ex parte Burke (Cal. Sup.) 212 Pac. 193. Section 29 of the Volstead Act provides:

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200 nor more than \$2,000 and be imprisoned not less than one month nor more than five years." Fed. Stat. Ann. 1919 Supp. p. 215 (U. S. Comp. St. Ann. Supp. 1923, § 10138½p).

The act contains no provision as to the place of imprisonment, nor does it specify whether the offenses therein enumerated shall constitute felonies or misdemeanors. If the offense of which petitioner was convicted is a misdemeanor only, then the court exceeded its powers in sentencing him to imprisonment in the state prison. In a case in which the defendant had been sentenced to imprisonment in a penitentiary contrary to law it is said:

"The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers." Ex parte Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107.

Section 17 of the Penal Code provides:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

The term "punishable by imprisonment in the state prison" implies, of course, an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense or by denominating the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not prescribed. See, generally, Brooks v. People, 14 Colo. 413, 24 Pac. 553; Ex parte Cain, 20 Okl. 125, 93 Pac. 974; Ex parte Smith (Okl. Cr. App.) 218 Pac. 708. The question here presented is not a new one in this state. In the case of Union Ice Co. v. Rose, 11 Cal. App. 357, 104 Pac. 1006, the court had under consideration the provisions of the Cartwright Law (Stats. 1907, p. 984), making certain acts punishable by imprisonment for not less than six months nor more than one year, without specifying the place of imprisonment. After quoting the defini-

tion of a felony contained in section 17 of the Penal Code, the court said:

"The conclusion would therefore seem irresistible that, since the offense is clearly a crime for which a penalty is imposed, the punishment for which, however, is not that prescribed for a felony, it must necessarily and logically follow that it is a misdemeanor."

The determination of the question was necessary to the decision in that case, and a hearing was denied by the Supreme Court. It may be said, therefore, that petitioner's contention is sustained by the decision of the court of last resort in this state.

Section 335 of the Penal Code of the United States provides:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies." 7 Fed. Stats. Ann. (2 Ed.) p. 987 (U. S. Comp. St. § 10509).

Basing his argument upon the provisions of this section, the district attorney contends that, since more than one year's imprisonment may be imposed for a second offense of selling liquor, the crime is a felony under the federal law, and is therefore made a felony under the state law by the adoption of the penal provisions of the Volstead Act. The argument is fallacious in assuming that the word "felony" has a fixed and certain meaning, whereas the word may have as many meanings as there are lawmaking bodies. Under the federal law, the question whether a crime, not punishable by death, is a felony or a misdemeanor depends upon the term of imprisonment which a court is authorized to impose, while under the state law it is determined by the place of imprisonment, the term of imprisonment authorized not being a factor. The Penal Code provides for the maximum term of imprisonment for the commission of certain felonies, without prescribing a minimum term. In such cases, under the provisions of section 18a of the Penal Code, a defendant could be imprisoned in the state prison for as short a term as six months, but the offense would be a felony notwithstanding the short term. On the other hand, section 245 of the Penal Code authorizes imprisonment in the county jail for a term of ten years for assault with a deadly weapon. If a defendant were so sentenced for the maximum term, the offense would not thereby lose its classification as a misdemeanor. Section 5541 of the Revised Statutes of the United States provides:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of

which jail or penitentiary is allowed by the Legislature of the state for that purpose." 8 Fed. Stat. Ann. (2d Ed.) p. 278 (U. S. Comp. St. § 10527).

It has been held that the words "state jail" and "penitentiary" as used in this section mean the same thing. *Ex parte Mills*, supra. If the imprisonment imposed, though for a felony, be for a shorter term than one year, the defendant cannot be confined in a penitentiary, or "state jail." *Ex parte Mills*, supra. It thus clearly appears that the word "felony" as used in the federal laws means something different from the word "felony" in the state laws, and there is no more reason to hold that it was intended by the Wright Act to adopt the federal classification of crimes than there would be if the federal law had used the term "high misdemeanor" instead of the word "felony" in section 335.

[4] Section 19 of the Penal Code provides:

"Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

The district attorney says:

"Under section 19 of the Penal Code except where a different punishment is prescribed by that Code the maximum period of imprisonment in a county jail shall not exceed six months. No different punishment for a sale after a prior conviction of sale under the Wright Act or Volstead Act is prescribed in the Penal Code."

If this statement is intended as an argument to the effect that section 19 limits imprisonment in the county jail for a second offense of selling liquor to a period of six months, while other complete answers might be made, it is sufficient to say that section 19 was adopted in 1872, and that it is elementary that the Legislature of 1872 was without power to tie the hands of the Legislature of 1921.

[5] If the sentence imposed by the court were wholly void it would still be within the power of the trial court to pronounce a valid sentence of imprisonment in the county jail. Petitioner, however, argues that the part of the sentence imposing a fine is valid, and that therefore the power of the court to sentence him is exhausted, and that he is entitled to be discharged from imprisonment. To this contention the district attorney makes no reply. Petitioner's contention seems to be well founded. *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781.

The petitioner is discharged from custody.

We concur: PLUMMER, J.; HART, J.

64 Cal. App. 614

EASTWOOD v. STEWART. (Civ. 3844.)

(District Court of Appeal, Second District, Division 2, California. Dec. 4, 1923.)

1. Executors and administrators $\Rightarrow$ 513(9)—**Agent for sale of land, being a person "interested in the estate," held concluded by settlement and allowance of account.**

Where executrix, pursuant to an order of the probate court granted under Code Civ. Proc. § 1559, procured an agent to sell the property of the estate, he was a person "interested in the estate" by virtue of his claim for commissions in view of section 1643, subd. 5, and sections 1635, 1637, and was concluded by the settlement and the allowance of the account of the executrix by the probate court.

2. Courts $\Rightarrow$ 472(4)—**Probate court held to have exclusive jurisdiction to pass on demand of agent employed to sell property of estate; "claim"; "expense."**

A court of probate has exclusive jurisdiction to pass upon the demand of an agent employed pursuant to Code Civ. Proc. § 1559, to sell the property of an estate, though not a "claim" against the estate within the meaning of sections 1490-1514, not having accrued against decedent in his lifetime, it being an "expense" in the care and management and settlement of the estate in view of section 1616.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Claim; Expenses.]

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by H. H. Eastwood against Anna Stewart, executrix of the last will and testament of Mary E. Sebastian sometimes known as and called Elizabeth E. Sebastian, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

Robert M. Clarke, of Los Angeles, for appellant.

Charles F. Blackstock, of Oxnard, for respondent.

FINLAYSON, P. J. This is an action by a real estate agent to recover commissions alleged to have been earned by him in finding a purchaser for certain real property which was a part of the assets of the estate of Mary E. Sebastian, deceased. The defendant, the executrix of the last will and testament of the decedent, is sued in her representative capacity; i. e., she is sued "as" the executrix of the last will and testament of her testatrix. The action is based upon a written contract for commissions entered into by plaintiff and the executrix during the course of the latter's administration of the estate of her testatrix. The executrix appeals from a judgment in favor of plaintiff.

On November 11, 1918, the superior court, sitting in probate, made an order authorizing the executrix to sell all the real property

belonging to the estate of her testatrix. The preliminary steps essential to the making of the order were duly taken under the law then in force. On December 24, 1918, the court, acting under the grant of power contained in section 1559 of the Code of Civil Procedure, made its order authorizing the executrix to employ a real estate agent. On December 31, 1918, plaintiff and the executrix, pursuant to the authorization thus given by the court, executed the contract upon which this action was brought. By the terms of their contract the executrix authorizes plaintiff to secure a purchaser for the property and agrees that, upon a purchaser being secured whose bid shall be accepted and to whom a sale shall be made by her and confirmed by the court, she will pay plaintiff a commission of 5 per cent. on the first \$10,000 and 2½ per cent. on the balance of the purchase price. On November 8, 1920, the property was sold by the executrix to a purchaser procured by plaintiff; and on November 22, 1920, the sale was confirmed by the court.

On December 11, 1920, the executrix rendered her final account, prayed a settlement of her administration, and petitioned for final distribution of the estate. She set up that all debts had been paid, but made no mention of plaintiff's claim for commissions. A day was appointed for the settlement of the account and notice thereof was given as required by law. On December 27, 1920, the court settled the account and made final distribution of the estate. Plaintiff did not contest the account, nor did he appear at the settlement thereof to make any claim for commissions. Instead, he brought this action against defendant, as executrix, some time after her final account had been settled and the decree of final distribution had been made.

[1] One of the points made by appellant is that respondent's remedy was in the probate proceeding, and that because he did not appear therein he is concluded by the settlement of the final account and may not now maintain this action for his commissions. We are constrained to hold with appellant on this contention.

At the time when respondent made his contract with appellant section 1559 of the Code of Civil Procedure—added to the Code in 1909 (Stats. 1909, p. 251)—empowered the court, sitting in probate, to make an order authorizing an executor or administrator to enter into a contract with any bona fide real estate agent to secure a purchaser of the real property of the estate. The section, as it then read, contained this provision:

"If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as

against the estate. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed and unless such contract be by the court first authorized."

Prior to this Code amendment an executor or administrator could not create any liability against the estate in his charge by his contracts with real estate agents, attorneys, or others employed to assist him in the performance of his duties. The real estate agent, attorney, or other person so employed by the executor or administrator had no action or claim against the estate. Whatever claim he had was against the executor or administrator in his individual capacity, who in turn, if the expenditure was made in good faith and was proper, might be credited therewith in the settlement of his accounts with the estate. *Maxon v. Jones*, 128 Cal. 77, 60 Pac. 516; *Estate of Willard*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554; *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886. Therefore, it formerly was held that a real estate agent, attorney, or other person employed by the executor or administrator to assist in the administration of the estate was not a person "interested in the estate" within the meaning of sections 1635 and 1637 of the Code of Civil procedure, and that therefore he was not required to contest the accounts of the executor or administrator nor was he concluded by the settlement thereof. *Briggs v. Breen*, supra.

Since the addition of section 1559 to the Code, the claim of a real estate agent, employed under authorization given pursuant to that section, constitutes one of the "demands against the estate," and as such it ranks among "the debts of the estate." Section 1643, subd. 5. Such agent, so employed, is therefore a creditor of the estate. Being a creditor of the estate, he is a person "interested in the estate," within the meaning of sections 1635 and 1637. He is entitled to appear and file exceptions to the administrator's or executor's account, and if his claim has been omitted therefrom he may ask to have the account surcharged to the extent of the commission found to be due him. "Upon the settlement of an account, every creditor [italics ours], heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party." *Estate of McDougald*, 143 Cal. 479, 77 Pac. 444. Because he is a person "interested in the estate," a real estate agent, employed pursuant to authority conferred under section 1559 is concluded by the settlement of the account and the allowance thereof by the court. Section 1637, Code Civ. Proc.

[2] Moreover, jurisdiction to pass on the demand of a real estate agent employed, as

was this respondent, under authority conferred pursuant to section 1559, is vested exclusively in the court sitting in probate. Though the claim of a real estate agent employed pursuant to an order of the court made under section 1559 may not be a claim against the estate within the meaning of sections 1490 to 1514, inclusive, for the reason that it is not a claim which accrued against the decedent in his lifetime, or resulted directly from contracts made, or acts performed, or wrongfully omitted to be performed, during the decedent's lifetime, it is nevertheless a claim which comes under the head of "expenses in the care, management and settlement of the estate" referred to in section 1616; and of such claims the court, sitting in probate, has the exclusive jurisdiction. *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352.

The personal representative of the decedent being exempt, under the express terms of the statute, from all individual liability, and the real estate agent having no claim directly against the property of the estate in the hands of the administrator or executor, the claim is a matter for determination in the probate proceedings, where all persons interested in the estate can be heard. All persons interested in the estate, the heirs, legatees, and creditors, have the right to be heard upon the propriety of the claim. The place for such hearing is in the court sitting in probate after the administrator or executor has rendered his account of expenses and disbursements, upon notice thereof to the parties interested. Such parties could not be heard in an action such as the one now before us—an action at law by the real estate agent against the personal representative of the decedent. If the superior court, in the exercise of its general jurisdiction over actions at law, could render judgments on such claims, the other persons interested in the estate might never be heard at all; and the court sitting in probate, whose peculiar province it is to hear and determine all matters concerning the expenses and disbursements attending the administration of an estate, and wherein the heirs, legatees, and creditors may be heard as to the propriety of such expenses and disbursements, might be robbed of the jurisdiction which rightfully belongs to it in matters of probate.

As early as *Gurnee v. Maloney*, supra, it was decided that the probate court has exclusive jurisdiction of claims which seek to charge the estate with expenses of administration. That was an action by an attorney to recover against the estate counsel fees and moneys expended for the benefit of the estate. The defendant, sued in his capacity as administrator of the estate, demurred to the complaint on the ground that the district court had no jurisdiction. In the course of its opinion the Supreme Court said:

"Conceding the liability of the estate upon such contracts as are set forth in the complaint, we do not think they constitute claims against the estate within the meaning of sections 128 to 140, inclusive, of the Probate Act [sections 1490-1504, inclusive, of the Code of Civil Procedure]. The claims therein referred to are such as accrued against the intestate in his lifetime, or resulted directly from contracts made, or acts performed, or wrongfully omitted to be performed, during his lifetime. The charge now in question, if necessary and proper to preserve the estate, comes under the head of expenses of administration referred to in section 219 [1616 of the Code of Civil Procedure]. The whole estate is in the custody and under the control of the probate court. It has jurisdiction of the whole subject-matter, and it is its exclusive province, subject to appeal to this court, to determine what items of expenditure incurred during the administration under its own supervision, are proper charges against the estate. * * * The parties interested in the estate are entitled to be heard upon the propriety of such expenditures; otherwise, the administrator might, through judgments collusively permitted in the district courts, allow the whole estate to be squandered. The heirs and creditors cannot be heard in such actions in the district court. In *Hope v. Jones* (24 Cal. 93), we held that the district court had no jurisdiction to interfere with the apportionment of commissions between administrators, in a suit by an administrator against his coadministrator. If the district court has no jurisdiction to entertain such a suit, we do not see why it should have jurisdiction to intermeddle in any other matter purely of administration. * * * The assumption of jurisdiction by the district court, to hear and determine such questions, would, it seems to us, be a direct interference with the administration of an estate actually in progress under the supervision of the probate court."

These views do not conflict with anything said by our Supreme Court in *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 Pac. 922, 52 L. R. A. (N. S.) 1151, Ann. Cas. 1915D, 742. That case, an action by an undertaker against the executrix to recover funeral charges, is *sui generis*. In the first place, funeral charges are ordinarily incurred before the appointment of an executor or administrator, and are not, strictly speaking, expenses of administration. Whereas charges for services performed by a real estate agent in the sale of property of the estate are expenses of administration, and as such are allowable to the executor or administrator under section 1616, if the real estate agent was duly employed. Moreover, a charge for funeral expenses is made a preferred debt of the estate (section 1643, Code Civ. Proc.); and, as was said by the court in *Golden Gate Undertaking Co. v. Taylor*, supra, 168 Cal. 100, 141 Pac. 925, 52 L. R. A. (N. S.) 1151, Ann. Cas. 1915D, 742: "To await the settlement of accounts would be destructive of the preference granted by the Code."

But such course of reasoning is not applicable to the demand of a real estate agent for commissions earned under a contract made pursuant to authority conferred under section 1559, for his is not a preferred claim, and there is therefore no reason why it should not await the settlement of the accounts in the probate proceeding.

The conclusion at which we have arrived makes it unnecessary to consider the other points presented by appellant.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 608

ARTHUR v. GRAHAM. (Civ. 4439.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1923.)

1. Vendor and purchaser $\S$ 116—Impossibility of exact reproduction of status quo no bar to rescission for fraud.

That a trust deed on property parted with by vendor under an agreement sought to be rescinded was paid by vendee, and a mortgage executed for a lesser sum on different terms and conditions, thereby rendering exact reproduction of the status quo impossible, will not preclude rescission for vendor's fraud, where it is possible to do substantial justice by adjusting the equities between the parties.

2. Pleading $\S$ 35—Allegations as to agency of brokers negotiating sale held unnecessary in suit to rescind contract.

Where the complaint, in an action to rescind a contract to purchase realty, sufficiently pleaded ultimate facts authorizing rescission for fraud, omission of allegations as to the agency of brokers between whom the negotiations were conducted may be disregarded as evidentiary and surplusage.

3. Vendor and purchaser $\S$ 44—Evidence of brokers' agency for vendor held admissible in vendee's suit to rescind.

In a suit to rescind a contract to purchase realty for vendor's fraud, evidence that brokers negotiating the sale were vendor's agents, and that an apparent option to buy, given them by vendor, was only a pretense, held admissible.

4. Evidence $\S$ 241(1)—Agent's statement to third person or latter's agent for communication binding on principal.

Statements by an agent to a third person or the latter's agent for communication to his principal are binding on the former agent's principal.

5. Vendor and purchaser $\S$ 44—Evidence of false statements by vendor to vendee or agent with knowledge of latter's agency held admissible in vendee's suit to rescind.

In a suit to rescind a contract to purchase realty for vendor's fraud, evidence of statements by vendor to vendee or the latter's agent with intent that they be repeated to plaintiff, the falsity thereof, and vendor's or his agent's

knowledge that the firm, with which the latter dealt, was acting as plaintiff's agent, *held* admissible.

6. Vendor and purchaser — 44 — Particular matters held admissible in evidence in vendee's action to rescind for vendor's fraud.

Evidence of vendor's acceptance of vendee's deposit, an escrow agreement, receipt of the purchase money and a deed thereunder and an attempted rescission by vendee, including a tender of the deed, *held* admissible in vendee's suit to rescind for vendor's fraud.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Adelphi A. Arthur against S. C. Graham. Judgment for defendant, and plaintiff appeals. Reversed.

Herbert J. Goudge, Harry W. Hanson, and F. Walton Brown, all of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of defendant, arising out of a suit for rescission of a transaction in which defendant sold certain real property to plaintiff.

So far as the questions here involved are concerned, the allegations of the complaint were, in substance, that defendant was the owner of the land in question; that he sold the property to plaintiff; that the purchase was induced by fraudulent representations of defendant and his agents made to plaintiff; that plaintiff offered to rescind and tendered to defendant a deed to the property, and offered to defendant or to the court to place defendant in statu quo and to do equity in the premises. The complaint contained further allegations showing, among other things, that at the time the sale was made the property was incumbered to the extent of a trust deed thereon to secure the payment of the sum of \$15,420, and "that thereafter the plaintiff, not knowing the said representations and statements of the defendant made as hereinbefore stated to be false, fraudulent, and untrue, paid the said trust deed, and thereafter the plaintiff, still ignorant of the falsity of the said statements and representations, procured a loan on said real estate of ten thousand dollars (\$10,000), * * * which loan is now secured by a first mortgage on said real estate." Also, that, prior to the sale to the plaintiff, defendant had given an option to certain persons by which they acquired the right to purchase the property, which option was extended personally by defendant in order that plaintiff might become the purchaser, and that the said optionees, "with the knowledge and approval of the defendant, consented that the said purchase and sale might be made directly by the plaintiff from

the defendant and from the defendant to the plaintiff."

The pleadings and such evidence as was admitted by the court also developed the fact that the option alleged to have been given to plaintiff by defendant was not a direct contract, but that the facts were to the effect that defendant had originally given an option to purchase the land to the firm of Burnett & Co., and that, through the means of a written offer to Burnett & Co., the firm of Allen & Irwin had secured its option from Burnett & Co. (who accepted the offer), and which action by Burnett & Co. was personally authorized by defendant in the following words:

"I hereby authorize you to accept above offer on the condition that the payment of \$500 for option is made to you to-day."

Plaintiff offered evidence to prove that, with the knowledge of Burnett & Co. and defendant, the firm of Allen & Irwin was acting on behalf of plaintiff; that both Burnett & Co. and defendant knew that it was plaintiff, and not Allen & Irwin, who was purchasing the property, and that any representations made to Allen & Irwin by either Burnett & Co. or defendant were made with the understanding and intention on the part of Burnett & Co. and defendant that they be communicated to plaintiff; that throughout the entire transaction Burnett & Co. was defendant's acknowledged agent; that the property was purchased by plaintiff directly from defendant, and that plaintiff paid to defendant personally the \$500 deposit made at the time defendant consented to the option taken in the name of Allen & Irwin. Also that plaintiff entered into an escrow directly with defendant for the purchase of the property; that defendant received the purchase money deposited by plaintiff in the escrow, and through this escrow plaintiff received a deed to the property. Plaintiff also offered to prove that certain material representations made by defendant to plaintiff and by Burnett & Co., either to plaintiff personally or to Allen & Irwin to be communicated to plaintiff, were untrue; that plaintiff had offered to rescind the contract of purchase and had tendered a deed of the property to defendant. To each question propounded to witnesses called on behalf of plaintiff, and by which plaintiff expected to prove each of the foregoing elements of plaintiff's cause of action, objection was made by counsel representing defendant and each of which objections was by the court sustained. It is because of such rulings by the court that plaintiff seeks a reversal of the judgment.

In defense of the several rulings made by the court as to the admissibility of such proffered evidence, it is contended by defendant that the complaint fails to state a cause of

action against defendant, in that "the complaint shows on its face that there was no power in the plaintiff to restore defendant to the status in which he was at the time of the transaction in question," and that the rule of law is that there can be no rescission unless the parties can be restored to statu quo, the point being that when the property was sold to plaintiff it was incurred by a trust deed amounting to \$15,420, payable at a certain time and under certain conditions, whereas at the time of the attempted rescission the property was mortgaged for only the sum of \$10,000, but with terms and conditions differing from those contained in the trust deed, and that plaintiff in her notice of rescission demanded from defendant not only the money which she had originally paid to defendant at the time the sale was made, but, in addition thereto, the sum of \$5,420, being the difference between the original \$15,420 incumbrance on account of the trust deed and the \$10,000 mortgage against the property as of the date of the notice of rescission.

[1] The general rule is in accord with defendant's contention. However, the authorities are somewhat numerous to the effect that, where defendant has been guilty of fraudulent acts or conduct which have induced the agreement between him and the plaintiff, courts of equity are not so much concerned with decreeing that defendant receive back the identical property with which he parted in the transaction as they are in declaring that his nefarious practices shall result in no damage to the plaintiff. Persons who attempt to secure profits by deceitful means may not confidently expect to receive special consideration from courts of equity. In such a case, as a result of the rescission by the court, nothing is exacted from the plaintiff out of particular regard for the condition of the defendant. If his fraudulent acts have resulted in disastrous financial consequences to himself, it is no one's fault but his own, and he must sustain the necessary inconveniences thereby entailed. *Neblett v. Macfarland*, 92 U. S. 101, 23 L. Ed. 471; *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Green v. Duvergey*, 146 Cal. 390, 80 Pac. 234. Where it is possible to bring about substantial justice by adjusting the equities between the parties, the fact that the status quo cannot be exactly reproduced will not preclude the plaintiff from equitable relief. No matter what may be the complications or complexities, the powers of a court of equity are so broad as to adequately meet the exigencies of the case and render a decree which will justly determine the rights of the respective parties. *Green v. Duvergey*, supra; *Kelley v. Owens*, 120 Cal. 510, 47 Pac. 369, 52 Pac. 797; *California, etc., Co. v. Schiappa-Pietra*, 151 Cal. 740, 91 Pac. 593; *Spreckels v. Gorrill*, 152 Cal. 392, 92 Pac. 1011; *Neblett v.*

Macfarland, supra; *Myrick v. Jacks*, 33 Ark. 430; *Gatling v. Newell*, 9 Ind. 579; *Menefee v. Oxnam*, 42 Cal. App. 81, 183 Pac. 379; *Hegel v. Hannas*, 43 Cal. App. 218, 184 Pac. 598; *Paquin v. Milliken*, 163 Mo. 79, 63 S. W. 426, 1092.

[2] Other objections by defendant to the complaint relate to the failure of plaintiff to allege that the firm of Burnett & Co. was the agent of defendant in the transaction in question, or that the firm of Allen & Irwin was the agent of plaintiff therein. An examination of the complaint, however, shows that ultimate facts are pleaded sufficiently to comply with the requirements of the rules of pleading in a suit for rescission on the ground of fraud; and the omission by plaintiff to insert in the complaint allegations with reference to the agency of Burnett & Co., or the agency of Allen & Irwin, may be disregarded on the ground that the inclusion of such allegations in the complaint would be evidentiary matter and surplusage.

[3-6] The remaining question for the consideration of this court has to do solely with the admissibility of the evidence to which defendant's objections were sustained by the court. Assuming that the proffered evidence would have been favorable to plaintiff's theory of the case, that is, that, notwithstanding an apparent option given by defendant to Burnett & Co., the only relationship existing between them was that of principal and agent and that the option was nothing but a pretense, under the issues raised by the pleadings any relevant and competent testimony going to establish such agency would be admissible (*Sigafus v. Porter*, 84 Fed. 430, 28 C. C. A. 443; *Ellis v. Crawford*, 39 Cal. 528; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 Pac. 738); and, the agency being established, any statements made by such agent to plaintiff, or to her agent to be communicated to plaintiff, would be binding upon the principal (*Herdan v. Hanson*, 182 Cal. 538, 189 Pac. 440; *Bonnarjee v. Pike*, 43 Cal. App. 502, 185 Pac. 479; *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Graham v. Moffett*, 119 Mich. 303, 78 N. W. 132, 75 Am. St. Rep. 393; *Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365; *Culliford v. Gadd* (Sup.) 17 N. Y. Supp. 457; *Simonds v. Cash*, 136 Mich. 558, 99 N. W. 754). Admitting the foregoing principles of law to be correct, evidence regarding any conversations either between defendant personally and plaintiff, or as between defendant personally and plaintiff's agent with like intentions that such conversations should be repeated to plaintiff, should also have been admitted by the court, as should any evidence tending to show knowledge on the part of defendant or his agent that the firm of Allen & Irwin throughout the transaction in question was acting as the agent of plaintiff. Statements made by

either defendant or by his agent being admitted, plaintiff should have been permitted to show their falsity. The acts and conduct generally of defendant, especially with relation to the acceptance by him from plaintiff of the \$500 deposit, the matter of the escrow, and the attempted rescission by plaintiff, including the alleged tender, were likewise admissible. *Sigafus v. Porter*, 84 Fed. 430, 28 C. O. A. 443.

The rulings by the court relating to the proffered evidence to which attention has been directed were prejudicial to plaintiff's substantial rights in the premises.

The judgment is reversed.

We concur: CONREY, P. J.; CURTIS, J.

(64 Cal. App. 643)

In re PATTERSON'S ESTATE. (Civ. 4381.)

(District Court of Appeal, Second District, Division 1, California. Dec. 5, 1923. Hearing Denied by Supreme Court Jan. 31, 1924.)

1. Wills ⚡193 — Divorce held not to revoke will made by husband to wife prior thereto.

A divorce and a destruction of the wife's will in favor of testator does not revoke a will made by testator to the wife prior to divorce, in view of Civ. Code, § 4, providing that the Civil Code establishes the law on the subject to which it relates, and Civ. Code, §§ 1292, 1299, 1300, 1300a, and 1304, relating to the means by which a will may be revoked, which contain no reference to a divorce.

2. Wills ⚡70—Law of domicile of testator controls disposition of personal property by will.

That a statute, providing that a divorce subsequent to the making of a will shall revoke the will as to the divorced spouse was effective in the state where the will was made, did not have the effect of revoking a will made by testator in favor of his wife, in view that the law of the domicile of the testator at the time of his death controls the disposition of his personal property by will.

3. Courts ⚡95(1)—Divorce ⚡326—States ⚡5½, New, vol. 14A Key-No. Series—Full faith and credit clause held not to require courts of one state to accord full force and effect to laws and decisions of another state.

Const. U. S. art. 4, § 1, the "full faith and credit" clause, does not require the courts of one state to accord full force and effect to the statutes, decisions, and a decree of divorce of another state in determining the validity of a will of testator as to personal property domiciled within the state at the time of his death; the duty of the courts resting alone on comity.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of A. A. Patterson, deceased. From an order admitting will to probate, contestants appeal. Affirmed.

Morris & Shipley, of Seattle, Wash., and Yakey & Devin and Arthur W. Thompson, all of Los Angeles, for appellants.

Fredericks & Hanna, of Los Angeles, for respondent.

HOUSER, J. The facts herein appear to be as follows: That on the 11th day of April, 1916, at Seattle, in the state of Washington, the deceased, A. A. Patterson, executed his will in favor of his wife, Martha Isabelle Patterson, and at the same time and place Martha Isabelle Patterson executed her will in favor of her husband; that on March 9, 1920, a decree of divorce was rendered in favor of Martha Isabelle Patterson and against A. A. Patterson by a court of record and of general jurisdiction in the state of Washington, which said court had jurisdiction of the parties and the subject-matter; that prior to the rendition of a decree in said divorce action the parties effected a settlement of their property rights, which settlement was confirmed and adopted by the said court as being in full of all claims of plaintiff and defendant each against the other; that a division of all the property of the parties was made in accordance with said property settlement, and thereafter the deceased, A. A. Patterson, converted all his personal property into money and removed to Los Angeles, Cal., where he died on November 6, 1921: that the divorced wife, Martha Isabelle Patterson, following said divorce and prior to the death of her divorced husband, destroyed her will which had theretofore been executed in favor of her former husband; that on the death of said A. A. Patterson his former wife, Martha Isabelle Patterson, offered for probate the will of A. A. Patterson which had theretofore been executed by him in the state of Washington and which will was found among the personal effects of the deceased. A contest and objections to the probating of said will were duly filed by the brothers and sisters of the deceased.

From an order admitting the will to probate and directing the issuance of letters testamentary therein and appointing the proponent thereof, Martha Isabelle Patterson, as executrix thereof, this appeal is prosecuted.

On the trial of the issues in the lower court, the decree of divorce, certain statutes of the state of Washington, and certain decisions by the Supreme Court of that state were introduced in evidence. The statutes were as follows:

(a) "If, after making any will, the testator shall marry and the wife, or husband, shall be living at the time of the death of the testator such will shall be deemed revoked, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way as mentioned therein as to show an intention not to make such provision, and no other

evidence to rebut the presumption of revocation shall be received. A divorce subsequent to the making of a will shall revoke the will as to the divorced spouse."

(b) "Whenever judgment of divorce from the bonds of matrimony is granted by the courts of this state, the court shall order a full and complete dissolution of the marriage as to both parties."

The decisions by the Supreme Court were: *Schirmer v. Schirmer*, 84 Wash. 1, 145 Pac. 981; *Hilleware v. Hilleware*, 92 Wash. 99, 158 Pac. 999; *McDonall v. McDonall*, 95 Wash. 533, 164 Pac. 204; and which decisions are to the effect, among other statements of rules of law, that "if a decree of divorce is granted in favor of one of the spouses both are thereby necessarily divorced."

[1] The first contention on the part of appellants is that the execution of the concurrent wills of A. A. Patterson and Martha Isabelle Patterson, the settlement by them of their respective property rights, the subsequent divorce and the destruction by Martha Isabelle Patterson of her will in favor of deceased, A. A. Patterson, constitute a revocation of the will here in question and an estoppel against Martha Isabelle Patterson from probating or claiming under the will of her divorced husband, A. A. Patterson.

While it must be conceded that some of the cases, notably *Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, and in *re Hall's Estate*, 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 541, support the claim by counsel for appellants, certain other authorities, such as *Baacke v. Baacke*, 50 Neb. 19, 69 N. W. 303; in *re Brown's Estate*, 139 Iowa, 219, 177 N. W. 260; *Cunningham's Succession*, 142 La. 701, 77 South. 506, hold to the contrary. As is adverted to in the case last cited, the conclusion for which appellants contend and in which they are upheld in the cases to which reference has been made depends entirely upon a common-law doctrine, which principle has been expressly repudiated in this state in the case of *In re Comassi*, 107 Cal. 4, 40 Pac. 16, 28 L. R. A. 414, where it is said that—

"The Civil Code establishes the law of this state upon the subjects to which it relates' (Civ. Code, § 4); and, in order to determine whether a will has been properly executed or revoked, or whether after its execution there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether, in the one case, there has been a compliance with the requirements of the statute, or, in the other case, whether the changed condition of the testator is within the conditions named in the statute."

The several sections of the Civil Code (sections 1292, 1299, 1300, 1300a, 1304) which re-

late to and provide for the means by or through which revocation of a will may be effected contain no reference whatsoever to a divorce either as affecting a will or otherwise. Inasmuch as the rule is that "the Code establishes the law of this state upon the subjects to which it relates" (section 4, Civ. Code), and because of the fact that no provision is found therein which will warrant a revocation of the will in question arising out of the theory that the circumstances of the testator were so changed after his will was executed, by reason of the divorce or otherwise, as would raise the presumption that the testator intended a revocation, we conclude that the circumstances to which we have referred did not operate as a revocation of the will and that the proponent was not estopped from either probating the will or from claiming as a legatee or devisee thereunder.

[2] Appellant's next contention is that by virtue of that portion of the Washington statute which provides that "a divorce subsequent to the making of a will shall revoke the will as to the divorced spouse," the effect of the decree of divorce between the testator and his wife was that the will of A. A. Patterson was immediately revoked. The authorities cited by appellants in support of the principle for which they contend are to the effect that, under the provisions of certain statutes concerning the marriage of the testator or the birth of a child to the testator following the execution of the will, the will is thereby revoked. The statutory rule to which appellants refer appears to be common to many different jurisdictions; and where the question of revocation has arisen under such a statute and in the state where the statute was enacted, the decision of the courts thereunder seems to be quite uniform in accordance with counsel's contention. Those cases, however, were all decided in the same jurisdictions in which the statute was enacted and in which the testator was deceased. The facts of the instant case, though somewhat similar to many of the facts in some of the cases cited, differ largely therefrom, in that the question of revocation here depends upon the residence of the testator at the time of his decease within the state of California, while the revocatory statute was enacted by the Legislature of the State of Washington. Similar questions have been decided by courts of many different jurisdictions. They have generally arisen from a consideration of statutes which have provided for the revocation of wills by reason of the marriage of the testator or by reason of the birth of a child to the testator after the execution of the will, and by the great weight of authority the conclusion is reached that the law of the domicile of the testator at the time of his death controls the situation, especially as to personal property. Mr. Schouler, in his work on Wills, Executors and Ad-

ministrators (5th Ed., vol. 2, p. 889), lays down the rule that—

"The law of the place of last domicile regulates as to the execution and validity of wills of personal property."

And Mr. Alexander in his Commentaries on Wills (volume 1, p. 338) says that—

"The general rule, except as modified or changed by statute, is that a will disposing of personal property is governed, as to the formal requisites essential to its validity and as to its construction, by the law in force at the place of domicile of the testator at the time of his death."

In Wharton on the Conflict of Laws (3d Ed.) vol. 2, p. 1351, is found the statement that—

"The question whether the marriage of the testatrix, or the birth of a child subsequently to the execution of the will, revokes the same, depends upon the *lex domicilii* so far as personal property is concerned, and upon the *lex rei sitæ* so far as real property is concerned."

And as announcing the same principle, see the following cases: *Mills v. Fogal*, 4 Edw. Ch. (N. Y.) 559; *In re Coburn's Will*, 9 Misc. Rep. 437, 30 N. Y. Supp. 383; *Evansville I. & C. S. Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317, 44 Atl. 877; *Ware v. Wisner* (C. C.) 50 Fed. 310; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Eyre v. Storer*, 37 N. H. 115; *In re Harwood*, 172 N. Y. Supp. 296; *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *In re Witter's Estate* (Sur.) 15 N. Y. Supp. 133; *Moultrie v. Hunt*, 23 N. Y. 394; *Despard v. Churchill*, 53 N. Y. 192; *Lowndes v. Cooch*, 87 Md. 478, 39 Atl. 1045, 40 L. R. A. 380; *Lewis v. Corbin*, 195 Mass. 520, 81 N. E. 248, 122 Am. St. Rep. 261; *Martin v. Stovall*, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130; *McEwan v. Brown*, 176 N. C. 249, 97 S. E. 20.

[3] Appellants also urge that because of the so-called "full faith and credit" clause of the United States Constitution (article 4, § 1), the Washington statute, as well as the decree of divorce by a court of general jurisdiction and the several decisions by the court of last resort, to all of which attention has already been directed, should be accorded their full force and effect and therefore be controlling upon the courts of this state in determining the question of the validity of the will. While we recognize generally the soundness of such rule, we fail to see its application to the facts of this case. Assuming (without deciding) that under the laws of the state of Washington, had the testator died in that state leaving all his property therein, the will executed by him would have been revoked, it does not follow that in the circumstance of his death in the state of California, where he left personal property, the same rule should prevail. The courts of this state

had and have jurisdiction, and, in accordance with the authorities heretofore cited, should determine the case in conformity with its own laws governing the matter. Had the Washington courts jurisdiction of the question herein involved and had such courts rendered a judgment thereon, then in any subsequent action in this state involving such judgment it might well be claimed that the California courts would be bound by the "full faith and credit" clause of the United States Constitution. But no such condition, nor one analogous thereto, is here presented. A divorce decree was rendered between the testator and the proponent of his will; the state of Washington has simply enacted a statute affecting the status of the will under such circumstances; and certain detached and unrelated decisions by the court of last resort interpret the meaning of certain words which are found within that statute. Nowhere in such decisions is there any attempt on the part of the court to determine the direct question here involved; and, considering the facts, the effect of the statute is necessarily limited territorially to the boundaries of the state of Washington. Surely the statute of the state of Washington providing that "a divorce subsequent to the making of a will shall revoke the will as to the divorced spouse" possesses no greater strength than statutes of other states which in substance declare that a marriage of the testator subsequent to the making of a will shall revoke the will; or that the birth of a child to the testator after the execution of the will shall have the same effect; and the text-writers and the authorities generally, heretofore cited, are clear in their expression that statutes of the latter class will not prevail as against a rule that as to personal property a will must stand or fall in accordance with the law of the domicile of the testator at the time of his decease.

As has been heretofore adverted to, the several judgments rendered by the courts of last resort of the state of Washington, and which are especially relied upon to establish the "full faith and credit" contention of appellants, were in no way connected with the issues involved in this controversy. Their facts were in no wise, even remotely, related to the facts of this case, nor were their parties, nor their privies, nor their assigns. Those judgments are here entitled to no more than the same faith and the same credit and the same respect that they would receive in their home state. If the issues before this court were issues before a court in the state of Washington, while the decisions here pleaded and introduced in evidence would be entitled to great consideration, they would not necessarily be conclusive; indeed, the Supreme Court would have the power and the right to absolutely disregard them. The constitutional provision to which reference has been made "does not require that judgments

in one state shall be followed by the courts of other states as matter of authority in other similar cases. The Constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. * * * The duty of the courts of one state to follow those of another, upon questions arising upon the construction of the statutes of the latter, is a duty resting alone upon comity, and not one imposed by the federal Constitution." *Wiggins Ferry Co. v. Chicago & A. R. Co.* (C. C.) 11 Fed. 381.

From the views which we have expressed herein, it follows that the order from which the appeal is taken should be affirmed. It is so ordered.

I concur: CURTIS, J.

CONREY, P. J. (concurring). I concur in the judgment. As pointed out in the foregoing opinion, the Washington statute provides that "a divorce subsequent to the making of a will shall revoke the will as to the divorced spouse." I think that this provision of the statute should be construed so as to give some meaning to the phrase "as to the divorced spouse." If appellants' contention be correct, the phrase has no meaning at all. It seems clear that the Legislature intended that a party against whom a divorce had been granted for his or her misconduct should not be permitted to profit by the terms of a will made during the period of the marriage by the innocent spouse in whose favor the divorce was granted. While some Washington decisions hold, as well they might, that when a decree of divorce has been entered both parties are divorced, yet I do not understand that any of those decisions referred to or in any way involved the construction of the provision of the statute above quoted.

Upon the other questions discussed in the foregoing opinion I am in accord therewith.

(64 Cal. App. 632)

TAYIAN v. TAYIAN. (Civ. 2669.)

(District Court of Appeal, Third District, California. Dec. 5, 1923.)

1. Marriage ⚭57—Wife may file cross-complaint for separate maintenance in husband's action for annulment of marriage.

In husband's action for annulment of marriage under Code Civ. Proc. § 442, the wife may file a cross-complaint for separate maintenance under Civ. Code, § 137.

2. Divorce ⚭209, 231—"Alimony" defined.

"Alimony" is an allowance made to a wife out of her husband's estate or income for her

support upon her divorce or legal separation from him, or during a suit therefor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alimony.]

3. Divorce ⚭203, 231—Valid marriage must be pleaded and proved to warrant allowance of alimony.

To warrant the allowance of alimony a valid marriage must be pleaded, and, where permanent alimony is sought, must be proved.

4. Marriage ⚭62—Marriage regarded as valid in action for annulment until ground of annulment is established.

In husband's action for annulment of marriage the marriage is to be regarded as perfectly valid, so as to authorize alimony, until the ground for the annulment is established.

5. Husband and wife ⚭283(1)—Allowance to wife of separate maintenance held error.

In husband's action for annulment of marriage, in which the wife filed a cross-complaint for separate maintenance, and in which the husband's testimony that the wife refused to live with him was undisputed, and there was no testimony that the husband deserted or willfully failed to support the wife, or showing that she had a cause of action for divorce under Civ. Code, § 92, it was error for the court to award the wife separate maintenance.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Gaius Tayian against Houghaper Tayian, for annulment of marriage, in which the defendant filed a cross-complaint for separate maintenance. From so much of the judgment as awards defendant a certain sum per month for separate maintenance, the plaintiff appeals. Reversed and remanded.

Julius Hansen and M. K. Harris, both of Fresno, for appellant.

Ohannesian & Ohannesian, of Fresno, for respondent.

HART, J. The plaintiff brought this action to secure a decree declaring the marriage between him and the defendant void upon the ground of fraud and for the annulment of said marriage.

The complaint, which was filed January 10, 1922, alleges that the parties intermarried in Fresno county on the 29th day of September, 1921; that the said marriage was the culmination of fraudulent acts and willful misrepresentations practiced upon the plaintiff by one T. G. Brave and his wife, uncle and aunt of the defendant. The gist of the charge of fraud is that the said T. G. Brave and wife conducted with the parents of the plaintiff negotiations looking to and eventuating in the intermarriage of the parties; that said T. G. Brave and wife represented to the plaintiff and his parents that the defendant was at the time referred to between 14 and 15 years of age, and that she was and

had always been "a true Christian and a virtuous girl," whereas, so the complaint proceeds, the plaintiff alleges that he discovered after his marriage with the defendant that she was not "a true Christian and a virtuous girl." The complaint alleges that the defendant deserted and abandoned plaintiff, and refused to return to the plaintiff. Other allegations tending to state a case of fraud as the means by which the marriage was brought about are contained in the complaint, but, for the purposes of this decision, a sufficient statement of the ground upon which the plaintiff sought to have the marriage annulled has now been given.

The defendant, answering the complaint, admitted the fact of the marriage between plaintiff and her at the time stated in the complaint, but denied each and every other allegation of the last-named pleading. She also filed a cross-complaint, in which she alleged that the plaintiff, on the 4th day of December, 1921, deserted and abandoned her, and that he "has ever since lived separately and apart from this defendant, and has failed, refused and neglected to provide this defendant with the necessities of life." It is further alleged in the cross-complaint that there is no community property belonging to the parties, and that there are no children, the issue of said marriage. It is likewise alleged that the defendant is without means of support, and that she has no home or relatives with whom she may reside; that "she is now living at the home of T. G. Brave and his wife, Araxie Brave, and is dependent upon the charity of friends for her support and maintenance," etc. The prayer of the cross-complaint is that the relief sought by the plaintiff in his complaint be denied, that the marriage between the plaintiff and the defendant be adjudged valid, and that the plaintiff "be required to pay to this defendant the sum of \$100 per month for her permanent support and maintenance, and the further sum of \$150, attorneys' fees, and for costs and expenses incurred by this defendant in the defense of this action," etc.

The plaintiff moved to strike the cross-complaint from the files on the ground that, in an action for annulment of a marriage, a cross-complaint for separate maintenance is not permissible. The motion was denied, and thereupon the plaintiff answered the cross-complaint denying all the essential averments thereof, except the allegation that there is no community property belonging to the parties, and the further allegation that there are no issue of said marriage.

The findings were against the plaintiff on the allegations of fraud as the inducing cause of the intermarriage of the parties and also as to the allegation that the defendant deserted plaintiff. As to the cause of action stated in the cross-complaint, the court found that the plaintiff willfully and without cause deserted and abandoned defendant, "and still

continues so to do"; that the plaintiff is a "strong and able-bodied man and is capable of earning good wages," and that defendant "had not and has not any means of support"; that the plaintiff is the owner of 20 acres of land, free and clear of all incumbrances, situated in Fresno county.

As a matter of law, the court's conclusions are, among other things, that plaintiff, since the 4th day of December, 1921, "has been guilty of willful neglect of the defendant, and that defendant is entitled to a decree of separation from plaintiff, herein, and to the sum of \$75 per month, separate maintenance, commencing from the 1st day of January, 1923, together with \$150 attorneys' fees."

Judgment passed accordingly. The appeal here is by the plaintiff from so much of said judgment as awards defendant, as for separate maintenance, the sum of \$75 per month.

The points urged for reversal are: (1) That the court erred in denying the motion of the plaintiff to strike from the files the defendant's cross-complaint; (2) that the findings and the judgment are not sufficiently supported.

1. An action by the wife for separate maintenance is authorized by section 137 of the Civil Code. Said section reads in part as follows:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children or to prosecute or defend the action. When the husband willfully deserts the wife or when the husband willfully fails to provide for the wife or when the wife has any cause of action for divorce as provided in section ninety-two of this Code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children."

[1-4] It will be noted that said section includes a provision authorizing the court in the exercise of its discretion in a divorce action to require the husband to pay as alimony any money necessary for the support of the wife and her children and to prosecute and defend the action, and also, in connection therewith, includes a provision authorizing an action by the wife for separate maintenance and support, independently of an action for divorce. It is true that the right to maintain the latter action comes entirely from the statute, but the principle at the bottom of it is the right of the wife to be provided with support suitable to the condition of the parties, at the hands of the husband, who holds the family "purse strings." The two proceedings, although in a sense different, are cognate in their nature, and, manifestly, relate to the same "transaction." Alimony merely means provision for the support of the wife in cases of divorce, either temporary or permanent, as the exigencies of the

case warrant. In other words, it is "an allowance made to a wife out of her husband's estate or income for her support upon her divorce or legal separation from him or during a suit for the same." Bouvier's Law Dictionary. It is an incident of divorce. Divorce or separation without divorce and alimony spring from the same root, to wit, the marriage relation. It has repeatedly been held that the right of a court to allow alimony in actions for divorce may proceed from its inherent power to make such provision in such cases, and therefore the court could make an allowance of alimony in the absence of express statutory authority for such action. *Dunphy v. Dunphy*, 161 Cal. 87, 90, 91, 118 Pac. 445. Of course, there must be a valid marriage, or a valid marriage must be pleaded, and, where permanent alimony is sought, proved. The same rule applies to an action in which the annulment of the marriage is the relief asked for. In such cases the marriage is to be regarded as perfectly valid until the ground for the annulment is established. See *Dunphy v. Dunphy*, 161 Cal. 87, 118 Pac. 445, supra, and cases therein cited. In this case all the pleadings aver and admit that, on the 29th day of September, 1921, the marriage between the plaintiff and the defendant was duly solemnized by a minister of the Gospel, duly authorized to perform such a ceremony. Upon the face of the pleadings there was a legal marriage. The defendant in her cross-complaint stated that the plaintiff had deserted her, and by her answer to the complaint denied the right of the plaintiff to an annulment of the marriage contract upon the ground stated in his complaint, and asked for a decree denying him the relief for which he prayed. It seems to us that there could not have been a more appropriate legal course on her part in the action, under the circumstances (the husband having shown that he did not desire that their marital relations should further be continued or perpetuated), than that which she did pursue, to wit, to seek a decree requiring him to provide her with sufficient means for her maintenance and support in case the court denied the relief sought by the plaintiff in his complaint. At any rate, it is perfectly clear that a complaint by the husband either for a divorce or for an annulment of the marriage contract and a cross-complaint by the wife for separate maintenance are so correlated, so far as the subject-matter of the litigation is concerned, that the two actions necessarily involve the same "transaction," within the meaning or contemplation of section 442 of the Code of Civil Procedure. It would be unreasonable, where the husband seeks a divorce from his wife or an annulment of the marriage between him and his wife, and the latter defends against the action, to require the wife to proceed in an independent suit for separate maintenance, if such relief she

desired to secure. Such procedure would certainly fly in the face of the general rule following from the establishment of the reform procedure that all matters of a cognate nature or essentially growing out of the same transaction or subject-matter of the suit ought to be tried and determined in one and the same suit.

[5] 2. The contention that the findings upon which that part of the judgment appealed from is predicated are devoid of sufficient evidentiary support must be sustained. In fact, so far as the present record discloses, there was no trial of the issues made by the cross-complaint and the answer thereto.

The record shows that, on the opening of the trial of the case, the attorney for the defendant, addressing the court, said: "I assume that the court has looked over the pleadings—the cross-complaint for separate maintenance"—to which the judge replied, "That will not come in on plaintiff's case;" to which statement the said attorney agreed. The trial was thereupon proceeded with upon the theory as so suggested and agreed to by the court and counsel for the defendant, and as tacitly acquiesced in by counsel for the plaintiff—that is, the trial of the issues made by the cross-complaint and the answer thereto was not then proceeded with.

The only testimony given in the case was that which was presented by the plaintiff on the issue of the annulment of the marriage, and, incidentally, as to the alleged desertion and abandonment of the plaintiff by the defendant. The witnesses so giving said testimony were the plaintiff, his parents, and his sister. The defendant was not called to the witness stand, nor, as is to be implied from what is said above, did she offer any testimony or evidence of any character in her own behalf.

During the course of his examination the plaintiff testified that, after his marriage, and immediately upon the return of himself and wife from a week's "honeymoon," he took his wife to the home of his parents, by whom he was then employed, receiving the sum of \$75 per month for his services, and with whom he intended that they should reside, and did reside, until her departure therefrom and return to the home of T. G. Brave, on the 4th day of December, 1921; that he accompanied his wife to the house of the Braves on the day just named, but, when he was ready to return to the home of his parents, she refused to go with him, both she and T. G. Brave declaring that she intended to remain with her aunt and uncle at the latter's home; that, about a week later, accompanied by a minister of the Gospel, he went to the home of the uncle and aunt of the defendant, and, upon meeting the latter, stated to her that he was there for the purpose of taking her home, and that she refused to return with him, offering no excuse therefor, and merely stating to him that he

"could get a divorce." On cross-examination the plaintiff testified as follows:

"Mr. Ohannesian: Then I wish to ask a few questions as to the ownership of the property. Q. What property have you got, Mr. Tayian; what property have you? A. That 20 acres. Q. There is no mortgage on those 20 acres, I understand? A. No; there was no mortgage. Q. How much of a crop did you have off the place this year? A. Oh, about 900 pounds of peaches, I think. Q. 900 pounds of peaches? A. Yes. Q. But aside from that place you were working for your father and getting about \$75 a month; is that correct? A. That was in addition; but I put something in the property. I didn't get anything extra; no. Q. You have not paid your wife any money for the past five or six months, have you? A. No.

"Mr. Ohannesian: That is all."

On redirect examination he testified:

"Mr. Hansen: Q. This \$75 a month that you are receiving from your parents, do you get that and board, also? A. No. That is the wages for a whole month. Q. Well, have you received any of that money yet from your parents? A. For the last six months, no. Q. What do you have to pay, if anything, for board? A. About \$30 a month, I suppose; at most \$30.

"Mr. Hansen: I think that is all.

"Mr. Ohannesian: Q. Did you say about \$30 a month? A. Yes, \$30. Q. Well, don't you know what you were paying your parents? A. Well, \$30. Of course they do my washing and things like that, which I never considered. Q. Well, have you paid your parents any money for your keep? A. Yes, sir. Q. How much did you pay for last month? A. \$30 a month is what I paid. Q. Did you pay \$30 for last month? A. Yes, sir. Q. Have you paid anything for this month yet? A. No. This month ain't finished.

"Mr. Ohannesian: Oh, the month is not finished yet. Well, that is all.

"The Court: That is all. Call your next witness."

After the plaintiff was excused as a witness his parents and his sister were each in turn called to the witness stand. When they had completed the giving of their testimony the plaintiff's case was rested, and thereupon the attorney for the defendant stated to the court that he did not "intend to put in any testimony [referring, as we are justified in inferring, to the plaintiff's action], but if the court desires to hear any evidence relative to our action, cross-complaint, for separate maintenance, I will do so;" to which the court rejoined, "Well, I suppose your evidence would be about the same as on these various hearings." Said attorney, replying, stated, in effect, that he was prepared to prove, in support of the averments of the cross-complaint, that the defendant said to the plaintiff at the time that he requested her to return to the home of his parents that her reason for not returning with him was because she desired him first to provide for themselves a home at some other place than

that of his parents; that he also desired the defendant to testify to a conversation that took place between her and the plaintiff's sister. The court's response to these suggestions was: "I don't think there is anything in the conversation with the sister. * * * On the complaint, judgment will be for the defendant." Following this was a colloquy between court and counsel on both sides, in the course of which plaintiff's attorney objected to the issues made by the cross-complaint and answer thereto being tried in this action on the ground above stated and considered, and the court, in effect, overruled the objection, saying: "I don't think it is necessary to introduce any further testimony." Thereupon, and after further remarks by the judge, not material to the present inquiry, the court rendered and announced its judgment upon the cross-complaint, awarding the defendant the relief as above explained.

Annexed to the transcript is the court reporter's certificate to the effect that said transcript sets forth or comprises all of the testimony taken at the trial of this action, and of which there has been presented hereinabove substantially all the testimony which may warrantably be said to bear upon the defendant's alleged desertion of plaintiff and refusal to return to him and upon the question of the plaintiff's ability to pay the monthly amount adjudged by the court to be paid the defendant by the plaintiff for her permanent maintenance and support.

It will be observed that there is not a word of testimony in this record contradicting or to any degree tending to contradict the plaintiff's testimony that the defendant deserted him. There is not a line or word of testimony contradictory of the plaintiff's testimony that the defendant, a few months after the marriage, went to the home of her relatives and there remained, and refused, after he had besought her to do so, to return to the plaintiff's home and there live with him. There is no testimony satisfactorily showing that the plaintiff was or is able to pay the monthly sum of \$75 to the defendant as in support of the latter. The testimony, as will be noted, is that he owned a 20-acre tract of land, and upon that land he raised, during the year 1922, 900 pounds of peaches, and that he was receiving, as services performed for his parents upon their place the sum of \$75 per month. It was not shown how much the land referred to was worth or how much he received for the peaches raised thereon in the year 1922, nor was it shown whether he derived a yearly income in any considerable amount or, indeed, made any profit from the peaches grown on said land. He testified that out of the \$75 per month he was receiving as wages he paid his parents for his board and other accommodations the sum of \$30 per month, leaving the sum only of \$45. It was not shown whether the defendant was

financially in such a condition as to require for her support the sum of \$75 per month.

It is true that the trial court was at liberty, in the sound exercise of its functions as a trier of the questions of fact submitted at the trial, to disregard the testimony presented by the plaintiff upon the question of the defendant's alleged desertion of him as carrying with it no probative force. Indeed, it is to be presumed, from the result arrived at below, that the court either did disbelieve the plaintiff's testimony as to the alleged desertion by defendant, or, if believing it, regarded his whole testimony as insufficient, as a matter of law, to entitle him to a judgment upon his complaint. But in either case the result would be the same, to wit, that there would be left in the record no evidence upon which the court could predicate any other decision than that neither the plaintiff nor the defendant was entitled to the relief asked by their respective complaints. Upon the face of the evidence, however, no other conclusion is justified upon the question of desertion than that the defendant, without just or any cause, deserted the plaintiff. In the extended colloquy between the court and counsel, above referred to, and after the plaintiff's case was concluded, the court stated, when counsel for the defendant proposed to introduce proof upon the cross-complaint, that any further evidence which might be introduced in support of the allegations of the said complaint would involve a mere repetition of evidence received "on these various hearings." From this it may be assumed that at some other hearings of matters incidentally arising in the action—perhaps on an application for alimony pendente lite—the court received evidence in some form or another which applied with more or less pertinency to some of the matters set forth by the several pleadings filed in the action. But, whatever might have been the nature of the occasions calling for such hearings, the fact is that any evidence received at the "various hearings" referred to by the court is not embraced or set forth in the transcript here, unless the very same evidence certified to this court in the present transcript was received at said "various hearings." However, it is very clear that there is absolutely no evidence in this record which justified the court in granting the defendant the relief involved in the judgment entered in her favor. In other words, it was not shown that the plaintiff either willfully deserted or willfully failed to provide for the defendant, or that she had any cause of action for divorce as provided by section 92 of the Civil Code.

"The wife cannot abandon the dwelling place which he [the husband] may have provided for her, if it be a reasonable place, and then seek support at his expense by virtue of" section 137 of the Civil Code; "nor is she entitled [under such circumstances] to maintain the action for his mere neglect to provide her with suitable

support. Hence, if, at the time she institutes the action, she is living separate and apart from him, it is essential for her to show that it is by reason of his desertion, or that by reason of his cruelty, or threats of bodily harm, she was forced to leave the family dwelling place." *Hardy v. Hardy*, 97 Cal. 125, 127, 128, 31 Pac. 906.

See, also, *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554; *Volkmar v. Volkmar*, 147 Cal. 175, 81 Pac. 413.

The judgment is reversed, and the cause remanded.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 555

IN RE DAHNKE'S ESTATE AND GUARDIANSHIP. (Civ. 4308.)

(District Court of Appeal, Second District, Division 2, California. Nov. 27, 1923.)

1. Guardian and ward $\S$ 13(3)—Court without jurisdiction to appoint father guardian in absence of notice to mother or proof that notice could not be given.

Where mother was given no notice of petition for appointment of the father, from whom she was divorced, as guardian of infant child, and no proof was made that her address was unknown, or that for some other reason notice could not be given her, the court had no jurisdiction to appoint the father, under Code Civ. Proc. $\S$ 1747, as amended in 1921, requiring notice to the parents.

2. Guardian and ward $\S$ 13(3)—Statute as to notice of petition for appointment must be substantially complied with.

The power to appoint a guardian is a special power conferred by statute, and the provisions of the statute as to notice must be substantially followed in order to make valid the exercise of the power, for compliance with the statute is jurisdictional.

3. Judgment $\S$ 346—Judgment or order void on face may be set aside at any time by court which rendered it.

A judgment or order which is void on its face and which requires only an inspection of the judgment roll or record to show its invalidity may be set aside on motion at any time after its entry by the court which rendered the judgment or made the order.

4. Judgment $\S$ 346—Invalid judgment or order may be set aside on motion within reasonable time, though invalidity does not appear from judgment roll or record.

A judgment or order, which is in fact void for want of jurisdiction, but the invalidity of which does not appear from the judgment roll or record, may be set aside on motion within a reasonable time after its entry, not exceeding the time limit prescribed by Code Civ. Proc. $\S$ 473, an independent suit in equity being unnecessary.

5. Judgment ☞346—Motion to set aside for invalidity not appearing from judgment roll or record must be made within time prescribed by statute.

A motion to set aside a judgment or order for invalidity not appearing from the judgment roll or record must be made within the time limit prescribed by Code Civ. Proc. § 473, though the motion need not be based on such statute.

6. Judgment ☞346—Question as to reasonableness of time within which to move to set aside judgment dependent on circumstances of particular case.

The question of what constitutes a reasonable time within which to move to set aside a judgment or order because of invalidity not appearing from the judgment roll or record must depend somewhat upon the circumstances, and is not definitely determined further than that it will not extend beyond the time prescribed by Code Civ. Proc. § 473.

7. Judgment ☞392, 518—Facts dehors record as well as those appearing on the face of the judgment roll or record may be presented on motion to vacate.

A motion to vacate a judgment or an order is a direct and not a collateral attack, and any facts going to show the invalidity of the judgment or order, those dehors the record, as well as facts appearing on the judgment roll or record, may be presented.

8. Guardian and ward ☞18—Order to show cause held substitute for notice of motion to vacate order of appointment.

An order to show cause why order appointing a guardian should not be vacated, served on the guardian, was the equivalent of and a substitute for a notice on the guardian that motion would be made to vacate the order.

9. Appeal and error ☞935(1), 948—Presumptions indulged in favor of court's action as against contention, that motion was not made within a reasonable time, and burden on appellant to show abuse of discretion.

On appeal from an order vacating an order appointing a guardian, in which it is claimed that the court had no jurisdiction to vacate the order, because the motion was not made within a reasonable time, all presumptions will be indulged in favor of the correctness of the court's action, and the burden is upon the appellant to make it appear that the court abused its discretion in making the order.

10. Guardian and ward ☞18—Four months held reasonable time within which to move to vacate order appointing guardian.

Where father was appointed guardian of minor child without notice to divorced wife, the action of the court in vacating the order on the wife's motion made four months later held not an abuse of discretion as against the contention that the motion was not made within a reasonable time.

11. Guardian and ward ☞18—Petition for vacation of order appointing guardian held sufficient.

Mother's petition to vacate order appointing father guardian of minor child without no-

tice to mother, as required by Code Civ. Proc. § 1747, as amended in 1921, stating as one of the grounds that no notice had been given her, as required by such statute, held sufficient, it being unnecessary that such petition should measure up to the requirements of the complaint in an ordinary action.

12. Guardian and ward ☞18—Mother petitioning for vacation of appointment for want of notice not required to prove power to give notice.

In a proceeding by mother to vacate order appointing father guardian of infant child without notice to mother as required by Code Civ. Proc. § 1747, as amended in 1921, the mother was not required to prove that it was within the father's power to give such notice, since such statute requires that notice be given or that proof be made before entry of the order that notice could not be given.

13. Guardian and ward ☞18—Recitals in order prima facie true.

Recitals in order vacating an order appointing a guardian are prima facie true.

14. Guardian and ward ☞13(3)—Matters not defeating petition to vacate appointment without notice stated.

Where father was appointed guardian of minor child without notice to the mother, and without proof that mother could not be served with notice required by Code Civ. Proc. § 1747, as amended in 1921, the order was void for want of jurisdiction, and the father could not defeat the mother's petition for vacation thereof by proof that he did not know the mother's address, or that she was not a fit and proper person to have the custody of the child.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the estate and guardianship of Esther Dahnke, a minor. From an order vacating an order appointing Henry Dahnke guardian, he appeals. Affirmed.

Arthur E. Koepsel, of Santa Ana, for appellant.

Chas. D. Swanner, of Santa Ana, for respondent.

FINLAYSON, P. J. This is an appeal by Henry Dahnke, the father of Esther Dahnke, a female minor of the age of 10 years, from an order made by the superior court for Orange county on March 8, 1923, vacating an order previously made by that court appointing appellant guardian of the person and estate of the minor. The order appealed from was made upon the motion of Selma Dahnke Wichman, who is appellant's divorced wife and the mother of the minor, the principal ground of her motion being that the court was without jurisdiction to make the order by which the father had been appointed guardian of their child.

The facts are substantially as follows: Appellant filed a petition for letters of guardianship on August 14, 1922, wherein he stated

that the minor was under his care and custody, and that the only relatives residing in the county were himself, the minor's grandparents, and an aunt. The father's petition made no mention of the minor's mother, petitioner's divorced wife. Upon the filing of the petition the court made an order directing that notice be given to each of the grandparents and to the aunt by a citation requiring each of them to show cause, on September 1, 1922, why the petitioner should not be appointed guardian. Such notices were given, and at the time set, without any notice having been given to the mother of the minor, the court appointed appellant guardian of his child's person and estate, and directed the issuance to him of letters of guardianship upon his taking the oath and giving a bond in a fixed amount. Thereupon appellant qualified, and letters of guardianship were issued to him.

On January 3, 1923, the mother filed a petition praying that an order be made by the superior court requiring appellant to appear and show cause why the order appointing him guardian should not be set aside and his letters of guardianship revoked. In her petition Mrs. Wichman alleges that appellant had knowledge of her place of residence when he filed his petition for letters, but that she was not given any notice thereof or of the hearing thereon, and that she had no actual knowledge of her former husband's petition or of the proceedings thereon until after his appointment as guardian. Her petition also states, on information and belief, that at the hearing on her former husband's petition for letters of guardianship he falsely represented to the court that the child's mother was dead.

Upon the filing of the mother's petition for revocation of the letters of guardianship, an order was issued by the court directing appellant to appear on January 19, 1923, and show cause why the order appointing him guardian should not be set aside and his letters of guardianship revoked. In due time appellant filed a demurrer to his former wife's petition and also a notice of motion to strike out certain portions thereof.

At the hearing on the order directing appellant to show cause why the order appointing him guardian should not be revoked, namely, on February 28, 1923, the court overruled appellant's demurrer to his divorced wife's petition, and denied his motion to strike, and thereupon made the order from which this appeal was taken—the order setting aside the order appointing appellant guardian and revoking the letters of guardianship theretofore issued to him.

It is recited in the order of revocation that, "upon examining the files and records" in the proceeding, it appears to the court that it "had no jurisdiction to make said order appointing Henry Dahnke as guardian

of the person and estate of Esther Dahnke, a minor, for the reason that no notice of the hearing of the petition of Henry Dahnke for appointment of himself as guardian of said minor child was given to Selma Dahnke Wichman, the mother of said minor, nor was proof made to the court that her address was unknown, or that for other reasons such notice could not be given.

[1] If, as the order of revocation recites, no notice of the hearing of appellant's petition for letters of guardianship was given to the mother, and no proof was made to the court either that her address was unknown or that for some other reason notice could not be given her, then the court was without jurisdiction to make the order appointing appellant guardian of his daughter's person and estate. Section 1747 of the Code of Civil Procedure, as amended in 1921, provides:

"In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice cannot be given."

Obviously this means that, if the parents' addresses be known, and no reason exists why notice cannot be given them, notice of the petition for letters of guardianship must be given to both parents. So that, if both parents be living, and if one of them be the petitioner for the letters of guardianship, notice must be given to the other if his or her address be known, and no reason exists why it cannot be given. A fortiori must this be so where, as here, the parents are living separate and apart from each other. By the express terms of the statute it is made mandatory that notice be given to the nonpetitioning parent, or that, if such notice be not given, proof be made either that such parent's address was unknown or that there was some valid reason why the notice could not or should not be given.

[2] The power of the court to appoint the guardian is a special power conferred by statute, and the provisions of the statute as to notice must be substantially followed in order to make valid the exercise of the power; for compliance with the statute is a condition precedent to the valid exercise of the power, and is jurisdictional. Any attempt to exercise the power of appointment without compliance with such express requirement is a nullity. See *Estate of Eikerenkotter*, 126 Cal. 54, 58 Pac. 370. In the *Matter of Lundberg*, 143 Cal. 407, 77 Pac. 158, the court referring to the notice then required by the statute, said:

"The statute does in terms require that notice shall be given to the person having the care of the minor, and such notice, for such time as the court may determine to be reasonable, is necessary to give the court jurisdiction to make the appointment."

It follows that notice to Selma Dahnke Wichman, or statutory proof showing why it was not given, was absolutely necessary to give the court jurisdiction of the proceeding and power to make the order appointing appellant guardian. Therefore, the only question on this appeal is as to the power of the court to make the order setting aside its former order appointing appellant guardian and revoking his letters of guardianship.

[3-5] It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the court which rendered the judgment or made the order. *People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448; *People v. Temple*, 103 Cal. 453, 37 Pac. 414. Equally well settled is it that a judgment or order, which is in fact void for want of jurisdiction, but the invalidity of which does not appear from the judgment roll or record, may be set aside on motion within a reasonable time after its entry, not exceeding the time limit prescribed by section 473 of the Code of Civil Procedure; and an independent suit in equity to set aside the judgment or order is not necessary. *Norton v. Atchison*, etc., R. R. Co., 97 Cal. 388, 30 Pac. 535, 32 Pac. 452, 33 Am. St. Rep. 198; *People v. Temple*, supra; *Smith v. Jones*, 174 Cal. 513, 163 Pac. 890. The motion, in such case, is not necessarily based upon section 473; but, in determining whether it is presented within a reasonable time, the period prescribed by section 473 within which motions under it may be made is, as said in *Smith v. Jones*, supra, "the standard or criterion in all cases."

[6] The general common-law rule is that courts have power over their judgments during the entire term at which they are rendered, and may vacate them on motion (*Freeman on Judgments*, § 90 et seq.); but terms of court having been abolished with us, a motion to set aside a judgment, or order, not void on its face, must, as we have said, be made within a reasonable time, not exceeding the limit prescribed by section 473 of the Code of Civil Procedure. What is a reasonable time within which a motion may be made to set aside a judgment or order, not void on its face, must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by the last-mentioned code section. *Norton v. Atchison*, etc., R. R. Co., supra; *People v. Temple*, supra; *Smith v. Jones*, supra.

[7] A motion to vacate a judgment or an order is a direct and not a collateral attack; and on such motion, if it be made in time, any facts going to show the invalidity of the judgment or order may be presented—facts dehors the record as well as facts appear-

ing on the face of the judgment roll or record. *Norton v. Atchison*, etc., R. R. Co., supra; *Estate of Eikerenkotter*, supra.

In *Estate of Eikerenkotter*, which was an appeal from an order of the superior court refusing to set aside an order appointing a guardian, it is said that, if the "record" discloses that the court had no jurisdiction to make the order of appointment, then the order is void on its face and can be attacked at any time. 126 Cal. 55, 58 Pac. 370. Just what the court meant by its use of the word "record" in this connection is not altogether clear. In this state we have no statute prescribing, as in the ordinary action, what papers shall constitute "the judgment roll" or "record" of an order in a guardianship proceeding. In the present case, however, it will not be necessary to decide whether or not the "record," as that word is technically understood, affirmatively discloses the non-existence of the jurisdictional prerequisite—i. e., the lack of notice to the mother and the absence of all proof that her address was unknown, or that for other reason the notice could not be given her. This is so because, even if the absence of the jurisdictional requirement be not disclosed by what is technically called the "record"—the equivalent of the judgment roll—the motion to vacate the order of appointment and to revoke the letters of guardianship was made in time to permit the absence of the jurisdictional requirement to be shown by evidence aliunde the documents which constitute what is technically the "record" in the proceeding. That is to say, if, as we presently shall show is the case, the motion to vacate the order of appointment was presented within the time limit prescribed by section 473, then it was enough that, as the revoking order recites, the absence of the jurisdictional matters is shown by "the files and records," whether those files and records constitute the "record," in the technical sense of that term, or are aliunde such record.

[8] An order to show cause is the equivalent of and a substitute for a notice of motion. *Ency. Pl. & Prac.* vol. 15, p. 363; *McAuliffe v. Coughlin*, 105 Cal. 270, 38 Pac. 730; *Dambmann v. White*, 48 Cal. 440; *Larson v. Minnesota*, etc., R. Co., 136 Minn. 423, 162 N. W. 523; *Spaeth v. Sells* (C. C.) 176 Fed. 797, 799. "The purpose of such an order," says the court in *Marty v. Ahl*, 5 Minn. 34 (Gil. 14), "is to indicate to the attorney that he will find the judge at a certain place and time, ready to hear the motion, and nothing more or less." It follows, therefore, that the order to show cause, which was served upon appellant January 10, 1923, was the equivalent of and a substitute for a notice by the mother of the minor that she would move the court to vacate the order appointing appellant guardian of their child. The

mother's motion for the revocation of the order of appointment was actually presented to the court not later than February 28, 1923. This is made evident by the fact that on that day the court signed an order which, after reciting that the mother had presented her petition, and that the court is satisfied that it had no jurisdiction to appoint appellant guardian, directs the mother's counsel to prepare the proper formal order of revocation. The period between September 1, 1922, the date of the order appointing appellant guardian of his daughter's person and estate, and February 28, 1923, the date of the ruling on the mother's petition to revoke the appointment, is 5 months and 27 days, or less than the maximum period of 6 months prescribed by section 473 of the Code of Civil Procedure.

[9, 10] If, as we are assuming for the purpose of this decision, the invalidity of the order appointing appellant does not appear on the face of the "record," i. e., on the face of what is equivalent to the judgment roll in ordinary actions, then it was necessary not only that the motion should be presented within the 6 months' limitation prescribed by section 473, but that it should be presented within a reasonable time after the entry of the order appointing appellant guardian. What is a reasonable time in any case depends, as we have stated, upon the circumstances of that particular case. In determining whether or not the motion is presented within a reasonable time, a large discretion is necessarily confided to the trial court, and the appellate court will not interfere with the exercise of the discretion of the lower court, unless it is plainly made to appear that such discretion has been abused. *Smith v. Pelton, etc., Co.*, 151 Cal. 394, 398, 90 Pac. 934. All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that the court abused its discretion in making the order. *Moore v. Thompson*, 138 Cal. 23, 26, 70 Pac. 930. We cannot say that in this case the trial court abused its discretion in holding, as it must have done, that the mother's motion was presented within a reasonable time.

[11] From the foregoing it follows that the lower court did have the power to make the order from which this appeal has been taken, unless, as appellant claims, there were certain insuperable procedural defects. It is claimed that the mother's petition does not state facts sufficient to justify the order of revocation. There is no merit in this contention. It was not necessary that the petition should measure up to the requirements of a complaint in an ordinary action. All that was necessary was that the mother's petition should state the ground or grounds upon which her motion would be made. It sufficiently appears from her petition, read

as a whole, that one of the grounds of her prayer for revocation of the letters of guardianship was that no notice had been given her as required by section 1747 of the Code of Civil Procedure, as amended, and that no proof had been made to the court which would dispense with the giving of such notice. More than that was not necessary. A copy of the mother's petition was attached to the order to show cause which was served upon appellant. Her petition thus became a part of her notice of motion—for that is what the order to show cause amounted to; and the grounds of her motion having in this manner been made to appear, it was not necessary that her petition should state the facts in detail. *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. Indeed, the mother's petition unnecessarily details many facts which are not at all essential to the revocation of the order appointing appellant guardian.

[12] Appellant seems to think that it was incumbent upon his former spouse to show that it was within his power to give the notice which he failed to give. No such burden rested upon the mother of the minor. The statute requires the petitioner for letters of guardianship to give the parent notice of the petition, or, in lieu of such notice, to make to the court proof that the notice could not be given, either because the parent's address was unknown, or because of the existence of some other sufficient reason. Such notice must be given or such proof made before the entry of the order appointing the guardian; and the burden rests upon the petitioner for the letters either to give such notice or to make such proof. If he fails to do either, the court is without jurisdiction to make the appointment.

[13, 14] Appellant complains that he was deprived of his day in court because, as he asserts, the court, after overruling his demurrer to the mother's petition, and denying his motion to strike, proceeded with the hearing on the order to show cause without permitting him to introduce evidence that his former wife's address was in fact unknown to him, and without permitting him to show that she is not a fit and proper person to have the custody of the minor. The objection lacks merit. In the first place, the record before us does not suffice to show that appellant was not given every opportunity to present all relevant and material evidence. The appeal has not been brought up on a printed transcript, and consequently there is no bill of exceptions before us. The appeal was taken under section 953a of the Code of Civil Procedure, and the record here consists only of the clerk's transcript of certain documents and orders—the documents and orders already mentioned. The clerk does not certify that these were all the docu-

ments filed in the case; nor does his transcript purport to show what took place at the hearing on the order to show cause why the letters of guardianship should not be revoked. For aught that appears to the contrary in the record before us, appellant may have been given every opportunity in the lower court to introduce all the evidence which he believed to be relevant to the question then before the court, i. e., the question of the court's jurisdiction to make the order appointing him guardian. In the next place, the recitals in the order appealed from—recitals which are prima facie true—show that the lack of the jurisdictional requirement appeared from an examination of "the files and records" in the proceeding. Appellant does not contend that notice of his application for letters of guardianship was given to his ex-wife. Indeed, his petition negatives any such idea, for it makes no mention whatever of his former spouse, although it does mention the other persons whom the statute entitles to notice of the proceeding. If, as a substitute for such notice, appellant had made proof to the court, prior to his appointment, that his former wife's address was unknown, then the trial court would be warranted in inferring that some reference to such proof would appear somewhere in the files or on the minutes of the court. True, we are assuming, for the purposes of this decision only, that the absence of the jurisdictional requirement is not shown affirmatively upon the face of what is technically the "record" in the proceeding. But, since the motion for the revocation of the letters of guardianship was seasonably presented, evidence dehors the "record" was admissible to show that the court had not acquired jurisdiction to make the order appointing appellant guardian. That is, the order of revocation could properly be based upon inferences reasonably deducible from the matters disclosed by the "files and records" in the proceeding, even though they were not such files or records as would constitute the "record" in the strict sense of the term. And in view of the inferences which may reasonably be drawn from the contents of appellant's petition for letters of guardianship, to say nothing of the other "files and records" in the proceeding, it is difficult to conceive how he could have succeeded in showing that his former wife had in fact been given notice, or that he had in fact

made proof to the court that her address was unknown. But, be this as it may, appellant does not claim that he expected to give testimony at the hearing on the order to show cause which would have shown either that his former wife had in fact been given the statutory notice, or that, prior to his appointment as guardian, he did make to the court the statutory proof which would have dispensed with the necessity for such notice. What he does claim is that at the hearing on his divorced wife's order to show cause he was not given an opportunity to show at that time that he did not know his former spouse's address when he filed his petition for letters. But such proof, made after his appointment as guardian, would not have satisfied the requirements of the statute. If, as seems to be conceded, no notice was given to the mother of the child, then, in order to confer jurisdiction upon the court to appoint appellant guardian of the minor, it would be necessary for him to make proof, prior to the time when the court made its order appointing him guardian, that the mother's address was unknown or that for some other reason notice to her could not or should not be given. Such proof after the order appointing him guardian could not breathe the breath of life into the stillborn order.

If it be a fact that the court gave appellant no opportunity to show that the mother was an unfit person to have the custody of the child, that is no ground for a reversal. Such an issue was entirely immaterial on the hearing of the mother's motion. The court could not thereon determine any question as to the ultimate custody of the child. The sole question properly before the court was as to whether the mother should be relieved from an order which deprived her of all right to her child's custody but which the court was without jurisdiction to make. Guardianship of Van Loan, 142 Cal. 423, 428, 76 Pac. 37. When it appeared to the court that it was without jurisdiction to make the order appointing appellant guardian, it was its duty to set aside the order, recall the letters of guardianship, and hear the matter de novo, when all parties could have a showing.

The order is affirmed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 514

PEOPLE v. DANIELS. (Cr. 988.)

(District Court of Appeal, Second District, Division 1, California. Nov. 27, 1923.)

1. False pretenses — Evidence held admissible to show falsity of statement.

Where, in prosecution for falsely representing to complainant that the assets of a corporation were in excess of \$34,000 whereby complaining witness was induced to pay over \$11,000 for a one-third interest in the corporation it appeared that defendant's representations were made by means of a written statement, which he represented to complaining witness was taken from the books of the corporation and correctly showed its condition, a second statement prepared at the instance of the defendant, after the purchase by complaining witness, and given to him for the express purpose of showing the assets of the corporation, and which showed such assets to be less than \$17,000, was admissible as evidence of the falsity of the first statement.

2. False pretenses — Must be relied on by complaining witness.

To find defendant guilty of false pretense, it is necessary to find that complaining witness relied on false statements made by defendant.

3. False pretenses — Refusal of cross-examination of complaining witness as to whether he had made independent investigation held reversible error.

In prosecution charging defendant with obtaining money by false pretenses, consisting of representation as to the assets of a business concern by which complaining witness was induced to purchase a one-third interest therein, it was reversible error to refuse to permit cross-examination of complaining witness as to whether he had made independent investigation of the affairs of the company prior to his purchase, and as to whether he did not rely upon such investigation, irrespective of defendant's statements, in making of such purchase.

4. Criminal law — Witnesses held competent to testify as to contents of defendant's books.

In prosecution for obtaining money by false pretense, where the charge was that defendant misrepresented in a statement the assets of a business concern, and induced complaining witness to buy one-third interest therein, defendant's bookkeeper and an expert accountant, employed by defendant to examine the books and prepare a statement showing assets and liabilities of the business, were both competent to testify as to contents of books.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

T. M. Daniels was convicted of obtaining money by false pretenses, and he appeals. Reversed.

Walter J. Little, Randall, Bartlett & White, and Schenck & Kittrelle, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. Appellant prosecutes this appeal from a judgment of conviction under an information charging him with the crime of obtaining money by false pretenses. He relies upon three grounds for a reversal of the judgment: First, insufficiency of the evidence to sustain the judgment; second, errors of the trial court committed in the admission and rejection of evidence; third, errors committed by the trial court in the giving of and the refusal to give instructions.

[1] As to the sufficiency of the evidence to sustain the judgment, appellant contends that, as the charge against him was of obtaining money by false pretense, and that the false pretense in question was that the assets of a certain business concern, composed of the defendant and one W. L. Brown, doing business under the firm name of the Reliance Building Company, were in excess of \$34,000, there was no evidence that the assets of said firm were not as represented by defendant. The complaining witness purchased a one-third interest in said business upon the representations of the defendant that the net assets of said firm amounted to the sum of \$34,208.34. These representations were made by defendant to the complaining witness by means of a written statement purporting to show the assets and liabilities of the company. This statement, defendant represented, was taken from the books of the firm, and correctly showed the condition of the business of the company and its assets and liabilities. Shortly after making said purchase and paying therefor in cash and securities the sum of \$11,402.78, being exactly one-third of the amount of the net assets of said firm as shown by said written statement, the complaining witness became convinced that he had been victimized by the defendant, and demanded of defendant a return of his money and securities. The defendant thereupon had prepared by an expert accountant a second statement of the affairs of the company showing its assets and liabilities. This second statement, which was given to the complaining witness by the defendant, showed that the net assets, including the \$11,402.78 paid into the firm by the complaining witness, were slightly less than \$17,000.

It is now claimed by appellant that this latter statement only shows the condition of the books of the company at the time of its preparation, and is no evidence whatever of the amount or character of the property or assets owned by the company. We are unable to agree with appellant in this contention. The evidence shows that this statement was prepared at the instance of the defendant for the express purpose of show-

ing the assets and liabilities of the company, and that it was given to the complaining witness by the defendant for this purpose. Defendant at the trial took the stand in his own behalf, and he made no claim that this statement was not correct, nor that it did not correctly show the property and assets of the company. Under the circumstances surrounding the preparation and delivery of this statement we think the trial court committed no error in admitting it in evidence. It purported to show the character and value of the property and assets of the company, and therefore tended to prove the falsity of the representations made by the defendant to the complaining witness as to the net assets of the company.

[2, 3] It is next claimed by appellant that the court erred in the admission and rejection of evidence in two particulars: First, in its refusal to permit defendant to cross-examine the complaining witness, and, second, in permitting the prosecution to introduce evidence pertaining to the books of the company.

The court refused to permit the complaining witness to answer certain questions propounded to him on cross-examination, the answers to which appellant claims might have shown that the complaining witness had made an independent investigation of the affairs of the company prior to his purchase of an interest therein, and therefore that he did not rely upon any statement made by the defendant as to the property or assets of said company. Among other questions, the complaining witness was asked upon cross-examination:

"Did you make any inquiries of anybody regarding the truth or falsity of any of the items set forth in that statement prior to the time you signed the agreement of copartnership?"

The court sustained an objection to this question. The ruling of the court appears to be based upon the theory that the complaining witness had a right to rely upon the statements of the defendant, and was not obliged to make any further investigation. In this construction of the law we agree with the trial court, but it is further insisted by the appellant that, if the complaining witness made an independent investigation, and relied upon the information obtained thereby, and acting upon such information parted with his money or property, then the defendant cannot be found guilty of obtaining money under false pretenses, notwithstanding the falsity of the representations made by him. In order to find defendant guilty of such an offense it is necessary to find that the complaining witness relied upon the false statements made by the defendant. The

question therefore propounded to the complaining witness, to which the court sustained an objection, might possibly have elicited an answer from the witness to the effect that he had made inquiries regarding the truth or falsity of the items contained in the statement, and as a result of these inquiries he became satisfied, irrespective of anything the defendant may have said to him that the statement was correct, and that he entered into the contract with defendant for the reason that he believed from the investigation made by him that the statement presented to him by the defendant was correct. The rule is stated in Wharton's Criminal Law as follows:

"When the prosecutor resorts to verification, this may be a defense. The prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding it withstood the test, he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner 10 shillings, the sum he asked, and took the chain as a pledge. It was held that, if the money had been obtained on the statement made by the prisoner, he might have been convicted of obtaining it by false pretenses; but that, as the prosecutor relied entirely upon his own examination, and not upon the false statement, the prisoner was properly found guilty of only an attempt to commit that offense." Wharton's Criminal Law (11th Ed.) § 1442.

See, also *People v. Gibbs*, 98 Cal. 661, 33 Pac. 630.

Under these circumstances we must agree with the appellant that it was error on the part of the court to sustain the objection to this question propounded to the complaining witness upon cross-examination.

[4] There was no error upon the part of the court in permitting the witnesses Lewis and Blackman to testify as to the contents of the books of the company. These witnesses were both in the employ of the defendant—Lewis having been employed as bookkeeper, and Blackman as an expert accountant to examine the books and to prepare a statement showing the assets and liabilities of the company. They were, therefore, in our opinion, both competent witnesses to testify as to the contents of the books.

We find no error in the rulings of the court upon the instructions.

For the reasons heretofore given, the judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; HOUSER, J.

PEOPLE v. BIGELOW. (Cr. 1129.)

(District Court of Appeal, First District, Division 2, California. Dec. 13, 1923.)

1. Robbery — 24(1), 26—Evidence held to sustain conviction.

Evidence *held* to make a question for the jury, and sustain a conviction for robbery.

2. Criminal law — 1036(1)—Objection to evidence cannot be first made on appeal.

Objection to the admission of evidence that defendant was an ex-convict cannot be first made on appeal.

Appeal from Superior Court, City and County of San Francisco; Harold Loudereback, Judge.

Ruel Bigelow was convicted of robbery, and he appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The appellant, a negro, was convicted of the crime of robbery, he made a motion for a new trial, his motion was denied, and he has appealed. In his opening brief he makes two points: (1) The uncontradicted evidence on the trial of this case is wholly insufficient to justify or sustain the verdict; and (2) the court erred in denying defendant's motion for a new trial.

[1] To present both points the attorney for the appellant has been at much pains to state in narrative form the evidence. While, as we have quoted it, his main point regarding the insufficiency of the evidence is stated in very broad language, the appellant's exact claim is that the evidence was insufficient to prove that he committed the robbery in question. We make this statement in the beginning to simplify the record, and because the record shows, without any contradiction whatsoever, that on the evening of the 27th day of November, 1922, at and in his garage in San Francisco, Milton A. Rosenbaum was robbed, and at that time there was taken from him by the robber money in the sum of \$16.50, one yellow metal wrist watch, one white metal ring set with one white stone, one overcoat, and one fountain pen, all of the aggregate value of \$340. However, it will be conceded at the outset that Mr. Rosenbaum did not testify, in so many words, that he was robbed by Ruel Bigelow. The real question involved, then, is this: Was there evidence in the record on which the jury were entitled to base a verdict that Ruel Bigelow was the person who robbed Mr. Rosenbaum?

We think that question must be answered

In the affirmative. The reflected light was such that Mr. Rosenbaum was able to discern, and afterwards he testified, that the robber was a negro about the height and build of the defendant; that he wore a dark suit and a gray cap. Immediately after the robbery Mr. Rosenbaum ran into the street and he saw a Ford automobile going down Jackson street toward Fillmore street. On the day following the robbery the defendant was arrested in Oakland while trying to dispose of the watch and ring taken from Rosenbaum. He attempted to explain their possession by saying that he had won them in a crap game nearly a year previous to that time. But after he learned that the robbery had been reported to the Oakland police department, he then stated that the articles had been given to him by a man named Young, and that Young had requested him to dispose of them. In this connection he stated that he did not know Young's address. At the time of his arrest he had in his possession an automobile operator's license taken out in the name of R. Willes, which was the name he gave the arresting officer. Later he said his name was Ruel Bigelow, and that he was a prisoner on parole from San Quentin, and that that was the reason he had not given his true name. Whether we as jurors would have accepted the foregoing facts as sufficient evidence proving, or tending to prove, that the appellant was the individual who robbed Mr. Rosenbaum, is beside the case. It cannot be said that there was not some evidence on that subject, and the weight of that particular evidence in this particular case was for the jury.

The defendant attempted to prove an alibi. He called witnesses who testified they saw him in San Francisco on that evening. Only one of the witnesses testified to any fact or facts which, taken together, prove that at the time of the robbery, to wit, about 11:30 p. m., the defendant was at another point so far distant that he could not have committed the crime. That witness was a man by the name of Bond. It was for the jury to say whether or not they believed this one witness' testimony. This court has no right to disturb the conclusion of the jury.

As a part of his second point the appellant raises in another form the sufficiency or insufficiency of the evidence. That subject has been treated above and need not be reconsidered.

[2] Under the second point, the appellant complains of testimony coming into the record showing him to be an ex-convict. No objection to that evidence was made in the trial court, and the objection may not be entertained in this court for the first time.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 654

WILSON et al. v. EDGAR, Justice of the Peace. (Civ. 4833.)

(District Court of Appeal, First District, Division 2, California. Dec. 6, 1923.)

Municipal corporations — 631(2)—Zoning ordinance held violated by nonconforming use of premises.

The saving clause of a zoning ordinance, which provided that "in any building or premises any lawful use existing therein at the time of the passage of this ordinance may be continued therein, although not conforming to the regulations of the use district in which it is maintained," held not to authorize the conducting of a nonconforming business in a building other than that business to which it was devoted at the time of enactment of the ordinance.

Petition by Charles M. Wilson and another for a writ of mandamus to be directed against Robert Edgar, Justice of the Peace of the City of Berkeley. Writ granted.

Frank V. Cornish, of Berkeley, for petitioners.

Lemuel D. Sanderson, City Atty., of Berkeley, for respondent.

TYLER, P. J. Petition for mandamus to compel the issuance of a warrant of arrest for the violation of a zoning ordinance regulating the use of buildings. The petition alleges: That on July 20, 1920, a certain ordinance was passed by the council of the city of Berkeley, districting the location of residences and certain trades, and the location of buildings designed for certain specified uses, establishing the boundaries thereof and providing a penalty for the violation of the ordinance. That defendant Robert Edgar is the regularly elected, duly qualified, and acting justice of the peace of the city of Berkeley, county of Alameda, state of California, and that all complaints for violation of ordinances of the city of Berkeley are required to be issued out of the court of said justice of the peace. That Charles S. Shuey and Robert A. Shuey are residents of the city of Berkeley and the owners of a building on the east side of Telegraph avenue, between Stuart and Oregon streets, in said city of Berkeley, occupied and used by them prior to July 1, 1920, for a milk bottling and distributing station, and that said use of said property was continued by them on said premises until the early part of the year 1923, when said use was terminated. That thereafter, on or about the 1st day of August, 1923, the said Shueys leased the said building or a portion thereof to one E. Seidel, a resident of the city of Berkeley, for the purpose of conducting therein a dyeing and cleaning works, and that said E. Seidel thereafter established in said building a dyeing

and cleaning works or business, which he has continued to conduct and is now conducting therein. That plaintiff Wilson is a resident of the city of Berkeley, residing at No. 2815 Telegraph avenue, in a house which he owns, and that this house, together with the adjoining residence owned by him, are directly south in the same block and adjoining said building owned by said Shueys, and that said houses are occupied by tenants of said Wilson. That plaintiff Kovacevic resides at No. 2803A Telegraph avenue, in one of the apartments of a building owned by him at the southeast corner of Stuart street and Telegraph avenue adjoining the property of said Shueys hereinbefore referred to. That said building contains also an apartment and three stores occupied by tenants of said last-named plaintiff.

It is claimed that the dyeing and cleaning establishment is maintained in violation of the ordinance, and that Robert Edgar, as justice of the peace, has refused to issue a warrant of arrest for such violation, for which reason it is prayed that a writ issue out of this court commanding that he perform his duty. The ordinance contains a saving clause relating to the continued existence of nonconforming buildings and premises. Section 11 of the ordinance reads as follows:

"(a) In any building or premises any lawful use existing therein at the time of the passage of this ordinance may be continued therein, although not conforming to the regulations of the use district in which it is maintained, providing that no new building or addition be erected except in conformity with the requirements of this ordinance, or unless required by law; and provided further that any such building or premises which is not used for such nonconforming use for a period of 180 days at any time after the passage of this ordinance, then the use of such building or premises must thereafter conform to the use of the district within which it is situated."

As indicated by the recitals in the petition, the premises in question were lawfully used at the time of the passage of the ordinance as a milk bottling and distributing station, and under section 11 thereof such use could be continued, though not conforming to the regulations of the use district, so long as such nonconforming use was continued. It is contended by the petitioner, however, that, such use having been discontinued, the future use of the property as to the character of business which may be conducted therein is subject to the restrictions imposed by the ordinance upon the district within which such property is situated.

The determination of the question depends upon the proper construction to be given to the saving clause of the ordinance. This clause, as above indicated, provides that in any building or premises any lawful use ex-

isting therein at the time of the passage of the ordinance may be continued, although not conforming to the ordinance. It is suggested by the respondent that this language of the saving clause is to be interpreted as not only permitting the continuance of the particular business which was being conducted in the building at the time of the passage of the ordinance, but that it might be succeeded by any other business which might prior to the enactment of the ordinance have been lawfully conducted in such building, although it could not subsequent to the enactment be originally established there. This contention is based upon the fact that elsewhere in the ordinance the phrase "use of the district" is employed, and that when so employed it refers to all businesses which may lawfully be conducted within the district, so that when the word "use" is employed in the ordinance it denotes the whole class of businesses permitted in a given district.

We cannot agree with this contention of the respondent. The sense in which the word "use" is employed is to be gathered from its immediate context. Sometimes the words are "use of the premises"; at others, "use of the district." The latter phrase evidently denotes the entire class of businesses permitted in a district, while the former with equal clearness refers to the particular business conducted upon given premises. In the phrase "any lawful use existing in any building may be continued therein" (which is but a transposition of the language of the ordinance) the word "use" plainly refers to the particular business conducted in the building. We think there is no merit in the contention of respondent that the word "use" must be given the same signification wherever it occurs in the ordinance.

Moreover, if the contention of the respondent be held to be correct, the purpose of the ordinance would be largely frustrated. That purpose is to confine certain classes of business to certain localities, but at the same time an exception is made for the purpose of alleviating any hardship which the immediate discontinuance of a particular use of a building might entail. The ultimate purpose, however, is plainly that nonconforming uses of premises shall gradually be eliminated, which purpose would be practically defeated if one nonconforming use might be succeeded by another.

The property in the case at bar being thus used for a purpose in violation of the ordinance, an injured and complaining party is entitled to a warrant of arrest of those violating its provisions.

It is ordered that the writ as prayed for be issued.

I concur: ST. SURE, J.

64 Cal. App. 673

In re O'CONNELL. (Civ. 4751.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1923. Hearing Denied by Supreme Court Feb. 8, 1924.)

1. Attorney and client — Reinstatement after disbarment depends on fitness of applicant.

On an application for reinstatement after disbarment, the court is primarily concerned with the fitness of the applicant, and not with the question as to whether he has been sufficiently punished.

2. Attorney and client — Reinstatement after disbarment held unwarranted.

An attorney disbarred after conviction for a felony, and sentenced to the penitentiary for seven years, *held* not entitled to reinstatement when discharged, after serving approximately two years of his term.

Application by Daniel O'Connell, formerly an attorney and counselor at law, for reinstatement after disbarment. Application denied.

See, also, 189 Pac. 700; 194 Pac. 1010.

Daniel O'Connell, of San Francisco, in pro. per.

H. W. Glensor and Ernest Clewe, both of San Francisco, for respondent Bar Association of San Francisco.

TYLER, P. J. This is an application for reinstatement as an attorney and counselor at law after disbarment. The petition recites that the applicant was disbarred on February 20, 1921, upon the filing in the Supreme Court of a certified copy of a judgment of conviction of a felony, and that by said judgment petitioner was sentenced to imprisonment in the state penitentiary for a period of seven years, and that he was discharged June 5, 1923.

Petitioner alleges that he has suffered great mental and physical pain, and he has also suffered great financial and professional losses by reason of his imprisonment, and prays that he may be reinstated as an attorney and counselor.

[1] The question for determination in an application for reinstatement by a disbarred attorney is not the sufficiency of the punishment already suffered by him, but the fitness of the applicant to be admitted to the practice of the law. The disbarment of an attorney is not intended primarily as punishment, but as a measure for the protection of the public and the bar; and therefore a belief that the attorney has been sufficiently punished will not warrant his reinstatement. Courts will not ordinarily reinstate an attorney when his petition for reinstatement follows closely upon his disbarment. Accordingly it has been held that such application will not be considered where the attorney has

been deprived of his license for only three years, though the application be supported by testimonials of numerous persons to his conduct and present good character. *In re Cate*, 54 Cal. App. 401, 201 Pac. 964; *Id.* (Cal. App.) 212 Pac. 694; *In re Shepard*, 35 Cal. App. 492, 170 Pac. 442; *In re Stevens* (Cal. App.) 210 Pac. 442; *Id.* (Cal. App.) 219 Pac. 1014. In proceedings of this character the court owes a solemn duty to the community and to the legal profession which must be performed without regard to feelings of sympathy for the applicant. *In re O'Keefe*, 62 Mont. 534, 205 Pac. 667.

[2] We find nothing in the record sufficient to warrant us in granting the application at this time. This being so, we do not deem it necessary to pass upon questions raised by the demurrer filed on behalf of the bar association.

The petition is denied.

I concur: ST. SURE, J.

64 Cal. App. 791

In re RICCARDI. (Civ. 4642.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1923.)

Attorney and client — Reinstatement after disbarment held unwarranted.

An attorney, disbarred after conviction for a felony involving moral turpitude, *held* not entitled to reinstatement after pardon by the Governor, though his application was accompanied by numerous testimonials of officials and others recommending reinstatement.

Application by C. V. Riccardi, formerly an attorney and counselor at law, for reinstatement after disbarment. Application denied.

See, also, 189 Pac. 694; *People v. Riccardi*, 195 Pac. 448.

James J. Dunne, of San Francisco, for applicant.

A. P. Black and F. E. Boland, both of San Francisco, for respondent Bar Association of San Francisco.

TYLER, P. J. This is an application for reinstatement as an attorney and counselor at law after disbarment. From the record it appears that petitioner was convicted of a felony involving moral turpitude, and sentenced to be imprisoned in the state penitentiary. After serving a portion of his sentence, he was, on the 24th day of December, 1922, granted a full pardon by the governor of the state. Attached to the petition are numerous testimonials from officials and other persons, recommending the reinstatement of the applicant. On the other hand certain

protests have been filed against such action. The case presents the identical situation with which we were called upon to deal in the matter of Daniel O'Connell (No. 4751) 222 Pac. 625, this day decided, in which we denied a similar petition. Upon the authority of that case the petition herein is denied.

I concur: ST. SURE, J.

64 Cal. App. 684

In re HIGLEY'S ESTATE.

HURLEY v. JOHNSTON.

(Civ. 4450.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1923.)

1. Wills — 324(3)—Evidence held not to show undue influence, and to justify nonsuit.

In a will contest, in which neither the subscribing witnesses nor any person present when the will was executed were called as witnesses, evidence held insufficient to show undue influence, so that a nonsuit was proper.

2. Wills — 165(4)—Letters and declarations of testatrix, showing hostility to proponent, inadmissible to show undue influence.

In a suit to contest a will for undue influence of proponent, testatrix's letters and declarations showing hostility to proponent and friendliness to contestant, subsequent reconciliation having been proved, were inadmissible to show undue influence, though admissible to show testatrix's mental state when uttered.

3. Wills — 165(1)—Undue influence not provable by testator's declarations.

Testator's declarations, made during his lifetime, in a contest of his will, are inadmissible to prove undue influence.

4. Wills — 400—Rejection of declarations of testatrix held harmless error.

In a suit to contest a will for undue influence, failure of the evidence to show undue influence justifying nonsuit rendered harmless the rejection of letters and declarations of testatrix, admissible only to show her state of mind when made, since they were insufficient to send the case to the jury.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Suit by Belle M. Hurley against Ida E. Johnston, to contest the will of Lottie E. Higley, deceased. From a judgment for respondent, contestant appeals. Affirmed.

Jos. Crail, Harold C. Morton, and Julius V. Patrosso, all of Los Angeles, for appellant.

H. J. Fish and Ward Chapman, both of Los Angeles, for respondent.

CURTIS, J. This is a contest of the will of Lottie E. Higley, deceased, brought by Belle M. Hurley, a daughter, contestant and

appellant, against Ida E. Johnston, proponent and respondent, on the ground of undue influence on the part of proponent. The trial court ordered a nonsuit, and entered judgment accordingly, and this appeal is from said judgment.

[1] The judgment of nonsuit was properly granted. Neither of the subscribing witnesses to the will was called as a witness in the case, nor was any other person present at the execution of the will called to testify on behalf of the contestant, nor was there any testimony that the proponent or any other person had directly or indirectly influenced or attempted to influence the decedent in the making of her will or in the disposition of her property. The proponent of the will, Ida E. Johnston, was called on behalf of the contestant, and testified that she was not present at the execution of her mother's will; that she had never made any suggestion to her mother as to the manner in which, or the persons to whom, the decedent should leave her property; that her mother had never indicated to her, prior to the execution of said will, how she intended to leave her property; and that, after the execution of the will, her mother had never informed her of its contents, and that she, proponent, had no knowledge of the contents of the will until the same was read to her and her sister, the contestant, immediately after the death of her mother, by the attorney in whose custody the mother had left the will, except that some time after the will had been executed the mother made a conveyance of six lots at Manhattan Beach, and at the time she made this conveyance the mother stated to the proponent that these were the lots that she had left to the contestant. The testimony further showed that decedent and her daughter Ida E. Johnston were estranged during a period of time beginning in 1908 and ending about the first part of the year 1916. During the latter part of the year 1915 a reconciliation was effected between the decedent and her daughter Mrs. Johnston, and in the early part of 1916 Mrs. Johnston took up her residence with her mother, and the two lived together until the death of the decedent in November, 1919. The will was executed in March, 1918. Prior to the death of her mother the contestant lived in Rockford, Ill., except for a visit made by her to her mother in 1905. The relations between the contestant and her mother were of the most friendly nature, and they corresponded regularly, except during the last year of her mother's life. There was evidence to the effect that the proponent, some years prior to her mother's death, had said that she would never live with an old person without she got everything she had. One of the neighbors of the deceased also testified that she had been very friendly with the deceased, and visited

her in her home every day, but after the deceased and proponent became reconciled the relations between the witness and the deceased changed, and that decedent thereafter did not appear to want to see the witness. A mere statement of this evidence is in our opinion sufficient to show that it is utterly lacking in those essentials which go to make out a case of undue influence, and in our opinion the trial court committed no error in granting proponent's motion for a nonsuit. Estate of Anderson, 185 Cal. 700, 198 Pac. 407. In this case will be found an extensive reference to the authorities of this state upon this subject. These authorities undoubtedly sustain the ruling of the trial court in granting a nonsuit in the case at bar.

[2, 3] The further objection is made to rulings of the court in excluding certain letters written by the decedent to the contestant some years prior to the date of the execution of the will, and also in excluding certain declarations concerning the contestant and proponent, made by the decedent during her lifetime. So far as the letters are concerned they are not in the record and this court has no means of ascertaining their contents, and for this reason could not review the ruling of the court excluding them. However, what is said hereafter regarding the declarations of the decedent would also apply to these letters, as all were written during the year 1911, some seven years prior to the execution of the will. All of the declarations sought to be introduced in evidence, with one exception of such slight consequence that no further mention will be made of it, were made, it is claimed, by the decedent prior to 1916, and at least two years prior to the execution of the will. The date of some of them was given as far back as 1909. These purported declarations of the decedent in the main were expressions of friendliness towards Mrs. Hurley and of unfriendliness, and often of hostility, towards Mrs. Johnston. Appellant offered to prove by these declarations that decedent had said that her daughter Ida E. Johnston had received her share of her property, and in case of her death that she did not want Mrs. Johnston to step into her house, because she knew that she would take everything, and that she did not want Mrs. Johnston to step in and take away everything from Mrs. Hurley. Respondent contended before the trial court, and now contends, that these declarations were hearsay, and therefore were inadmissible in evidence as against respondent. The rule is well established in this state that the declarations of the testator made during his lifetime in a contest of his will, on the ground of undue influence, are inadmissible for the purpose of showing undue influence. Estate of Arnold, 147 Cal. 583-594, 82 Pac. 252, and authorities

there cited. They may, however, be admitted for the purpose of showing the state of mind of the testator at the time of their utterance. Estate of Anderson, 185 Cal. 700, 718, 198 Pac. 407, 415. In this case we find the following language used:

"But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of that mental state. It follows from this that unless his mental state at that time is material to the issue under investigation, the declarations are not admissible, even though they do show his mental state at that time, not because they are not competent for that purpose, but because that purpose is not germane to the issue."

As we have already noted, the declarations which the court held to be inadmissible purported to have been made by the testatrix some time prior to the year 1916, and over two years before the making of the will. They were made at a time when an estrangement existed between the testatrix and her daughter Ida E. Johnston. The evidence shows without contradiction that there had been a reconciliation between the mother and daughter some time during the latter part of the year 1915, and that since this reconciliation they had lived together in the most friendly relations up to the time of the death of the testatrix, and that this friendly relation between mother and daughter existed in November, 1918, the date of the execution of the will. These declarations, therefore, under the circumstances, would throw absolutely no light upon the state of mind of the decedent at the time she executed her will, and were therefore properly excluded by the trial court.

[4] Even conceding that these declarations were admissible to show decedent's state of mind, yet their rejection was harmless under the facts of this case. If we are correct in our conclusion that the judgment of nonsuit was properly granted by the court, on account of a lack of evidence showing undue influence, then the admission of these declarations would not have helped the contestant's case. As we have already seen, they are admissible for one purpose only, that is, to show the state of the mind of the decedent, and are inadmissible and cannot be considered by the court or jury for the purpose of establishing undue influence. The case of the contestant, therefore, even with these declarations in evidence, would still have been insufficient to have been submitted to a jury, and the court would have been compelled to have granted a nonsuit.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 733

In re RICKEY'S ESTATE.

SCOTT et al. v. RICKEY et al.

(Civ. 4574.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1923. Hearing Denied by Supreme Court Feb. 11, 1924.)

1. Wills §400—Review of judgment of nonsuit in will contest.

On appeal from a judgment of nonsuit against the contestants of a will, if there is evidence in the record which, standing alone or coupled with testimony erroneously excluded or erroneously stricken out, is sufficient to sustain a possible verdict that the will should be set aside on any of the grounds alleged, the judgment must be set aside.

2. Wills §164(5)—No presumption of undue influence.

Testimony showing reason for hostility by second wife towards contestants, and that she was a person capable of influencing testator, will not raise a presumption of fraud or undue influence in the making of a will.

3. Wills §324(3)—Evidence held not to show fraud or undue influence, and nonsuit proper.

In will contest, evidence held to warrant nonsuit on issues of fraud and undue influence.

4. Wills §163(6)—When unnaturalness of will is of importance in contest stated.

The consideration of the question whether or not a will is unnatural is of no importance in a will contest, except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence, in which event it might serve to help out a weak case.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Thomas B. Rickey, deceased. Contest by Bertha Levina Scott and others, of will, propounded by Alice Belle Rickey and another. Judgment in favor of the will, and the contestants appeal. Affirmed.

Peter J. Crosby and John D. Murphey, both of Oakland, for appellant Scott.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for appellants Charles T. Rickey and Jeanette Rickey.

James F. Peck and M. C. Chapman, both of Oakland, for respondents.

LANGDON, P. J. This appeal is by certain heirs at law of Thomas B. Rickey from a judgment of nonsuit in an action in which they sought the revocation of an order admitting to probate a certain instrument as the will of Thomas B. Rickey, deceased.

Thomas B. Rickey died on January 11, 1920, and an instrument in writing was admitted to probate as his will by the superior court of the county of Alameda, state of

California, on January 27, 1920. By this instrument the appellants and contestants were left small legacies, with the statement that the testator had made gifts to them at different times, a sister of the testator was given \$100 a month for the remainder of her life, together with such additional sums as might be necessary for unusual expenses, such as illness, etc., the wife and youngest daughter of the testator, the proponents of the will, were given \$5,000 each, and the income from the bulk of the estate was to be enjoyed by the wife and said youngest daughter of the testator during their joint lives; said youngest daughter taking the residuum of the estate after her mother's death. By the will, the wife and youngest daughter were named as executrices to serve without bond, and they were duly appointed and thereafter qualified, and were the acting executrices of the will at the time of the trial.

Within the statutory period, the appellants Bertha Levina Scott, a daughter of the testator by his first wife, and Charles Treadwell Rickey and Jeanette Rickey, children of a deceased son of said testator by his first wife, severally, filed petitions contesting the validity of said instrument and praying for the revocation of its probate. The residuary beneficiaries, individually and as executrices, severally, answered each of the petitions. The contests were consolidated. A jury was called in an advisory capacity by the court, but after the evidence was presented the trial court refused to submit the case to the jury, but granted the motion of the proponents of the will for an order of nonsuit against the contestants.

The petitions are lengthy, the allegations including recitals of incidents in the personal history of the testator occurring during a period of nearly 30 years. A detailed statement of these matters does not seem necessary, and we shall merely state the general issues as they are concisely outlined by the appellants in their brief, to wit: Was the paper writing probated executed by Thomas B. Rickey as his will? Was the signature to said paper writing procured by fraud exercised and practiced upon said T. B. Rickey by the proponents of the will? Was the signature to said paper writing procured by the undue influence of said proponents or either of them?

[1] It is, of course, beyond question that if there is evidence in the record, which, standing alone or coupled with testimony erroneously excluded, or admitted and subsequently erroneously stricken out, sufficient to sustain a possible verdict that the will should be set aside on any of the grounds alleged in any of the petitions for revocation of probate, the judgment upon the order granting the nonsuit must be set aside.

The trial of the case extended over a period of many days, sharp legal contests occurring over the admission of evidence, and much of the evidence admitted was subsequently stricken out upon motions of the proponents of the will. The reporter's transcript includes over 2,500 pages.

The appellants have printed in their brief the testimony upon which they rely, and have included therein, not only the testimony admitted by the trial court, but also the testimony which was stricken out upon motion. The rulings upon these motions present many intricate questions in the law of evidence, but for a decision upon this appeal a solution of these problems is unnecessary. For the purposes of this appeal only, we will concede to the appellants that every ruling on evidence of which they complain was erroneous; that all the testimony printed in their brief should have been admitted by the trial court. We consider the motion for nonsuit, then, in the light of all the testimony appearing in the appellants' brief, and accept it all as true.

That evidence indicates reasons for antagonism between the proponents of the will and the contestants, who were descendants of testator's first wife. It also shows that the testator and Alice Belle Rickey, one of the proponents of the will, had been husband and wife for over 25 years prior to his death; that they had married in 1893, after the children of his first marriage were grown, and after the death of their mother in 1891. A great deal of testimony was introduced tending to show that the second wife, before her marriage with the testator, and during the lifetime of his first wife, had been the cause of unhappiness in his home; that after the death of his first wife testator married said Alice Belle Rickey, and considerable hostility existed between the second wife and the children of the first wife; that testator was a man of great wealth and large business interests. After his second marriage he became involved in business difficulties in Nevada and was sued for a large amount of money and threatened with criminal prosecution because of the failure of a bank of which he had been president; that he feared his entire fortune would be subjected to the payment of judgments against him and entered into a scheme; with the consent and connivance of his second wife and his son by his first marriage, by which his property and assets were so manipulated as to be concealed from creditors until such time as he succeeded in disposing of the claims against him.

Testimony was offered showing the testator's apparent affection for his daughter Mrs. Scott, one of the contestants and appellants here. There was also some testimony that he had made remarks on some occasions during the last few years of his life indicating that he was not happy in his domestic

relations, and that he disliked and distrusted his second wife; that his daughter, Mrs. Scott was without money for her support; that she was in poor health; that testator had told his sister that this daughter would be provided for; that the wife and her daughter, the chief beneficiaries under the will, had received valuable property from the testator at different times prior to the execution of his will.

[2] It is upon substantially these facts that the appellants rely. They argue that the wife knew of the concealment of the husband's property to avoid the payment of possible judgments against him, and used this knowledge as a means of coercion. There is not the slightest evidence that she so used this knowledge, but, on the contrary, the record discloses that the lawsuits which brought about the concealment of the property had been settled and the judgment paid years before the making of the will. The record does not even show that this matter furnished a possible means of coercion at the time of the making of the will, much less that such means were used by the proponents. The testimony regarding the early relations of the parties suggests a reason for the alleged hostility between the respondents and appellants. But that fact being established would not raise a presumption of fraud or undue influence in the making of the will. To prove that the wife was a person capable of influencing testator does not prove that she actually did so.

"It will not be presumed, because a wife has ample opportunity to exert an influence which may be undue, that she has in fact done so." *Fulton v. Freeland*, 219 Mo. 494, 118 S. W. 12, 19, 131 Am. St. Rep. 576.

See, also, *Peery v. Peery*, 94 Tenn. 328, 29 S. W. 1, and *In re Langford*, 108 Cal. 608, 622, 41 Pac. 701. In a Missouri case quoted with approval in *Fulton v. Freeland*, supra, it was said, in relation to matters urged upon our attention by the present appellants:

"The plaintiffs sought to raise a presumption of undue influence affecting the execution of the will by proofs of the relations existing between the testator and his second wife before their marriage, which was about 11 years before the making of the will; by testimony showing the dependent condition of the disinherited children; by showing that the testator had had difficulties with his first wife, and had separated from her, and that some of the disinherited children had taken sides with their father in those controversies; by showing that the relations between the testator and his disinherited children were friendly and affectionate about the time of the making of the will; by showing that some of the first wife's children had assisted the testator in accumulating property; and by proving some conversation of the testator, in the same year in which the will was made, concerning his intended disposition of his property. There was also an offer to prove that one of the testator's daughters by his first wife had been obliged to leave her father's

house, by reason of his second wife's request or influence to that effect. All the offers of testimony upon these matters were, upon defendant's objections, refused by the court, and these refusals are assigned for error. We can discover no ground of admissibility for any of this proposed testimony. The plaintiffs have undertaken to prove that the paper purporting to be the last will and testament of their ancestor was the product of an undue influence exercised upon him by Sarah M. Ketchum. 'Undue influence is that which compels a testator to do that which is against his will, through fear, through the desire of peace, or some coercive power which he is unable to resist, and but for the exercise of which the will would not have been made as it was.' *Pierce v. Pierce*, 3 Cent. Law. J. 226. The testator was married to his second wife in 1855. His will was executed in 1866, and he died in 1877. Here is a period of more than 20 years, at some time during which these incidents of remote bearing, or none at all, are supposed to have indicated that the testator, in the hour when his will was written and signed, was acting under the coercive power above described, and that this coercive power was in fact held over him by Sarah M. Ketchum. Cause and effect are here far too widely separated for the purpose of fair investigation. All or any of the facts tendered might or might not coexist with a total absence of any such undue influence. They prove, or tend to prove, upon the question at issue, absolutely nothing. Their only effect, if introduced in evidence, might be, in the hands of ingenious counsel, to play upon the passions or prejudices of a jury, and give them an apparent excuse for thwarting the unkind discrimination of a father against some of his children."

[3] The facts appearing in the record show that the proponents of the will had nothing whatsoever to do with its execution and knew nothing of its terms. The following facts with relation to the testamentary disposition of testator's property appear uncontradicted in the record: The will was signed on August 14, 1918, about a year and a half before Mr. Rickey's death. At that time Mr. Rickey was in a sanitarium recovering from an illness. He was nearly 80 years old and his eyesight had been poor for some time. It was impossible for him to read, but he was able to distinguish persons and to go about unaided. He appears to have been a man of great mental vigor at all times, and the evidence shows that this condition had not changed at the time the will was made nor for considerable time after that. About August 10 or 11, 1920, testator asked his wife to telephone to his attorney and ask the attorney to call at the hospital. She stated she did not know why Mr. Rickey desired to see his attorney, but she complied with his request. The attorney was not alive at the time of the trial, but his deposition was introduced in evidence, and, in all essential particulars, it corroborates the proponents of the will in their account of the circumstances surrounding its execution. It appears, uncontradicted in the record, that the attorney

went to the hospital in response to this telephone message and was told by Mr. Rickey that he wished to make a will. Mr. Rickey explained what provisions he desired and gave the attorney the names of his children and grandchildren. The conversation occurring at that time, as narrated by the attorney, showed a complete intellectual grasp of his personal affairs by the testator. The attorney made notes of what was desired and returned to his office and had a draft of a will made. He returned the next day with the typewritten will. Rickey asked the attorney to read the will to him, which was done. He then asked that it be read again. After the second reading, testator said, "Now that is all right, just the way I want it, but I forgot something. I want to make a provision for my sister, Anna Plate." The attorney took the draft of the will to his office and had it typewritten, incorporating therein a provision for the benefit of the sister of testator in accordance with directions from said testator. Upon the next day the attorney took the amended draft of the will to the sanitarium and at the request of Mr. Rickey read it aloud to him. Mr. Rickey asked questions about the legal effect of certain provisions, and then asked that the entire will be read to him again, which was done. Mr. Rickey then said that the will was what he wanted and that he was ready to execute it. The proponents of the will were not in the room with the testator during the times when any of these conversations occurred between him and his attorney. The attorney went into the office of the sanitarium and secured two nurses to witness the will. Mr. Rickey duly executed the will and handed it to his attorney, telling him to keep it and not disclose its contents to any one. The attorney kept the will in his safe deposit box until after the death of the testator, when he handed it to Mrs. Rickey. The attorney testified that he had known Mr. Rickey for years before his death; that at the time of the execution of the will—

"his mental condition was as clear and vigorous and keen as it ever was. * * * Physically he was getting over a spell of sickness. He was feeling well. He was cheerful, smiling, laughing, and joking with the nurse and sitting up in bed. He was all right, and within a few days afterwards he left the sanitarium and went home, and was discharged."

There is evidence that over a year later the contestant Mrs. Scott and a nurse employed to care for Mr. Rickey read to him daily books and magazines and newspapers, and that he took a keen interest in them and his mind was clear and active, and there is abundant evidence in the entire record that during his entire lifetime Mr. Rickey was a man of more than ordinary mental acuteness.

In relation to the making of the will, proponents testified in substantial accord with the attorney, and from their testimony it

appears that they had no knowledge that a will was to be made and knew of none of its provisions until after Mr. Rickey's death; that, after the execution of the will and the departure of the attorney, they learned from the testator that a will had been executed by him and left with his attorney, but did not learn the contents thereof.

The motion for a nonsuit was made upon the ground that there was no evidence produced of any influence, undue or otherwise, upon the testamentary act. The appellants do not point out to us any such evidence. In this case, as in the case of *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081—

"The testator was of sound mind and in the active management of his own affairs; * * * no evidence was offered to show that it was executed at a time other than upon the date it bore; that no claim was made that the appellant [respondent here] was present when the will was made, or that she ever at any time requested the decedent to make a will, or that she ever made a suggestion in reference to the making of a will, or that she even knew of the existence of the will [in the present case, the contents of the will] until after her husband's death."

As stated in the *Estate of Donovan*, supra:

"General influence not brought to bear upon the testamentary act, however controlling, is not undue influence such as will afford ground for the setting aside of the will of a person of sound mind. *Estate of McDevitt*, 95 Cal. 17; *Estate of Langford*, 108 Cal. 609; *Estate of Calkins*, 112 Cal. 296; *In re Wilson*, 117 Cal. 262. Undue influence, however used, must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of the making of the testament. It must bear directly upon the testamentary act. *Goodwin v. Goodwin*, 59 Cal. 560; *Engelbert v. Engelbert*, 198 Pa. St. 327; *Page on Wills* (Ed. 1901) §§ 127, 130; *Chaplin on Wills*, p. 95. Says Chaplin: 'The true test of undue influence is that it overcomes the will without convincing the judgment.' It is apparent, therefore, that there is in this case an entire absence of evidence legally sufficient to show that the appellant here unduly influenced the mind of this testator in his testamentary act, and the conclusion seems irresistible that under the stimulus of their sympathy the jury substituted their views of a fair will for that which under the law the testator had the undoubted right to make. For, as has been said, 'A testator of full age, sound and disposing mind and memory, and not under restraint, may make such disposition of his property as does not conflict with the law. The fact, then, that a testator with such qualifications makes a foolish, unnatural, or unjust will, does not show that undue influence caused the will.'"

In *Re McDevitt*, 95 Cal. 17, 33, 30 Pac. 101, 106, it was aptly said:

"The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because

it does not conform to their ideas of what was just or proper. * * * Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind. This does not amount to proof. And many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence. And the presumption of law, in the absence of all proof, in a contest, is in favor of the will."

In *re Langford*, 108 Cal. 608, 41 Pac. 701, recites facts which liken it to the instant case. In that case, a second wife was the chief beneficiary of the testator to the disadvantage of children of his first marriage who contested the will. Evidence was introduced to show that the second wife of testator had worked in the home of his first wife during the first marriage, and that the relations between her and the testator had been illicit. The court said:

"All this was 17 years before the execution of the will, and 20 years before the codicil in which he reaffirmed the will; it was too remote in time to be admissible for any purpose; and that it was prejudicial to appellant is beyond question. There was also some testimony as to declarations and occurrences at a somewhat later period, but before decedent's removal from Illinois to California, and, if admissible at all, they are entitled to no weight in the absence of evidence, either direct or circumstantial, that undue influence was brought to bear upon the very testamentary act. And such evidence must 'do more than raise a suspicion. It must amount to proof.' * * * In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made."

[4] With regard to the claim of appellants that the will we are considering in the instant case is an unnatural one and suggests by its contents undue influence, it is pertinent to quote further from *In re Langford*, supra:

"The consideration of the question whether or not a will is 'unnatural'—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence; in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. * * * And indeed, if it were important to consider it, we do not see how the will in the case at bar can be considered unnatural in such extreme sense as to be remarkable. At the time of the execution

of the will the contestants—children of the first wife—were all grown up, middle-aged people with families of their own. He had seen but little of them after his marriage. * * * They had strenuously opposed the marriage, and had said unkind things of his wife; and, as was very natural there was not much social intercourse between the families afterwards. * * * At all events, being of sound mind and memory, it was for him to dispose of his property as he chose."

The case of *In re Calkins*, 112 Cal. 296, 44 Pac. 577, is pertinent because of the testimony relied upon by appellants in the instant case to show that the testator did not have any affection for his wife at the time he made the will, and that he distrusted her. In the *Calkins* Case it was said:

"The claim of the contestant that the testatrix had no affection for her husband would rebut any presumption of undue influence on his part, as would also the claim that the testatrix had a hearty dislike for Mrs. J. W. Calkins."

An examination of the authorities in this and other jurisdictions convinces us that the position of the respondents is correct when they state that, if it be admitted that the testimony shows Mr. Rickey's love for the contestants and his hatred and distrust of the proponents of the will, and that the trial court erred in every ruling in excluding and striking out such testimony, nevertheless, in the absence of any evidence showing undue influence directly operating upon the testamentary act at the time the will was executed, such testimony concerning the testator's feelings and all such rulings concerning such testimony would become immaterial. *Estate of McDevitt*, supra; *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407; *Estate of Ricks*, 160 Cal. 467, 485, 117 Pac. 539.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 675

HARRIS et al. v. UNION TRANSFER CO. of LONG BEACH and LOS ANGELES et al. (Civ. 4351.)

(District Court of Appeal, Second District Division 1, California. Dec. 10, 1923. Hearing Denied by Supreme Court Feb. 6, 1924.)

1. Appeal and error §1064(2)—Charge on facts ordinarily necessitates new trial.

Though a charge on matters of fact in violation of Const. art. 6, may not in itself warrant reversal where the fact charged is either admitted or uncontroverted, or where no other conclusion could be reached, in the absence of some such qualification such charge will necessitate a new trial.

2. Trial §194(16)—Instruction as to deceased's failure to look before going into the path of an automobile held erroneous as charge on facts.

In an action for the death of one killed by an automobile, an instruction, that the evidence is "she did not look and did not see it [the automobile]," and that "I am not going to tell you whether the plaintiff was guilty of negligence because she did not look or not," and that no one "can proceed without taking care and looking to see where they are going," held prejudicially erroneous as a charge on the facts where the fact of deceased's failure to look was not uncontroverted.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by John S. Harris and others, by their guardian ad litem, John S. Harris, against the Union Transfer Company of Long Beach and Los Angeles and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Harry J. McClean and Frank P. Doherty, both of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

HOUSER, J. This is an appeal from a judgment on a verdict in favor of the defendant in an action for damages brought by a guardian of minor children whose mother, Marion Harris, was killed in an automobile accident.

It appears that Mrs. Harris had been standing on the sidewalk near the intersection of two streets, at which point it was her intention to board a street car. As the street car approached Mrs. Harris left the sidewalk and walked near the rails of the street car track. As she did so a man with whom she had been conversing on the street corner called out to her that she could ride with him. At just about that time Mrs. Harris turned, gave a scream, and either walked very rapidly or ran toward the curb, and in doing so was struck and run over by an automobile truck owned and operated by defendant, and which truck had been following the street car, and which was passing the street car at that time. The evidence further shows that at the time the accident occurred it was a clear day, and that there was nothing to obstruct the view of either the driver of the truck or that of Mrs. Harris as to any of the immediate surroundings; but the evidence is conflicting as to the position of the truck with relation to either the street car or to Mrs. Harris at the time the street car stopped for the purpose of taking on passengers. The evidence is also conflicting as to the position occupied by Mrs. Harris with relation to the street car just before she attempted to return to the sidewalk, as well as to the position of Mrs. Har-

ris and the truck with relation to the curb, at the time the truck struck Mrs. Harris.

Appellants contend that there are several reasons why a new trial should be granted; but for the purposes of this appeal it is deemed necessary that but one of them should be considered by this court. It has to do with one of the instructions given by the court to the jury as follows:

"The court instructs the jury that every person has the right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person. That, however, does not mean or go to the extent of saying that anybody can proceed without taking care and looking to see where they are going. It is for you absolutely in this case to say—I am not going to tell you whether the plaintiff [plaintiffs' decedent] was guilty of negligence because she didn't look for the approaching automobile or not—it is for you to determine that. I say because she didn't, because the evidence is that she did not look and did not see it. It is for you under all the circumstances of the case to say whether she was or was not guilty of negligence proximately contributing to her injury under all the circumstances of this case."

While of necessity there could be no positive evidence regarding the fact as to whether or not Mrs. Harris actually saw the truck just before she started from the street car to go toward the sidewalk, the man who had called to her that she could ride with him testified that, so far as he knew, Mrs. Harris did not "look up the street, and that she never did look"; and another witness testified: "I would say doubtlessly that she was looking westerly." A third witness, after testifying that the truck was in full view of the pedestrians of whom Mrs. Harris was one, stated: "Mrs. Harris, the deceased, had turned around, and I knew nothing of the call from the neighbor's window, or wherever it was from, but thinking that she had turned around and saw this truck coming started to run back toward the curb, and by that time the truck was on her and had hit her." The testimony of other witnesses was, in substance, that Mrs. Harris screamed and then started to run in a southwesterly direction in front of the truck before it struck her.

It is suggested by appellants that the reason why Mrs. Harris screamed and then ran toward the sidewalk was because she had seen the truck bearing down upon her, and had endeavored to escape the accident by running to a place of safety.

[1, 2] One of the issues in the case was that of the contributory negligence of Mrs. Harris, which necessarily involved the question of the failure of Mrs. Harris to use or-

dinary care for her own safety. If (without deciding the point) it be assumed that, considering the facts of this case (as may have been determined by the jury) as being that the street car had not stopped for the purpose of either discharging or taking passengers thereon at the time the truck was passing the street car, a part of plaintiffs' decedent's duty was to look with ordinary care for approaching vehicles before attempting to cross that part of the street lying between the street car and the sidewalk, it would follow that the decision of the question of whether Mrs. Harris did actually so look was one exclusively for the jury. Section 19 of article 6 of the Constitution forbids judges to charge juries with respect to matters of fact; and, while an instruction to the jury upon a question of fact may not in itself be sufficient to warrant a reversal of the judgment in the case, especially if such fact be either admitted or uncontroverted, or where no other conclusion could be reached, and such error has not resulted in a miscarriage of justice (*Hoffman v. Pacific Electric Ry. Co.*, 45 Cal. App. 751, 188 Pac. 597), the authorities of this state, which are so numerous as to require no citation, are to the effect that, in the absence of some such qualification, such action on the part of the trial judge will necessitate the granting of a new trial to the aggrieved party. The instruction of which complaint is here made contains the statement (referring to the approaching automobile) that the evidence is "she did not look and did not see it," and that "I am not going to tell you whether the plaintiff [plaintiffs' decedent] was guilty of negligence because she didn't look for the approaching automobile, or not—it is for you to determine that;" and also the further admonition that no one "can proceed without taking care and looking to see where they are going." And, although within the same instruction the jury is advised that it must ultimately determine the question of the contributory negligence, if any, on the part of Mrs. Harris, the effect of the instruction is to tell the jury that it was the duty of Mrs. Harris to look, and that she did not do so. It cannot be stated with certainty that the fact that Mrs. Harris did not look is either uncontroverted, or that no other conclusion could have been reached by the jury. On the other hand, neither can it be said that the decision by the court of that particular feature of the case, and the consequent exclusion of a consideration thereof by the jury, did not result in a miscarriage of justice. It is highly probable that the jury determined that the failure of Mrs. Harris to look (which failure, according to the judge's instruction existed) amounted to negligence on her part; and, if the jury then concluded that such negligence proximately contributed to the injury of Mrs. Harris,

there was nothing left for the jury but to return a verdict in favor of defendant.

It would follow that the judgment should be reversed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 786

SWEET v. SWEET. (Civ. 4685.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1923.)

Divorce §133(3)—Evidence held not to entitle plaintiff to a divorce on ground of separation.

In a divorce action, evidence that went only to the fact that the parties were living apart, and that the separation occurred by reason of defendant going to another city, with no evidence of intent to desert or refusal of offer of reconciliation, was insufficient to entitle plaintiff to a decree of divorce, in view of Civ. Code, §§ 95, 100, 101.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action for divorce by Ernest L. Sweet against Hazel E. Sweet. Judgment for defendant, and plaintiff appeals. Affirmed.

W. S. White, of Salinas, for appellant.

STURTEVANT, J. The plaintiff commenced an action to obtain a decree of divorce from the defendant on the ground of separation. The defendant did not appear, her default was entered, and the plaintiff thereafter introduced evidence, and the trial court denied him a decree. From that judgment the plaintiff has appealed under section 953a of the Code of Civil Procedure.

The case was called for trial on November 22, 1922. The plaintiff took the stand and testified that he and the defendant had resided at Salinas for about two years when, on the 1st day of December, 1920, she left his bed and board. When she left it was against his will and without his consent. He did not know any particular reason why she left, only she did not want to live there. It is a fact that she showed a disposition, or rather her idea was she did not care particularly to live with him any more; she wanted to go home and live at San Jose where her folks were. Several of the foregoing statements were made in reply to leading questions, and some were made as mere conclusions—the witness not stating any probative facts. After the plaintiff had left the stand Erwin Collins testified that he knew that the defendant resided at San Jose at the time of the trial. He had known Ernest Sweet for the last two years, and Mrs. Sweet had not been at Salinas during that time. He knew Ernest Sweet and knew where he lived at the time of the trial; he lived

alone, and had lived alone for a period of two years. Thereupon the trial court remarked:

"It will require additional corroboration. The mere living apart is not sufficient. You will have to show the wife was at fault. I will have to have something to show that she deserted her husband—that she stated to some one or admitted in some way she did not intend to live with her husband, or did not intend to come to Salinas. That corroborative proof is necessary."

The further hearing of the action was continued until December 28, 1922. At that time Mrs. H. H. Hellman was called as a witness and testified that she knew the defendant; that the defendant at the time of the trial resided at San Jose, and had resided there probably around about a year. "She is working in Gross & Sons dry goods store and has an apartment house she rents. She has been renting it for about a year." In reply to questions propounded by the court the witness testified that she had known the defendant for about fifteen years; that she knew her before she was married; that she saw her in Salinas; but the defendant never in any way directly or indirectly mentioned her domestic unhappiness. From general appearances the witness did not think the defendant and her husband were getting along well together. She saw nothing in particular, but just the general attitude of both of them. "If the defendant had been unhappy our relations were not such that she would have told me those things." Thereupon the trial court denied the decree.

In support of his appeal the plaintiff relies on the decisions entitled *Morrison v. Morrison*, 20 Cal. 431; *Benkert v. Benkert*, 32 Cal. 467; *Lowman v. Lowman*, 165 Cal. 352, 132 Pac. 439. The first two cases were decided before section 130 of the Civil Code was enacted. The last case cited is not at all helpful. After stating the facts testified to by the plaintiff in that case, the Supreme Court in its decision states:

"There was evidence of other witnesses in corroboration of these facts."

An examination of the record in that case shows that the corroboration was the testimony of an eyewitness who saw and heard everything that the husband had testified to regarding the facts constituting the desertion. In the instant case it will be noted that the testimony went to the fact that the plaintiff and defendant were living separate and apart, and that the separation occurred by reason of the wife going to San Jose. The corroboration tendered by the plaintiff was to the effect that the wife was residing in San Jose. There was not a particle of corroboration, and in fact there was no direct testimony, that when the wife

left the domicile she did so "with intent to desert." Civ. Code, § 95. The plaintiff made no claim that his cause of action rested on the provisions of sections 96-99 of the Civil Code. No direct evidence and no corroboration was offered as showing, or tending to show, that the separation was amicable in the beginning, but that thereafter "the intent to desert" was "fixed during such absence or separation." Civ. Code, § 100. Neither was there any evidence, direct or corroborative, to the effect that after the defendant left the plaintiff's home the plaintiff sought a reconciliation, etc., and the defendant refused the same. Civ. Code, § 101.

In the case of *Hayes v. Hayes*, 144 Cal. 625, 78 Pac. 19, the Supreme Court had before it a cause of action for desertion which purported to rest on section 96 of the Civil Code. The court, among other things, held that there was no corroboration except perchance an alleged admission by the defendant, and that such admission should have been corroborated to constitute sufficient proof. In the case of *Kenniston v. Kenniston*, 6 Cal. App. 657, 92 Pac. 1037, the court was considering a cause of action which it was claimed rested on section 95 of the Civil Code, or, as claimed at another time, on section 102 of the Civil Code. It was argued that section 130 of the Civil Code was enacted to prevent collusion between the parties. On page 661 of 6 Cal. App. (92 Pac. 1039) the court said:

"Of these facts the court must be satisfied, but that conviction must rest in part at least upon corroborative evidence as provided by the statute. There seems to be no commanding reason why there should be any abatement of the rigorous requirement of the rule or any attempt by judicial action to enlarge the door of escape from the conjugal yoke and its corresponding obligations."

Corder v. Corder (N. J. Ch.) 59 Atl. 309, is a case that is almost parallel in its facts:

"The original separation of the husband and wife in this case, and the circumstances of it, are proved only by the oath of the petitioner. The corroboration of petitioner as to the fact that subsequent to the separation the wife lived alone is not a sufficient corroboration of the desertion charged. It proves the continuance of a separation, but not that the original separation was a desertion."

The case of *Stedman v. Stedman*, 179 Cal. 288, 176 Pac. 437, is a case that is stronger in its facts in support of the appellant's contentions. But, in that case, as in this case, when the plaintiff's evidence had been received the trial court called attention to the missing proof, and yet the plaintiff did not supply, nor offer to supply, the same. In that case the Supreme Court looked upon that feature as being determinative of what

was otherwise a very close case. It therefore affirmed the judgment of the trial court denying the decree.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 679

GRAYBIEL v. AUGER. (Civ. 2635.)

(District Court of Appeal, Third District, California. Dec. 10, 1923. Hearing Denied by Supreme Court Feb. 6, 1924.)

1. Highways ⇨172(1) — Enormous traffic on highways of California constitutes traveled portions danger zone, necessitating due care of user.

Independently of Motor Vehicle Act 1915, § 20, subd. (w), as added by St. 1919, p. 219, § 12, before its amendment, and whether or not it is valid, the enormous traffic on the improved highways of California is such as to constitute the traveled portions thereof a definite danger zone, necessitating due care and caution by every user thereof to insure his own personal safety.

2. Evidence ⇨14—Court may take notice of enormous traffic on improved highways of California.

Court may properly take notice of the enormous traffic on the improved highways of the state.

3. Negligence ⇨83—Party having last clear chance to avoid injury liable.

If one's negligence contributes to the cause of the injury, which would not have resulted without it, he cannot recover, unless the other party had a last clear chance to avoid inflicting injury for negligence.

4. Highways ⇨176—Passing driver must drive to one side to avoid injury to another driver in the highway making repairs.

If plaintiff motorist, driving south, stopped his car on the westerly side of the highway for repairs, and there was sufficient room for defendant, coming north, to pass without injuring plaintiff, it was defendant's duty to drive his car sufficiently to his right-hand side of the road to admit of such passage without injury.

5. Highways ⇨176—Duty of driver, seeing another in danger, to reduce speed to pass other without injuring him.

If defendant saw plaintiff in the road, making repairs on his car, which was facing south, at a time when defendant, driving north, was sufficiently distant to admit of his car being stopped or brought under such reasonable control as to admit of its passage of plaintiff without injury to him, it was defendant's duty either to stop his car or reduce its speed accordingly, though plaintiff had placed himself in a dangerous position.

6. Highways ⇐176—Motorist, having opportunity to pass another without injuring him and failing to do so, is guilty of reckless driving.

Where plaintiff, auto driver, whose car was standing still on the highway facing south, was seen by defendant driving north to be in a position of danger while defendant had ample opportunity to lessen his speed of 30 miles an hour, so as to pass plaintiff without injuring him, it was his duty to do so, under Motor Vehicle Act 1915, § 22, as amended by St. 1917, p. 404, § 16, and in failing to do so he was guilty of reckless driving.

7. Highways ⇐184(2)—Evidence held to show injury to plaintiff was caused by defendant's negligence in passing plaintiff on highway.

Evidence held to support finding of trial court that injury to plaintiff auto driver, who stopped his car on the right-hand side of a highway facing south, was caused by defendant in driving past plaintiff at a reckless speed, in violation of Motor Vehicle Act 1915, § 22, as amended by St. 1917, p. 404, § 16.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Lloyd E. Graybiel against C. Auger. Judgment for plaintiff, and defendant appeals. Affirmed.

Collins & Collins, of Fresno, and S. E. Tracy, of San Francisco, for appellant.

Wm. N. Graybiel, of Turlock, for respondent.

PLUMMER, J. This action was instituted by plaintiff for the purpose of recovering damages from the defendant for personal injuries sustained by the plaintiff as a result of being struck by an automobile owned and driven by the defendant. The trial was had before the court sitting without a jury. The plaintiff was awarded judgment in the total sum of \$1,050. This sum included expenses for medical attendance, plus loss of wages or compensation, and \$500 on account of pain and suffering sustained by the plaintiff.

It appears that the plaintiff at the time of the injury complained of was driving a Dodge automobile southerly on the state highway between the towns of Ceres and Keyes in Stanislaus county; that at the time of the injury in question construction work was being carried on along that portion of the state highway just referred to, such work consisting of the construction of shoulders on both sides of the improved portion of said highway. These shoulders were about 18 inches wide, and, according to the testimony, varied from 1½ inches to 3 inches in height above the theretofore traveled portion of the improved highway. As the plaintiff was traveling southerly it appears that the tire on the left-hand rear wheel collapsed, causing the plaintiff to stop for the purpose of changing tires. It further appears in the testimony that the shoulder on the right-hand side of

plaintiff as he was traveling southerly had just been constructed, was not sufficiently hardened to permit travel thereon, and that the plaintiff placed the right wheel of his car within an inch or two of the inside line of the right shoulder or the shoulder along the westerly border of said improved highway, and proceeded with the work of changing the tire on the wheel referred to; that the shoulder referred to continued a distance of a quarter or a half a mile southerly from where the plaintiff stopped, and that its condition was such as to render it improper for him to drive his car over or upon the same, and also it further appears from the testimony that, over and beyond the left-hand side of the road, to wit, being the east shoulder, the ground was not in a condition to admit of a machine being driven over and stopped for the purpose of making repairs; that the place where the plaintiff stopped was upon an unobstructed and straight way portion, giving ample opportunity to all persons using the highway of seeing the plaintiff's car standing in the position which it occupied, and also enabling the plaintiff to see all cars approaching from either direction. It appears that at the time of the injury sustained by the plaintiff he was occupying a crouching position close to the left rear wheel, hereinbefore referred to, engaged in the work of changing tires, and that while in this position he was struck by the defendant's automobile, which automobile was being driven by the defendant in a northerly direction along said highway.

The defendant appeals to this court from the judgment against him, and for grounds of appeal alleges that the plaintiff's injury is the result of his own contributory negligence, and that no negligence was shown on the part of defendant, but, if shown, was not the sole cause of injury, and would not have caused any injury, to the plaintiff, had the plaintiff himself not been guilty of contributory negligence at the very time the injury was inflicted. It is also contended by the plaintiff that the findings of the court are not sustained by the testimony.

The court found, among other things, that to the right of the place where the plaintiff stopped his car, and along the westerly side of said highway, and for a considerable distance in both directions therefrom, a concrete shoulder for said highway was being constructed; that said concrete shoulder was soft and pliable; that it would have been impossible in the ordinary course of travel to drive an automobile over said shoulder without injury thereto; that it was impossible for the plaintiff to remove his car from the highway in order to make the necessary repairs, for the reasons that it could not be moved to the right without interfering with the work of construction on the highway, nor to the left by reason of the condi-

tion of the ground, and that, therefore, plaintiff did not violate the statute in turning to the extreme right of the pavement, close to the edge of said concrete shoulder, to make the repairs to his car; that at the time of the injury the plaintiff was on the westerly side of the center of said highway; that the defendant carelessly, negligently, and without due care so operated his automobile as to strike and injure the person of the plaintiff. Appellant first called attention to subdivision (w) of section 20 of the Motor Vehicle Act of 1915 (as added by St. 1919, p. 219, § 12), wherein it is provided that no person shall stop an automobile upon the traveled portion of any highway for the purpose of making repairs, unless such automobile shall be disabled to the extent that it is impossible or impracticable to remove the same therefrom until the repairs have been made, and contends that to stop an automobile as the plaintiff did in this case constitutes a misdemeanor, and is such negligence per se as to prevent any recovery by him in this case.

[1, 2] Whether this section, which has now been changed by an amendment, as it then stood was sufficiently certain to describe the act of the plaintiff as a misdemeanor, or whether void for uncertainty, need not be determined, for the simple reason that the enormous traffic on the improved highways of the state of California, and of which we think the court may properly take notice, is such as to constitute the traveled portions thereof a definite danger zone, necessitating due care and caution on the part of every user thereof to insure his own personal safety. Under the motor vehicle law as applied to the circumstances under conditions requiring automobile drivers to use the right-hand half of the highway when unobstructed, there were two danger zones, to wit, one in the path of vehicles driven southerly, and one in the path of vehicles driven northerly. The testimony shows that, notwithstanding the construction of the shoulders referred to, there was sufficient space for each motor vehicle on the one-half of the road required to be used by the drivers of machines traveling in either direction, and that, while each machine remained on its proper side of the road, there would neither be collision, nor probability of collision, nor possibility of collision. It further appears from the testimony that at the time of the injury complained of much use was being made of the highway referred to. It thus appears, from what has been said, that whether subdivision (w) of section 20 of the Motor Vehicle Act of 1915 is valid or invalid as a definition of an act constituting a misdemeanor, nevertheless, the plaintiff was required to use very great care in keeping his machine and person on the westerly half of the improved portion of said highway, and might readily be charged with contributory negligence, if he allowed any

portion of his person to get beyond the center line thereof.

[3] As there is no dispute or controversy between the appellant and respondent as to the law applicable to this case, we do not deem it necessary to review the authorities cited. It is well settled that if one's negligence contributes to the cause of the injury, and the injury would not have resulted, had his negligence not contributed thereto, he cannot recover, unless it further appears that the defendant had a last clear chance to avoid inflicting injury. The court in this case found that the plaintiff was upon the westerly half of said highway, and was on the westerly side of the dividing line thereof, and that the defendant carelessly, negligently, and without due care drove his automobile, to wit, a Marmon car, against the person of the plaintiff, and in this manner inflicted the injury complained of.

[4, 5] As we view this case, if the testimony shows that the defendant had a last clear opportunity to avoid injuring the plaintiff, and could have done so by the exercise of due care, then whether the finding of the court that it was impracticable for the plaintiff to move his car to some other location for the purpose of making repairs is wholly immaterial. If the plaintiff was on the westerly side of the road, as just stated, and there was sufficient room for the defendant to pass without injuring the plaintiff, it was his duty to move his car sufficiently to his right-hand side of the road as to admit of such passage without injury; also, if the defendant saw the plaintiff in a position of danger at a time when his, the defendant's, car was sufficiently distant to admit of his car being stopped or brought under such reasonable control in relation to its stopping as to admit of its passage by the plaintiff without injury, then it was the duty of the defendant to either stop his car or reduce its speed to such a degree as to enable him to pass by the plaintiff without injury to him, even though the plaintiff had placed himself in a dangerous position.

[6, 7] This reduces the question in this case purely to one of fact and not to a definition of legal principles. The testimony set out in the transcript shows that the improved portion of the highway involved, lying within the shoulders, was 15 feet 4 inches in width; that the width of the Dodge car belonging to the plaintiff was 5 feet 6 inches; that the width of the Marmon car was 5 feet 10 inches, which would leave a space of 4 feet between the two cars; that at the time of the injury the plaintiff was in a crouching position, drawn up close to the left rear wheel of his machine, at work changing a tire, as hereinbefore stated; that the point or place where his body was struck by the defendant's car was from 17 to 21 inches from said wheel; that there was a distance between

the Dodge car to the center of the highway of at least 26 inches, and thus that defendant's car, instead of being on the easterly half of said highway, which would have left plenty of space for passage, was in truth and in fact some 9 inches or more to the westerly side of said dividing line. The testimony to this effect, if believed by the trial court, was sufficient to establish the position of the plaintiff's car and the position of the plaintiff's body as being wholly on his right or westerly half of the traveled highway, leaving the easterly half wholly unoccupied and free for the use of passing vehicles. It also appears from the plaintiff's testimony that other vehicles had passed by during the meantime; his testimony being as follows in this particular:

"As I say, I figured I was on my half and edge of the highway, which left the other half of the old highway in addition to the shoulder, which seemed to me to give plenty of room. But in view of the fact that several cars had passed, and had given me a reasonably wide berth, going by carefully, my danger seemed less at the time I was finally hit than it did at first."

Keeping the foregoing facts in mind, let us examine the testimony relative to the conduct of the defendant. His own testimony is as follows:

"Now, I saw the Dodge car parked on the left-hand side of the road, and when we were perhaps 15 car lengths away—hard to determine just exactly—I saw a young man come out from the back of the Dodge car and squat down to put a tire on. Due to the fact that we had passed a great number of machines, both machines driving inside of the collar, I presumed that there was room enough for him to squat down there; but, however, I blew the horn, and blew it continuously clear up to the machine, you might say, slackening down the speed we had been traveling—about 30 miles an hour—and I guess we slackened to around 20 or so, and we went by this car. The right-hand wheels of the Marmon were against the curb or against the right-hand collar, as the tracks were defined in the light sand covering. And we compared the imprint of the McClaren cords I had on the rear tires, which tracks were in the sand, and we identified them as our tracks. As we got by the Dodge car, some one said we had hit a man, or something like that. I felt no impact whatever. And we were probably three or four car lengths beyond the Dodge car then."

The defendant further testified that he first saw the Dodge car standing when he was about 150 yards from it; that he saw the plaintiff come around and squat down by the rear wheel when he was distant between 100 to 200 feet; that the plaintiff had been sitting in a crouching position a few seconds before the Marmon car reached the portion of the highway opposite the standing Dodge car. It further appears that the defendant did not continue to watch the position of the plaintiff

after first observing the same, and the explanation thereof is given as follows:

"Q. Will you explain to the court why, if you didn't see what happened until just a little bit before the accident happened, why it was you took your eyes off of him, and didn't even see your car hit him when you went by him? A. Why that is the natural thing to do Mr. Graybiel, if you are going by a little boy, or a man, or anything else, after you have got by, you naturally look ahead of you. If you are a careful driver, you don't keep looking at him."

"Q. Yes, I agree with you; but I ask you why you took your eyes off him before you got by? A. That's what I say, for I had seen the man right up to the time when we had got right there, and naturally supposed we were going by, and there was no reason for me to keep my eyes on him; would naturally look ahead of me more. I knew as I approached that he was bound to be very close to the edge of his car, as I passed by; and the way he was standing there, why, as I recollect it, it seemed to me there was a good space of light between me and him when he was squatted down; otherwise, I would not have attempted by any manner of means to go by him."

The testimony of the witness Fletcher is to the effect that the defendant on the day of the injury made the following statement:

"I asked Mr. Auger—I saw Mr. Auger and I says, 'How did it happen?' 'Well,' he said, 'he had his car (plaintiff's car) parked alongside the road changing a tire.' 'Well,' I says, 'you must have hit him awful hard,' I says, 'to hit him—bruise him up like that.' 'Well,' he says, 'I was going pretty fast,' he says, 'I was going 30 miles an hour.' 'Well,' I says, 'why didn't you slow down when you seen him?' 'Well,' he said, 'I figured I had all kinds of room, and I never even thought about hitting him.' He says, 'I never slowed down.'"

The testimony of other witnesses as to the speed of the defendant's car varied all the way from 20 to 35 miles per hour. The testimony of Mr. Hasse, a witness for the defendant, was as follows:

"Q. In your opinion, how fast were you traveling at the time you passed the Dodge? A. I don't know. I suppose between 20 and 30. It was a narrow highway there. Between 20 and 30 I should judge."

"Q. Between 20 and 30? A. Yes. * * *

"Q. Then your statement that he was going at between 20 and 30 miles an hour is simply made as you think of it at this time? A. As I think of sitting in the car. I don't think it was moving any faster."

"Q. Than 30 miles? A. Yes."

The testimony of the plaintiff was to the effect that the defendant was driving from 30 to 35 miles per hour, from all of which the court was justified in concluding that the defendant's car was traveling at a rate of speed not far from 30 miles per hour; that the defendant saw the plaintiff's car standing on the highway when he was distant therefrom about 150 yards; that the defendant saw the plain-

tiff pass around the rear of the Dodge car and assume a squatting position at a distance of some 15 car lengths, which would equal approximately 140 or 150 feet; that, even though the defendant slowed his car down to some appreciable degree, he made no effort to stop the same. It further appears from the testimony that the 15 or 18 inch shoulder on the easterly side of the improved highway was dry and hard, and that its height above the theretofore improved portion varied according to the witnesses' statements from 1½ to 3 inches. The testimony as to its possible use appears in the transcript as follows: Question of the plaintiff:

"Any obstruction between your car and the outer edge of the pavement? A. On the right-hand side?

"The Court: On the right-hand side—the east side. A. Oh, no; nothing at all; no, nothing at all.

"The Court: There was no construction work there going on which could prevent the free passage of others, any place? A. Nothing at all. * * *

"The Court: Along there where the accident occurred could a man driving a car say in a northerly direction have crossed upon that shoulder and gone even beyond the shoulder? Was there anything to prevent that? A. No, he could have gone two or three feet further.

"The Court: So as to avoid any obstruction on the highway? A. Yes."

The defendant's testimony upon the same point is as follows:

"Q. Do you mean to tell the court, in this case, that you could not drive your big Marmon car up onto that shoulder? Is that right? A. I do; not without jeopardizing the car, and taking the chance of twisting my wheels and turning my car over.

"Q. Going at a rate, as you have said, of 20 miles an hour? A. Yes.

"Q. That you could not drive your big, heavy car, weighing 3,900 pounds, up onto that shoulder without jeopardizing your car and the people in it? A. Yes, sir; weight has nothing to do with it.

"Q. Weight has not anything to do with it? A. No.

"Q. In the striking of something with the wheel, as the shoulder? A. No.

"Q. That is your testimony as an expert driver of a car, is it? A. Yes, absolutely; the collar is stronger than three tons of weight—or ten tons.

"Q. Then will you say that a Ford, if that shoulder were two inches high, would go up onto it just as easily going 20 miles an hour as the Marmon car at the same speed? A. Oh, I believe so; yes, sir.

"Q. In your estimation? A. Judgment; yes, sir.

"The Court: And with as little jar? A. Yes; about the same.

"The Court: The jar would be the same? A. Yes; there is very little difference in that, whether the car was light or heavy. There is danger pulling the wheels over to the right and twisting it—throw the steering gear out."

Upon this point the plaintiff testified as follows:

"Q. There was no difficulty in getting out of the main portion of the road and up on top of the shoulder? A. I customarily go up on that to pass another car. Have done so.

"The Court: There is no difficulty in doing so? A. No."

The defendant's further explanation of the cause of the injury was that the plaintiff must have moved back, or toward the center of the road, just preceding the impact. This movement the plaintiff, however, denies. The defendant also testified that he examined the position of the tracks of his car after the impact. A witness for the plaintiff testified that no such examination was made. Upon this statement of the facts, as the defendant was not driving over 35 miles per hour, it is contended that he was not driving at an illegal rate of speed, and hence not guilty of any negligence. Section 22 of the Motor Vehicle Act (as amended by St. 1917, p. 404, § 16), as it then read, is as follows:

"Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property. * * *"

This provision of the section is just as much a portion of the law as that which allows a speed of 35 miles per hour under certain specified conditions. From what has been said, it is apparent that the trial court was justified in concluding that the defendant was driving at a reckless rate of speed at the time of the commission of the injury complained of; that there was no testimony showing that the plaintiff had changed his position from the time the defendant saw him crouching down near the left rear wheel of the Dodge car until some portion of the Marmon car came in contact with the plaintiff's body; that there was nothing to prevent the defendant from having driven the right-hand portion of his car on the right-hand side of the road, onto and along the 15 or 18 inch shoulder then extending along the easterly side of said highway, and thus obtained a free, open, and safe passageway, admitting of no harm to the plaintiff; that the defendant observed and had knowledge of the position of the plaintiff, and that he took the chance of driving his car at a rapid rate of speed past the person of the plaintiff, and in so doing did not keep on the easterly or what was then to the defendant the right-hand half of the improved highway; that the defendant had ample time, after observing the standing car, to not only lessen the speed of his own car, but to bring the momentum of the same down

to such a degree that he could have passed the plaintiff safely and without doing him any injury; and we also think that the circumstances as hereinbefore detailed show that the section of the law which we have quoted required the defendant to slow his car down to such a rate of speed as to give him absolute control thereof and so prevent the injury. We also think that the section of the law just quoted justified the trial court, in view of the circumstances which we have detailed, in coming to the conclusion that the plaintiff's injury was due to the carelessness and negligence of the defendant in maintaining a high rate of speed while passing the person of the plaintiff. It may be here stated that the testimony shows that, after the injury of the plaintiff, the changing of the tire referred to on the Dodge car was completed without any one suffering any injury therefrom by passing automobiles; but what care was used thereafter in making the change of the tire or by passing motorists does not appear. And while, from the high rate of speed maintained by many motorists on the highway, it may be common knowledge that the use or occupancy thereof by any one, even though in broad daylight, as was the case in this instance, is more or less hazardous, yet from the circumstances detailed we think the trial court was justified in concluding that the plaintiff had taken all precautions, and was taking all the precautions, that could have been reasonably required of him under the circumstances, and that, if the defendant had done likewise, there would have been no injurious results.

No complaint is made as to the amount of damages awarded the plaintiff. It follows, from what has been said, that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 691

DUNLOP v. FARMER et al. (Civ. 2638.)

(District Court of Appeal, Third District, California. Dec. 11, 1923. Rehearing Denied by Supreme Court Feb. 6, 1924.)

1. Attachment §349—Complaint against sureties on attachment bond held defective for failure to allege demand on principal and that damages were unpaid.

The complaint in an action against the principal and sureties on an attachment bond was defective as against the sureties for failure to allege a demand made on the principal, or that the alleged damages were unpaid; the foundation of the suit against the sureties being the breach of the principal's obligation in the attachment suit to pay such damages.

2. Appeal and error §1170(3)—Overruling demurrer to complaint not alleging essential fact held not miscarriage of justice.

Where an amended complaint in an action on an attachment bond alleged no part of the damages claimed had been paid, but did not allege a demand for payment, but the evidence showed payment was demanded before action was commenced and defendant answered denying the alleged damages and at the trial endeavored to show plaintiff had suffered no damages, error in overruling demurrer held not miscarriage of justice.

3. Appeal and error §1011(1)—Finding based on conflicting evidence will not be disturbed.

Trial court's finding based on conflicting evidence will not be disturbed.

4. Attachment §375(3)—Measure of damages for wrongful detention of property under attachment is value of use during detention period.

The measure of damages for wrongful deprivation of the use of property, such as an automobile, is the reasonable value of the use of it during the period of detention.

5. Appeal and error §1052(8)—If evidence was erroneously admitted on the question of reasonable value of use of article during wrongful detention, no reversible error resulted.

In an action against principal and sureties on an attachment bond for damages for wrongful deprivation of the use of plaintiff's automobile, if in proving the reasonable value of the wrongful deprivation the trial court improperly admitted testimony of plaintiff to show his necessity for the car in his business, the amount he actually paid out for the hire of automobiles to use in place of the one under attachment, which proof showed he was compelled to pay out a total of \$350 to \$400 for the hire of other automobiles, admission of such testimony held not a miscarriage of justice where the award for wrongful deprivation was for less than 30 cents a day.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by William Dunlop against George A. H. Farmer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. W. Braswell, of Lindsay, for appellants. Max B. Jamison, of Porterville, for respondent.

FINCH, P. J. The defendant Farmer, in an action brought by him against plaintiff, caused an attachment to be levied on an automobile belonging to the latter. At the time of the issuance of the attachment, Farmer, as principal, and defendants Reed and Davis, as sureties, entered into an undertaking in the sum of \$500 to the effect that—

"If said defendant recovers judgment said plaintiff will pay all costs that may be awarded to the defendant, and all damage which he may have sustained by reason of said attach-

ment, not exceeding the sum of five hundred (\$500.00) dollars."

Dunlop was given judgment in that action and the automobile was restored to him. Thereafter this action was commenced to recover damages in the sum of \$500, the plaintiff alleging that he had been damaged in the sum of \$1,814 by reason of the wrongful attachment but praying for recovery of \$500 only. Plaintiff was given judgment for \$500 and costs of suit. From this judgment defendants appeal.

[1] The original complaint did not allege that a demand had been made on Farmer for payment of the alleged damages or that the same had not been paid. The defendants filed general demurrers to the complaint and the same were overruled. The undertaking on the part of the sureties was that the plaintiff in the attachment suit would pay the damages sustained by reason of the attachment and the complaint, as against the sureties, was defective for failure to allege a demand made on Farmer or that the alleged damages were unpaid. The foundation of the suit against the sureties was the breach of the obligation of the plaintiff in the attachment suit to pay such damages and the breach should have been alleged. 3 Cal. Jur. 555; Atlas Development Co. v. National Surety Co. (Cal. Sup.) 212 Pac. 196; Swain v. Los Angeles Morris Plan Co. (Cal. App.) 213 Pac. 703.

[2] By amended complaint, filed by permission of the court after the close of plaintiff's case, the plaintiff alleged that no part of the damages claimed had been paid, but did not allege a demand for payment. The evidence shows that payment was demanded before the action was commenced. An examination of the transcript on appeal in the case of Atlas Development Co. v. National Surety Co., supra, shows that the plaintiff therein did not allege a demand for payment or that the damages claimed had not been paid. A general demurrer was interposed and overruled. There, as here, the defendant answered, denying the alleged damages, and at the trial endeavored to show that the plaintiff had suffered no damage by reason of the attachment. The court said:

"The defendant was not deceived or misled by the imperfection of the pleading, and under the oft-cited sections of the Code and Constitution, no miscarriage of justice having resulted, the error should be disregarded."

[3] Appellant contends that the evidence shows that the plaintiff was not the owner of the automobile attached. Plaintiff testified that he purchased it for \$420 on the monthly payment plan, making an initial payment of \$215, and that he borrowed \$75 from his mother with which to make the final payment and gave her a bill of sale of the automobile as security for the money borrowed, but that he did not deliver the ma-

chine to her and that she never had possession of it or any interest in it. After the levy of the attachment, the mother made a demand upon the sheriff for the possession of the automobile under a claim of ownership. One witness testified that, at the time the attachment was levied, the plaintiff stated that the automobile belonged to his mother. Under the foregoing conflicting evidence the finding of the trial court that plaintiff was the owner of the automobile cannot be disturbed on appeal.

[4, 5] The only other ground for reversal urged by appellant is that there was no competent evidence to show the reasonable value of the use of the automobile during the time it was held under attachment. The complaint alleges that such value was \$2.50 a day. The automobile was held by the sheriff for 23 months. The court found that the plaintiff suffered damage in the sum of \$250 by being deprived of the use of the automobile during the time it was held under attachment. In addition, the court found that that plaintiff was damaged in the sum of \$306 for money actually and necessarily paid out by reason of the attachment. There is no contention that the plaintiff was not entitled to recover such additional sum. Deducting the \$306 from the \$500 for which judgment was given, it appears that plaintiff was given judgment for the value of the use of the automobile in the sum of only \$194, or at the rate of less than \$8.50 a month. At the trial there appeared to be some confusion as to the measure of damages for deprivation of the use of the machine. It has often been held that the proper measure of damages in such cases is the reasonable value of the use of the property during the period of detention. Atlas Development Co. v. National Surety Co., supra; Nahbas v. Browning, 181 Cal. 55, 183 Pac. 442, 6 A. L. R. 476; Taylor v. Bernheim, 58 Cal. App. 404, 209 Pac. 55; Blodgett v. Rheinschild, 56 Cal. App. 728, 206 Pac. 674; Los Angeles Furniture Co. v. Hansen, 46 Cal. App. 5, 188 Pac. 292; Ghio v. Cline, 45 Cal. App. 262, 187 Pac. 433; Tucker v. Hagerty, 37 Cal. App. 789, 174 Pac. 908. Apparently with this rule in mind counsel for plaintiff propounded the following question to the plaintiff while on the witness stand:

"What would you consider was a reasonable value for the use of that machine for the 23 months that it was held under attachment by the sheriff in that particular action?"

Counsel for defendants objected to the question. After a long colloquy between the court and counsel for the respective parties, but without any definite ruling on the objection, counsel for plaintiff, at the suggestion of the court, proceeded to prove plaintiff's necessity for the use of an automobile in his business and the amount he actually paid out for the hire of automobiles to use in place of

the one under attachment. This proof shows that plaintiff was compelled to pay out a total of \$350 to \$400 for the hire of such automobiles. Evidence of a like character has been held sufficient to support a judgment for the reasonable value of the use of an automobile during its detention under attachment. *Taylor v. Bernheim*, supra. In view of the small amount awarded for the deprivation of the use of the machine, being less than 30 cents a day, it cannot be said that there has been a miscarriage of justice.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

64 Cal. App. 658

NOCE et al. v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 4628.)

(District Court of Appeal, First District, Division 1, California. Dec. 7, 1923. Hearing Denied by Supreme Court Feb. 4, 1924.)

1. Negligence ☞136(9) — Contributory negligence question of fact.

Contributory negligence is ordinarily a question of fact, and becomes one of law only when the facts are undisputed and such that reasonable minds can draw but one conclusion.

2. Street railroads ☞117(26) — Contributory negligence of truck driver in driving on car track held for jury.

Contributory negligence of truck driver in driving on car tracks, where he was struck without warning and killed by a disabled and runaway car traveling in the same direction as deceased at a rate of more than 60 miles per hour, *held* not established as a matter of law.

3. Street railroads ☞117(29) — Contributory negligence of truck driver, failing to look, held for jury.

A truck driver, killed while driving on car tracks by a disabled and runaway car traveling at the rate of over 60 miles per hour, which struck him from the rear, *held* not negligent per se, or as a matter of law, for failure to keep a constant watch behind for approaching cars.

4. Street railroads ☞85(1) — Railroad has no exclusive right of way.

An electric railway company has no exclusive right to that portion of the road occupied by its tracks.

5. Death ☞99(4) — \$20,000 held not excessive.

\$20,000 for the death of a 31 year old truck driver, with an expectancy of 34 years more, who had been contributing \$125 to \$150 a month to the support of a wife and two minor children, and who was a partner in a profitable truck-gardening business, *held* not excessive.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Clorinda Noce and others against the United Railroads of San Francisco.

Judgment for plaintiffs, and defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and Wm. M. Cannon, all of San Francisco, and Ross & Ross, of San Mateo (Enid Childs, of San Francisco, of counsel), for appellant.

Walter E. Drobisch, Louis Ferrari, and Black & Black, all of San Francisco, for respondents.

NEEDHAM, Justice pro tem. This is an appeal by the defendant from a judgment in favor of the plaintiffs. The plaintiffs are the widow and minor children of one David Noce, and they recovered damages in the sum of \$20,000, awarded them by the verdict of the jury in an action wherein they allege that the death of David Noce was caused by the negligence of the defendant. This is the second trial of this case, a former judgment in favor of the plaintiffs having been reversed by this court upon appeal upon the ground that the trial court gave improper instructions to the jury. The former case upon appeal is reported in 53 Cal. App. 512, 200 Pac. 819.

There is some discussion in the briefs in the instant case by both the appellant and the respondents as to whether the doctrine, to wit, "the law of the case," is applicable to the case now under consideration. Both sides, however, have briefed the case upon the supposition that this doctrine is not applicable, the respondents stating in their brief:

"Without conceding this proposition, we respectfully desire to be understood that we are perfectly willing that the cause now pending before the court be determined upon the record in the instant case."

This being the situation, we will consider the present case and determine it as though the doctrine known as "the law of the case" does not apply. From the record in the case, the facts developed are substantially as follows:

On July 22, 1919, an electric car of the defendant left Daly City at 1:50 p. m., and proceeded in a southerly direction, and had gone but a short distance, when it collided with a motor truck, the property of one Witt. The car of defendant was running down a grade at the time of this collision; it crashed into the rear of the Witt motor truck, throwing it into an adjoining field; the front end of the electric car was smashed and dilapidated, and the motorman thrown to the floor, unconscious; the air brake and equipment and front control were destroyed. In this condition, the car proceeded on its course, downgrade, at a rapid and dangerous rate of speed. The car, while so proceeding and entirely out of control, ran into a truck operated by David Noce who as a result was killed. The truck of Noce, when struck,

was on the car track proceeding in a southerly direction ahead of the car. The electric car being out of control, the motorman unconscious, of course, no gong or bell sounded as the car approached Noce's truck. It is conceded that the electric car at this time was running at the rate of at least 60 miles an hour.

The appellant urges three grounds for a reversal of the judgment: (1) Contributory negligence on the part of David Noce was established as a matter of law; (2) appellant was deprived of a fair trial, and was seriously prejudiced by the erroneous instructions to the jury; (3) the amount of damages awarded by the jury is excessive and wholly unsupported by the evidence. If the first collision was the result of the negligence of the motorman operating the defendant's electric car, or of the concurrent negligence of the motorman and the driver of the Witt truck, then it follows that in either event the defendant would be liable for the death of Noce, provided Noce himself was not guilty of negligence which proximately caused the second collision.

[1] The appellant urges with much detail that the evidence shows that Noce was guilty of contributory negligence, and that this was established as a matter of law. The question as to whether a plaintiff has been guilty of contributory negligence as a matter of law has been before the appellate courts of this state very frequently, and this doctrine is well defined and stated in numerous cases. In the case of *Loftus v. Pacific Electric Ry. Co.*, 166 Cal. 464, 137 Pac. 34, this doctrine is concisely and clearly stated on page 467 (137 Pac. 35), as follows:

"Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence" (citing cases).

Again, in the case of *Seller v. Market Street Ry. Co.*, 139 Cal. 268, on page 271, 72 Pac. 1006, the doctrine is put in the following language:

"It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the

question is one of fact for the jury. These rules are so well settled as to render it unnecessary to here do more than state them" (citing cases).

Many other cases can be cited where the doctrine is stated, but the quotations from the two decisions just referred to are sufficient, and they very clearly and adequately express the doctrine.

[2] The appellant argues with much plausibility and with some detail that the evidence given upon the trial conclusively shows that Noce turned suddenly and directly in front of the electric car. We do not think the evidence necessarily warrants this conclusion. The Noce truck was traveling in the same direction that the defendant's car was proceeding. At just what point Noce drove his truck upon the car tracks is, we think, a matter of dispute. It is true that he swerved to the left to avoid two other trucks, standing upon the street and to his right. Various witnesses testified both for the plaintiff and the defendant in regard to this point. Furthermore, a map or plat showing the situation where the accident occurred and the immediate adjoining area was introduced in evidence and considered. Whether Noce did in fact drive suddenly upon the car track or whether he had been for some time upon the car track was for the jury to say. Under these circumstances we cannot see how it can be claimed that Noce was guilty of contributory negligence as a matter of law. It seems clear that the question was properly one for the consideration of the jury.

[3] The counsel for appellant also argues that Noce was guilty of contributory negligence as a matter of law in failing to keep a constant watch behind for approaching cars and in failing to look back for approaching cars at the time he turned upon the street car track, and asserts that the doctrine in the case of *O'Connor v. United Railroads*, 168 Cal. 43, 141 Pac. 809, is not applicable to the instant case and contends that the decision in that case deals with a situation in a large city where the traffic is congested, whereas the instant case concerns an accident which occurred on the state highway in San Mateo county in a region sparsely settled and rural. Whether the case of *O'Connor v. United Railroads*, supra, is applicable or not, it seems to us to be comparatively unimportant. There is no evidence brought to our attention, and we have discovered none from a careful reading of the record, that the accident in the case now under consideration occurred in a region sparsely settled. In any event, we think it must be held that the defendant had no exclusive right to that portion of the road occupied by its tracks.

[4] The evidence shows that there was much traffic in the neighborhood where the

accident occurred; at least, that is fairly deducible from the evidence. It cannot be claimed that one driving on or near the tracks of a street-car company on a public highway is guilty of negligence and ordinary care per se in failing to keep a constant watch rearward for approaching cars. Furthermore the evidence shows that the electric car of defendant was proceeding at a tremendous rate of speed, admitted to be sixty miles an hour, whereas the truck which the deceased was driving was not proceeding at a high rate of speed; therefore the electric car was overtaking the truck of the decedent in a space of time out of all proportion to that which would ordinarily be occupied by an electric car proceeding at the usual rate of speed. Furthermore, as stated, the electric car was running wild and no bell was sounded. It seems clear, therefore, that Noce was not guilty of contributory negligence per se.

The next point made by appellant is that the jury was erroneously instructed and that deprived appellant of a fair trial to its serious prejudice. We have read the instructions of the learned trial judge most carefully, and it seems to us that the instructions given are free from prejudicial error. The instructions, if anything, were more favorable to the defendant than to the plaintiffs. This case on the former trial was reversed because of two errors in the instructions. See *Noce v. United Railroads*, 53 Cal. App. 516, 200 Pac. 819. The learned trial court upon this, the second trial of the case, was careful to avoid the former errors. The argument of counsel for the appellant upon this branch of the appeal, in an endeavor to show that there were errors in certain instructions, seems to us to be highly critical and without substantial merit. We have carefully examined each and all of the criticisms of the instructions given, and we cannot see that they merit detailed consideration. It is sufficient to declare that in our opinion the jury was fairly and fully instructed, and we find no errors in the instructions given to the prejudice of the appellant.

[5] The last point urged for a reversal is that the amount of damages awarded by the jury is excessive and wholly unsupported by the evidence. The amount of damages awarded was the sum of \$20,000. The deceased, David Noce, was at the time of his death between 30 and 31 years of age, and he left a wife and two minor children. According to the evidence introduced he had an expectancy of living about 34 years more. He had always earned a good living for his family, and had contributed from \$125 to \$150 per month for their support. In 1918 he became a partner in the firm of Cuneo & Co., truck gardeners, paying for a half in-

terest in the firm the sum of \$1,600. The net profits of the business during the 7 months that he was with the firm aggregated more than \$3,900.

Under the authorities in this state this was not an excessive verdict, and does not suggestion passion or prejudice on the part of the jury. See *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 Pac. 714; *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400. For the foregoing reasons it seems clear that the evidence amply supports the verdict of the jury.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

64 Cal. App. 719

CRAWFORD v. KENNEDY. (Civ. 4769.)

(District Court of Appeal, First District, Division 2, California. Dec. 12, 1923. Hearing Denied by Supreme Court Feb. 6, 1924.)

Brokers $\S$ 43(3)—Subsequent letter held not to render oral contract enforceable.

Where an agreement employing a broker to sell real estate was void because not in writing, in view of Code Civ. Proc. $\S$ 1973, and Civ. Code, $\S$ 1624, subd. 6, a subsequent letter from owner to broker, reciting that the amount would be settled satisfactorily, but not promising to pay the reasonable value of his services, nor stating any amount of indebtedness, or any method by which it could be computed, was insufficient to render such agreement an enforceable contract.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by C. J. Crawford against W. C. Kennedy. Judgment for defendant and plaintiff appeals. Affirmed.

C. K. Bonestell, of San Francisco, for appellant.

Everts, Ewing, Wild & Everts and S. P. Coy, all of Fresno, for respondent.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against him in an action brought to recover \$5,250, the alleged reasonable value of plaintiff's services in negotiating a sale of real property owned by the defendant.

It was alleged and found by the trial court that prior to June 1, 1920, the plaintiff was a duly licensed real estate broker, engaged in business as such in the county of Fresno, state of California; that in January, 1920, defendant orally appointed plaintiff his agent to obtain for him a purchaser of certain real property situated in said county and state, orally promising plaintiff that if plaintiff should obtain a purchaser therefor at a price

and upon terms acceptable to defendant, defendant would pay plaintiff the reasonable value of such services; that thereupon, and pursuant to said understanding, plaintiff obtained such purchaser, to whom defendant sold said real property for the sum of \$105,000, which amount was acceptable to defendant; that thereafter defendant orally agreed to pay plaintiff the reasonable value of his services, and subsequent to said sale, and on June 26, 1920, defendants executed and delivered to plaintiff a written memorandum in words and figures as follows:

"San Francisco, June 26, 1920.

"Mr. Crawford, Fresno—Dear Sir: I received a letter from my daughter this morning in which she stated that you would like to have a writing from me. All I can say is that you may keep this letter to show that I am indebted to you. I cannot state the amount as that is to be settled between us, but you know me well enough to know that it will be settled satisfactorily. I expect to leave here in a day or so as I am tired of hearing anything regarding business. Every one seems to think we made a fine sale and all I can say is that I am glad I am out of it.

"Yours truly,

"[Signed] W. C. Kennedy."

The judgment for the defendant was reached upon the assumption that the above-quoted letter did not constitute an enforceable contract against the defendant. Appellant takes the position that he is not relying upon this letter as a contract of employment, but that he is entitled to recover upon it as a promise by the defendant, supported by the consideration of the past services of plaintiff in producing the purchaser for the land. The cases of *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180; *Mohr v. Rickgauer*, 82 Neb. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533; *Bagaef v. Prokopik*, 212 Mich. 265, 180 N. W. 427, 17 A. L. R. 1292; *Carrington v. Smithers*, 26 Cal. App. 460, 147 Pac. 225, and those cited in the note to *Rask v. Norman*, 17 A. L. R. 1353, are relied upon by appellant. They announce the rule that where services have been rendered with the intention that they shall be paid for, but, because there exists no written contract between the parties, payment for such services cannot be enforced, but the party receiving the benefit of the services, after their rendition, promises, in writing, to pay therefor, his moral obligation to pay for what he has received previously furnishes a consideration to support the subsequent promise to pay. Conceding to the appellant that the above rule is established in many jurisdictions, including California (*Carrington v. Smithers*, 26 Cal. App. 460, 147 Pac. 225) does not settle the question involved here. It merely advances the question to a point where we have a consideration sufficient to support any contract which the defendant

may have made, and we must examine the alleged contract to see if it is sufficiently definite to be enforceable. We think it is obvious that the letter above quoted does not amount to an enforceable agreement. It does not promise to pay the reasonable value of services. It does not mention any services nor the nature of any indebtedness. It does not state the amount of the indebtedness nor any method by which it could be computed. To say that the amount "will be settled satisfactorily" does not furnish a basis for judicial computation.

The oral contract between plaintiff and defendant was unenforceable, because it did not meet the requirements of section 1973, Code of Civil Procedure, and section 1624, Civil Code, subd. 6. The subsequent letter, based upon the consideration of the services rendered under the unenforceable agreement, does not amount to a contract enforceable by the courts, because its terms are too indefinite.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 669

ZETTLE et al. v. GILLMEISTER.
(Civ. 4635.)

(District Court of Appeal, First District, Division 2, California. Dec. 8, 1923.)

1. Ejectment — 73—Set-off and counterclaim — 34(2)—Counterclaim in ejectment based on fraudulent representations in effecting sale held improper.

Under Code Civ. Proc. §§ 438, 442, defendant, in an action of ejectment, cannot either by counterclaim or cross-complaint set up as grounds for affirmative relief a cause of action sounding in tort, consisting of prior fraudulent representations by plaintiff regarding the productivity of the land and water supply thereon made at the time of effecting a sale to defendant.

2. Ejectment — 3—Is possessory action not involving land itself or title thereto.

Ejectment is a possessory action not involving the land itself or title thereto.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action in ejectment by F. W. Zettle and Constance C. Zettle against Martha C. Gillmeister, wherein defendant by cross-complaint sought to recover damages for misrepresentations by plaintiffs. From a judgment for defendant in the action of ejectment, but which denied her relief on her cross-complaint, she appeals. Affirmed.

Rea & Caldwell and V. A. Chargin, all of San Jose, for appellant.

Fry & Jenkins, of San Jose, for respondents.

LANGDON, P. J. The plaintiffs commenced an action in ejectment against the defendant alleging that she had breached her contract with them by which she was to purchase certain real property in Santa Clara county, Cal., and that she had forfeited her right to its possession. She denied the breach of the contract, and pleaded that she had tendered to the plaintiffs the amount due thereunder. The difficulty had arisen, it seems, because of different interpretations placed upon the contract by the parties. Defendant also alleged by way of cross-complaint that the contract under which she had purchased the land was induced by fraudulent representations on the part of the plaintiffs regarding the productivity of the land and the water supply thereon, and that by relying upon such representations she had been damaged in the sum of \$36,000, for which amount she asked judgment. The jury brought in a verdict for the defendant in the action in ejectment. The court refused to hear evidence upon the cross-complaint, and no issue thereon was submitted to the jury. Defendant appeals from the judgment because it fails to grant her any relief upon her cross-complaint.

[1] Whether defendant's pleading be regarded as a counterclaim or a cross-complaint is immaterial. Its justification in the present action will depend upon whether or not it arises out of the same transaction as set forth in the complaint or is connected with the subject of the action set forth in the complaint, or relates to or depends upon the contract or transaction upon which the action is brought or affects the property to which the action relates. Code Civ. Proc. §§ 438 and 442.

[2] Plaintiffs' action in ejectment was merely a possessory action; it did not involve the land itself or the title thereto. *Porter v. Garrissino*, 51 Cal. 559; *Payne v. Treadwell*, 5 Cal. 310; 19 C. J. 1031. The cross-complaint was an action for damages for a tort, asking for a money judgment. It did not relate to the possession of the land, nor affect the property to which the complaint relates. The right of action for the fraud did not arise under the contract between the parties, but was collateral to that contract. In the case of *Hines v. Brode*, 168 Cal. 507, 511, 143 Pac. 729, 731, it was said:

"It is a principle of universal application that the right of action for damages for a fraud arises at once immediately upon the consummation of the fraud and of course upon its discovery. The consummation of a fraud may arise in a contract executed or executory. But in either case the right of action immediately exists. This is so, because even in the case of an executory contract the action for fraud is not upon the contract, but is collateral to the contract and is on the case. [Citing cases.]"

Plaintiffs' action in ejectment is not upon the contract; it arises out of alleged unlawful possession by the defendant, and sounds in tort. In the case of *Empire Investment Co. v. Mort*, 169 Cal. 732, 738, 147 Pac. 960, 962, it was said:

"The alleged tort of defendants and the tort of plaintiff averred by way of counterclaim did not arise out of the same transaction. In any event, such a counterclaim may not be set up in an action of ejectment. *Wigmore v. Buell*, 116 Cal. 95, 47 Pac. 927. The counterclaim does not tend to defeat plaintiff's recovery. Plaintiff asked for possession of certain land. Defendants' demand was for a money judgment by way of damages. Plainly the two causes of action founded on tort were distinct and did not arise out of the same transaction. It was therefore error to allow the amendment introducing the so-called counterclaim. [Citing cases.]

The contract for the purchase of the land set out in the complaint contains no statement as to the productivity of the land or as to the water supply or any of the other statements alleged in the cross-complaint to have been fraudulently made by plaintiffs.

In the case of *Los Molinos Land Co. v. MacKay*, 175 Cal. 305, 165 Pac. 926, a vendor sued a vendee of land in ejectment, alleging that the vendee had failed to make his payments under the contract of purchase, as in the present case. The vendee set up a counterclaim for damages arising out of certain alleged fraudulent representations and prayed for a money judgment. The court said:

"This is an action in ejectment, and an independent tort is not available against such a pleading. There was nothing in the contract by which the vendor guaranteed the quality of the land or its productiveness, and all of the allegations of fraud in the answer and counterclaim relate to misrepresentations and concealments regarding such matters. There was nothing in the fraud which prevented the defendant from carrying out the stipulations contained in the writing and then suing for the damages suffered because of plaintiff's misrepresentations and concealments, if any there were. Or he might have surrendered the land and sued while the contract was still of full vitality, praying for its rescission on account of the vendor's fraud and for damages. Having chosen to permit the vendor to rescind on account of his (the vendee's) own failure to comply with the terms of the contract, he is in no position to set up plaintiff's fraud either as an answer or by way of counterclaim as against the action in ejectment because such purported counterclaim may not be said to arise out of the same transaction. The counterclaim does not tend to defeat plaintiff's recovery which was for the repossession of the land after admitted breach of the contract of sale by the vendee. Defendant's demand was for a money judgment by way of damages, and cannot be said to arise out of the same transaction. See *Empire Investment Co. v. Mort*, 169 Cal. 738, 147 Pac. 960, and cases there cited."

Appellant attempts to distinguish the case last cited from the instant case by pointing out that in the former the vendee, admittedly, was in default, while in the latter the jury found that the vendee was not in default on her contract, and was not wrongfully in possession of the land. The unqualified principle that a defendant in ejectment may not set up as a counterclaim a tort of the plaintiff not arising out of the same transaction is involved in the two cases, and the language used in *Los Molinos Land Co. v. MacKay*, supra, is very definitely broad enough to control the present case. The reasons for the rule, as stated in the cases herein cited, are the statutory one that such a counterclaim does not arise out of the same transaction as the cause of action stated in the complaint, and that it does not tend to defeat plaintiff's recovery if he is able to prove the facts alleged in his complaint. These reasons are not affected by the incidental fact that upon trial the issues in the ejectment suit may be found in favor of the defendant.

The case of *Roffinella v. Roffinella* (Cal. Sup.) 218 Pac. 397, is relied upon by appellants. That was an action to enforce specific performance of a lease of land alleged to have been made orally and partially executed so as to remove the same from the operation of the statute requiring it to be in writing. A cross-complaint in ejectment was filed. The causes of action stated in the complaint and in the cross-complaint were intimately connected as stated in the opinion of the court; both related to possessory rights in the same land. However, in the instant case, as has been pointed out, the cross-complaint sought to set up an action for damages because of the misrepresentations of the plaintiffs—a tort independent of the possessory right to the land which was the subject-matter of the plaintiffs' complaint.

The judgment is affirmed.

We concur: NOURSE, J; STURTEVANT, J.

193 Cal. 54

EVANS v. SELMA UNION HIGH SCHOOL DIST. OF FRESNO COUNTY et al.
(ENOS, Intervener). (S. F. 10033.)(Supreme Court of California. Jan. 24, 1924.
Rehearing Denied Feb. 21, 1924.)**1. Statutes $\S$ 184—Statutes construed in view of purpose and mischief aimed at.**

The provisions of the Code must be construed with their intent and purpose, and the mischief at which they were aimed in view.

2. Schools and school districts $\S$ 165—Exclusion of all religious books not required by act excluding "sectarian" books from school libraries: "sect."

Pol. Code, $\S$ 1607, subd. 3, as added by St. 1917, p. 736, $\S$ 6, and section 1672, requiring exclusion of sectarian, partisan, or denominational publications from schools and school libraries, were intended, as indicated by their histories, to bar books and other publications of factional religion, but not all religious books not approved by all sects of a particular religion or the followers of all religions; the term "sectarian" being used in the sense of activities of the followers of one faith as related to those of adherents of another, rather than in accordance with the strict definition of the word "sect" as a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sect; Sectarian.]

3. Constitutional law $\S$ 84 — Schools and school districts $\S$ 165—King James version of Bible held not "sectarian publication."

The King James version of the Bible is not a sectarian book, the purchase of which for a school library would violate Const. art. 1, $\S$ 4, as to religious freedom, article 4, $\S$ 30, or article 9, $\S$ 8, prohibiting appropriations of public money for sectarian purposes, or Pol. Code, $\S$ 1607, subd. 3, as added by St. 1917, p. 736, $\S$ 6, and section 1672, requiring exclusion of sectarian, partisan, or denominational publications from schools and school libraries, because there are differences between it and other versions, or because it is of Protestant authorship, used in Protestant Churches, and not approved by the Roman Catholic Church; the mere act of purchasing it carrying no implication of adoption of the dogma therein.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Elbert L. Evans against the Selma Union High School District of Fresno County and others, in which George Enos intervened. Judgment for defendants, and plaintiff and intervener appeal. Affirmed.

Drew & Drew and Saylor & Collins, all of Fresno, for appellant Evans.

James Gallagher and H. L. Meyers, both of Fresno, for appellant Enos.

E. S. Page, of Oakland, for respondents.

PER CURIAM. Plaintiff brought this action to enjoin the trustees of the Selma union high school district of Fresno county from carrying into effect a resolution for the purchase of 12 copies of the Bible in the King James version for the library of the high school. George Enos was permitted to intervene, and filed a complaint which alleged substantially the same matters and sought the same relief as that of plaintiff. Both complaints rest on the contention that the King James version of the Bible is a book of a sectarian character, and that its purchase for the library of a public school is therefore contrary to constitutional and statutory provisions in this state.

The trial court held that the Bible in the King James version was not a publication of sectarian, partisan, or denominational character, and accordingly gave judgment for the defendants. This appeal is from that judgment.

The Constitution of this state provides (article, 1, $\S$ 4) that—

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state."

It prohibits (article 4, $\S$ 30) appropriations, grants, or payments of public moneys in aid of any "religious sect, church, creed, or sectarian purpose," or to support or sustain any school or other institution "controlled by any religious creed, church, or sectarian denomination whatever." In section 8 of article 9 it provides that—

"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this state."

Political Code, $\S$ 1607 (subdivision 3), as added by St. 1917, p. 736, $\S$ 6, makes it the duty of boards of education and school trustees—

"to exclude from school and school libraries all books, publications, or papers of a sectarian, partisan, or denominational character."

Section 1672 of the same Code provides that—

"No publication of a sectarian, partisan, or denominational character must be used or distributed in any school, or be made a part of any school library; nor must any sectarian or denominational doctrine be taught therein."

The question before us is different from those dealt with in the reported cases which consider the question of Bible instruction in the public schools. We have examined with care all decisions cited by counsel and all that our independent research has dis-

covered, and not one of them deals with the precise question now under consideration, namely, the placing of the Bible in a public school library. These decisions all deal with questions growing out of the use of the Bible in devotional exercises or for religious instruction or as a text-book in the public schools; for that reason we do not discuss these decisions in detail in arriving at our conclusion, although some of these decisions consider and decide whether or not the Bible is sectarian. In our opinion, for the reasons hereafter stated, it is clear that for reference and library purposes in the public schools, it is not a book of the class prohibited by our statute.

[1, 2] It will be seen from the provisions of our statutes above quoted that they do not in terms exclude from these schools "religious" books as such. Indeed, there is nothing in our statutes aimed at religious works. To be legally objectionable they must be "sectarian, partisan, or denominational in character." It is under our Code provisions that this question immediately arises, and their terms must be construed with their intent and purpose in view and the mischief at which they were aimed. The terms used are "sectarian" and "denominational." "Sect," strictly defined, means "a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system" (Standard Dict.), and "denominational" is given much the same definition. But the term "sect" has frequently a broader signification, the activities of the followers of one faith being regarded as sectarian as related to those of the adherents of another. Since the object of these Code provisions was to exclude controversial matters of any kind from the school libraries, in so far as that object could be attained by the exclusion of printed matter of partisan tendency, we have no doubt that the term "sectarian" was used in its broad signification. The purpose was to bar from school libraries books and other publications of factional religion—those whose character is "sectarian, partisan, or denominational." As a book on almost any subject may adopt a partisan tone, so a book on religion, instead of confining itself to broad principles and simple fundamentals, may emphasize particular points—those upon which differences of opinion have arisen. In a word, a book on any subject may be strongly partisan in tone and treatment. A religious book treating its subject in this manner would be sectarian. But not all books of religion would be thus excluded. The fact that it was not approved by all sects of a particular religion, nor by the followers of all religions, would not class it as sectarian for library purposes. There is no religion that has found universal acceptance, and therefore no book of religion that has.

The correctness of this view of the meaning

of these Code sections is indicated by their origin. Since 1851 the statutes of this state have excluded books of a sectarian character from public school libraries. Stats. 1851, pp. 491, 495, art. 3, § 5; Stats. 1852, pp. 117, 125, art. 6, § 3; Stats. 1855, p. 229, 237, § 33; Stats. 1863, pp. 194, 210, § 67; Stats. 1869-70, pp. 824, 835, 839, 842, §§ 42, 58, 71. Political Code, § 1607 (3), was derived from section 42 (subd. 11) of the Act of 1870, the language of which shows the class of publications in the mind of the Legislature. It required the school authorities to exclude from schools and their libraries "books, tracts, papers or catechisms of a sectarian character." As originally adopted into the Code (Pol. Code, § 1617, subd. 12, enacted March 12, 1872) this language was shortened to "books, publications or papers of a sectarian character." The words "partisan or denominational" were inserted after "sectarian" by Code Amendments 1873-74, p. 81, and its present number (1607) was given the section by an amendment in 1917 (Stats. 1917, p. 736).

Political Code, § 1672, which has remained the same since its adoption in 1872, was derived from section 58 of the same Act of 1870, which referred to "books, tracts, papers, catechisms or other publications of a sectarian or denominational character." Thus we think the history of these sections indicates the class of "books" and "other publications" at which the statute was aimed.

[3] Turning to the character of the King James version, it appears that the original manuscripts of the Bible have been lost for centuries. Those available for translation are themselves "versions," and either copies or translations or still older texts. There have been numerous English translations, but those most generally in use to-day are the King James version, and its subsequent English and American revisions, and the Douai version.

The Douai version consists of a translation of the New Testament made in the English College at Rheims, published there in 1582, and of the Old Testament published at Douai in 1609.

The King James version is a translation made at the direction of James I of England, and published at London in 1611. The work was done by a commission of forty-seven scholars drawn largely from the universities of Oxford and Cambridge. The work of its revision by English and American committees was begun in 1870, and the revised New Testament published in 1881, and the revised Old Testament in 1884.

The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha, which are omitted

from the texts of the Testaments in the King James version, though in many editions they have been printed between the two Testaments. The Douai version was the work of Catholics, and is the translation used by the Roman Catholic Church in English-speaking countries. The King James version and its revisions are the work of Protestants, and are used in Protestant churches.

The contention that the Bible in the King James translation is a book of a sectarian character rests on the fact that there are differences between it and, among others, the Douai version; that it is of Protestant authorship; that it is used in Protestant Churches; and that it is not approved by the Catholic Church. According to such a test the Bible in any known version or text is sectarian. In fact, until all sects can agree upon the manuscript texts that should be used, no English version of the Bible not "sectarian" in this view can be produced.

The statute, however, deals with publications of a sectarian character. It makes the character of the book the test of whether it is "sectarian," not the authorship or the extent of its approval by different sects or by all. That the authors of religious books belong to a sect or church does not necessarily make their books of a sectarian character. Nor does the fact that the King James version is commonly used by Protestant Churches and not by Catholics make its character sectarian. Its character is what it is, a widely accepted translation of the Bible. What we have said of the King James translation is equally applicable to the Douai version. Both are scholarly translations of the Bible, and neither is a book "of a sectarian character" within the meaning of the statute relating to school libraries. Both are eligible to a place on the shelves of our public school libraries for reference purposes. Each version has claims. Regarded merely as literature, the King James version is a recognized classic. For centuries it has been the version most generally used in Protestant Churches in England and America. The Douai version has merits of its own. It is the text approved by one of the world's greatest churches. Many children base their religious education upon its text. We do not assume to decide the comparative merits of the two versions. We do, however, hold that either or both may be purchased for and placed in a public school library without violation of the law of this state.

If it were a fact that the King James version of the Bible was sought to be placed in the public school library to the exclusion of all other versions of the Bible, or if it appeared to be a fact that this particular version or any other version of the Bible was to be used as a text-book for a prescribed course of study or to be used in reading

therefrom to the pupils as a part of school exercises, it might then be well argued that such circumstances amounted to an implied declaration that this version was the only true version of the Scriptures, and that all others were false in so far as not in accord therewith. So used and under such circumstances it might be justly claimed to be used as a basis for sectarian instruction. Such are not the facts in the case at bar. The mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself, except as a work of literature fit to be included in a reference library. For aught that appears in the instant case the library in question may already contain copies of the Douai version of the Bible as well as copies of the Talmud, Koran, and teachings of Confucius. If the Douai version and these other books are not already in the library, we have no right to assume that they will not be added thereto in the future. That such action would be legal and appropriate we have no doubt.

We are not required in this case to decide, nor are we to be understood as deciding, the question of whether or not the use of the Bible for class instruction amounts to the teaching of sectarian or denominational doctrine, nor to consider whether or to what extent its reading may be made a part of the exercises in the schools, without offending the provisions of the state Constitution and statutes.

The judgment is affirmed.

All concur.

193 Cal. 22

WILLIAMSON et al. v. RAILROAD COMMISSION et al. (Sac. 3497.)

(Supreme Court of California. Jan. 18, 1924.)

1. Evidence §11, 22—Judicial notice taken of geographical source and primary purposes of water system and of contemporaneous historical events.

The geographical source and primary purposes of a water system, as shown by articles of incorporation, actual uses of the water, and contemporaneous historical events are matters of which the Supreme Court will take judicial cognizance.

2. Eminent domain §10(1)—Reservation of power in articles of incorporation of water company held unnecessary.

The power of condemnation or right to acquire property for the corporate purposes of a water company, constituting a public utility from its inception prior to the present eminent domain law, held inherent in its public organism, and hence not necessary to be expressly reserved in the articles of incorporation.

3. Waters and water courses ⇨232—Finding of dedication of water by corporation authorized.

The organization of a corporation by appropriators of water for the declared purpose of selling it for manufacturing, mining, and other public purposes, in a vast area of gold-bearing and agricultural lands, widely separated communities, and all other places adjacent to the system, establishment of the system and actual furnishing of water for many years to thousands of consumers indiscriminately at rates adjusted to the uses to be made of it, and readiness to comply with such declaration of purposes, *held* sufficient, in the absence of countervailing facts, to justify a finding that the water was dedicated to a public use and that the corporation is a public utility.

4. Waters and water courses ⇨232—Company's dedication of waters to public use operative until revoked.

Waters dedicated to a public use by a water company retain the impress thereof, unless such dedication has since been revoked.

5. Evidence ⇨11—Judicial notice that water power was much prized in early mining days.

The Supreme Court takes judicial notice that, in the early days of placer and hydraulic mining, water power was much prized, as indispensable to the operation of such a system of mining.

6. Waters and water courses ⇨257(1)—Finding water company was public utility justified.

Evidence *held* sufficient to justify a finding by the Railroad Commission that a water company was a public utility.

7. Public service commissions ⇨35—Reception of testimony not strictly within rules of evidence not ground for annulment of order, if sustained by evidence in record.

Reception of testimony not strictly within the rules of evidence is not a ground for annulment of an order of the Railroad Commission, if sustained by sufficient legal evidence in the record.

8. Waters and water courses ⇨232—Company's status as public utility held not affected by its use of water.

That most of the water furnished by a water company for all purposes for 7 recent years was consumed or used by the company, which had been in existence over 70 years, did not affect its status as a public utility, nor prove that it was not theretofore impressed with such character.

9. Waters and water courses ⇨232—Company's status as public utility not affected by title to property.

Whether a water company, as a public utility, could transfer its properties to another company without legislative sanction, is immaterial as respects the latter's character as a public utility.

10. Waters and water courses ⇨232—Failure of boards of supervisors to regulate water system mere circumstance in determining status as public utility.

Omission by boards of supervisors of counties, in which a water company maintained its

system, to regulate it, as provided by Const. art. 14, § 1, is at best only a circumstance to be considered by the Railroad Commission in determining whether the company was a public utility.

In Bank.

Certiorari by W. H. Williamson and others to review an order of the Railroad Commission of California, fixing water rates to be charged by the Natomas Water Company. Order affirmed.

Elliott & Atkinson, of Sacramento, for petitioners.

Edgar T. Zook, of San Francisco, for respondent Natomas Water Co.

Hugh Gordon and C. I. Wheat, both of San Francisco, for respondent Railroad Commission.

SEAWELL, J. The petitioners are the owners of lands over which one of the branch ditches of respondent Natomas Water Company, known as the valley lateral, and which forms a part of an original system, is constructed, and each of said petitioners is a holder of a water-rate contract entered into by some of the petitioners in the year 1893 and by others in 1894, with the Natomas Vineyard Company, a corporation, predecessor in interest of said respondent.

On January 23, 1922, the state Railroad Commission, upon the application of respondent Natomas Water Company and after hearing duly had, by its order found and determined that respondent was, and its predecessor in interest, to wit, Natomas Water & Mining Company, a corporation, had been from its organization, a public utility, and the waters served by it and its successors were impressed with a public use, as defined by the laws of this state, and thereupon ascertained the value of respondent's property, and established a schedule of rates by which said utility was to be governed in all of its dealings with its consumers and the public in general.

Petitioners, whose contracts stipulate a fixed rate for the use of water, and which fixed rate will be increased by the commission's ruling, if permitted to stand, deny here, as they did at the hearing before the commission, that respondent or its predecessors in interest was, as found by the commission, a public utility, or that the waters in question were impressed with a public use from the beginning, or at all. Their claim, on the contrary, is that the waters in question have always been held in private use, and the commission exceeded its jurisdiction in holding upon the facts adduced that respondent was or is a public utility, and the commission's order is violative of both the state and federal Constitutions, which forbid the impairment of the obligation of contracts, the taking of property without due

process of law, and the deprivation of the equal protection of the law to all persons within the state. The matter is before us for review.

No portion of the commission's decision, other than that relating to said contracts, is presented for review, and we are therefore not required to make an examination of the whole transcript, nor of all the exhibits and records.

[1] The original organization, which is now being operated by respondent by the right of succession under another name, is intimately connected with, and is historically inseparable from, the early mining activities of the state. The system has its source in a branch of the American river, and penetrates the heart of the placer mining district of the "New El Dorado." That one of the primary purposes of the promoters of the pioneer enterprise was to bring to the aid of the miners a quick and economical method of extracting precious metals from gold-bearing gravels and earth by bank washings, sluicing, and the drift process is sufficiently established by the purposes of the parent corporation as declared by its articles of incorporation, and as followed by the actual uses made of the water by miners and others, and also by contemporaneous historical events, all of which form a part of the state's history. These are matters of which this court will take judicial cognizance. In addition to the sale of said water for mining purposes, it has also been used for viticultural, orchard, farming, and domestic purposes for a period of about 70 years. The head of the canal system was at a point upon the South fork of the American river near Rocky Bar, about 2 miles above Salmon Falls, in the county of El Dorado, and was extended to numerous early-day mining and farming localities.

The original predecessor in interest, the Natomas Water & Mining Company, was incorporated on July 13, 1853, many years before the adoption of our present Constitution. Uses were made of said water, however, by means of ditches and aqueducts as early as 1851. The Natomas Water & Mining Company became soon after its incorporation the owner of approximately 17,000 acres of land situate near the town of Folsom, county of Sacramento, and from an early period was engaged in mining said lands. The evidence shows that at least as early as 1876 the main canal had a capacity of 3,500 miners' inches of water measured under an 8-inch pressure in accordance with the method of that period.

In 1888 the Natomas Vineyard Company was formed, and the agricultural lands owned by the Natomas Water & Mining Company were transferred to it. Later, by deed dated November 11, 1893, the title to the canals and water rights passed from the Natomas

Water & Mining Company to the Natomas Vineyard Company. The incorporators of the vineyard company were the same persons, or the successors of the persons, who incorporated the water and mining company, and who at the time of the transfer owned and controlled the former. It is admitted that the subsequent corporations were subsidiary to the parent corporation. The purposes of the vineyard company, as set out in its articles of incorporation, were to purchase, acquire, hold, sell, and cultivate lands and real estate; to purchase and sell water and water rights; to engage in agriculture; in the cultivation and sale of grapes and fruits, and in the manufacture and sale of wines and liquors; also to engage in the issuance of bonds and other securities, and in any and all other businesses incidental thereto and connected therewith, in the county of Sacramento. One of the reasons stated by the witnesses for the incorporation of the vineyard company was that the water and mining company was soon to lapse (it then had about 14 years of corporate existence), and it was necessary to form a new corporation to take over the activities of the old. Another reason assigned for the formation of the new corporation was that "it did not look well for a water company to make and sell wines." Doubtless the chief reason for the organization of this corporation was to acquire authority by its articles of incorporation to engage in a new enterprise and incidentally to adopt a name expressive of the new industry which was at about that time a growing and important one in this state. The interests of the vineyard company were taken over in 1907 by the Natomas Land & Mining Company. In December, 1908, the latter's interests and holdings were transferred to the Natomas Consolidated of California, a corporation now known as the Natomas Company of California. In March, 1912, the water system, which had been organized about 60 years prior thereto, was transferred, together with all appurtenant and necessary lands, structures, rights of way, and water rights, to the Natomas Water Company, respondent herein, which corporation was formed and controlled by the Natomas Company of California.

This completes a brief résumé of the order in which respondent's predecessors have come into existence. While the said several corporations differ from the parent body in name, there was no substantial difference in the personnel of stockholders, or in privities of interests, or in the purposes and objects to be accomplished. The primary object of all of the projectors of said corporations was one of general industrial development, and as one industry by the law of progression succeeded another in the state's development a new corporation was formed, if the old was found to be inadequate to serve or pro-

mote the necessities of a growing section of the state which was undergoing many industrial readjustments and changes. Mining, which was the original and had long been the principal industry of the country, was becoming largely superseded by the planting of vineyards and orchards, and by general farming and other branches of husbandry. A fluctuating situation furnishes the reason for the formation of the several corporations, which were joined together by the cohesive force of mutual interests.

With this brief review of a situation which affected the several transactions, we return to a review of the parent organization and the purposes for which it was created. The articles of incorporation adopted by the first incorporators of the system, to wit, Natomas Water & Mining Company, so far as the question before us is affected thereby, state the purposes and objects to be as follows:

"To construct a canal commencing from a point near Rocky Bar, upon the South fork of the American river, about two miles above Salmon Falls, in the said county of El Dorado, and running from thence down the banks of said river, leading waters by means of canals, flumes, aqueducts, reservoirs, pipes and other necessary conduits to the gold-bearing regions, and to the agricultural grounds and inhabited districts in the vicinity of the McDowell Hill, Red Banks, Mormon Island, Willow Springs, Rhodes Diggings, Prairie Diggings, Alder Creek, Negro Bar, Texas Hill, Mississippi Bar, Pennsylvania Flats, and to all other places lying adjacent to the route of said canal or any of its branches, and to all such other places as the said water may be conveyed to by said canal, or any of its branches or extensions, for the purposes of using and selling said water for manufacturing, mining, mechanical, chemical, agricultural, or domestic purposes. The places of business of said company are to be located at Mormon Island, Willow Springs, and Prairie City, all of which places are situated in the said county of Sacramento, and the principal place of business of said company is to be located at Willow Springs, in the township of Natoma, in said county of Sacramento."

[2] It will be seen from the above quotation that said articles of incorporation include practically every known use to which water could at that early period have been devoted. It is true that the power of eminent domain was not reserved by express language, but such a reservation was not necessary, if the corporation was in fact a utility serving the public, which it unquestionably did in conformity with the powers and privileges conferred upon it by its articles of incorporation. If from its inception it was a public utility, as found by the commission, the power of condemnation or the right to acquire property necessary for its corporate purposes was inherent in its public organism from the first. The articles of incorporation in the instant case are not open to the criticism made in the case of *Allen v. Railroad*

Commission, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249. It was there pointed out that the articles of incorporation of the applicant as to its purposes declared that the corporation would acquire its water and water rights "by purchase and appropriation"; both methods being wholly within the purview of private ownership of such rights when acquired. "It is not without significance," the court observed, "that there is omitted therefrom the declaration of the right to acquire by condemnation, which right runs only with a public service, and of similar significance is the fact that when this applicant, in the course of its activities, needed to acquire and did acquire certain rights of way it did not undertake to do so by condemnation, but effectuated its purpose by purchase." The significance given by the court to the omission by the articles of incorporation of the right to acquire certain rights by condemnation, however controlling in view of the facts and circumstances of that case, is greatly weakened, if not entirely destroyed, when considered in the light of the circumstances of the instant case.

In the former case the power to acquire certain rights was expressly limited to the sole method of purchase and appropriation. No such limitation is placed upon respondent corporation here. The articles of incorporation in that case are much narrower in grant of powers in essential respects than are those of the instant case. It is neither significant nor strange that in the instant case no provision was made by the articles of incorporation for the acquirement of property or other rights by the method of condemnation as authorized by our present law of eminent domain. These terms, now common, were unknown to the earlier statutory law period within which respondent was incorporated. The only method of acquiring property for supplying cities or towns with pure fresh water, except by purchase, gift, or conveyance, was by following the statute adopted for the benefit of railroad corporations, which method consisted of presenting a petition to the judge of the district court, who appointed five commissioners of appraisal, who, upon giving such notices as were prescribed by law, became vested with the power of ascertaining in a procedural method the value of the property sought to be acquired and the assessment of whatever damages that may have otherwise accrued. The statute which gave the right to acquire property provided the method of procedure, and it was not necessary or usual to specifically refer to either in the articles of incorporation.

[3] While it is true that purposes avowed in articles of incorporation do not fix the character of the corporation in its future activities as being a public service corporation, as stated in *Allen v. Railroad Commission*,

supra, and that the additional act of dedication is necessary to the creation of a public use, it is also true that when the original appropriators of water from a stream, having declared by broad terms that its purposes are to secure the commodity for a consumption or use which cannot be otherwise than to supply a general public use, organize a corporation which in its articles of incorporation declare its purposes to be that of utilizing the water thus acquired for sale, for manufacturing, mining, mechanical, chemical, agricultural, and for general domestic purposes, to be conducted by means of canals, flumes, aqueducts, reservoirs, pipes, and other necessary conduits to a vast area of gold-bearing regions, agricultural lands, and to inhabited districts and communities widely separated from each other, and to all other places lying adjacent to the route of its main system and its lateral branches, and when such corporation proceeds under such declared purposes and does establish a distributing system, and actually furnishes water for mining, irrigation and domestic purposes in large quantities through a period of many years to thousands of consumers indiscriminately, and without refusal to any one who made application or request for the use of its water for any purposes whatsoever, at rates adjusted to the uses to be made of the water, and has apparently held itself in readiness to comply with its declaration of purposes as rapidly as the growth of the communities to which it extends would permit or has required, it must be held that substantial evidence of such a carrying into effect of the originally declared purposes of the original appropriators of such water and of the corporation formed by them has been presented as would suffice, in the absence of countervailing facts, to justify a finding that the water thus acquired and utilized by such corporation had from its inception been dedicated to a public use and that such corporation was a public utility. *Brewer v. Railroad Commission* (Cal. Sup.) 210 Pac. 511.

[4] And if it be a fact, as was found by the commission, that respondent at its inception or at any subsequent time, dedicated its waters to a public use, there being no claim that such dedication has at any time since been revoked, said waters have since continued to retain the impress of a public use. *Allen v. Railroad Commission*, supra; *Brewer v. Railroad Commission*, supra; *Francioni v. Soledad L. & W. Co.*, 170 Cal. 221, 228, 149 Pac. 161; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 89, 106 Pac. 404, 29 L. R. A. (N. S.) 213.

The contracts which have been superseded, so far as the water charges are concerned and which form the basis of petitioners' complaint, differ widely from the contracts considered in *Allen v. Railroad Commission*, su-

pra, the case relied upon by petitioners, and which concededly is the most favorable to their claim of any to be found in our reports. The contracts before us, reduced to an epitome, are substantially as follows:

The petitioners, in consideration of the sum of \$1 paid to each of them by the Natomas Water Company, respondent's predecessor, by separate but substantially identical contracts, conveyed to said water company the right to enter upon the lands of each of said petitioners situate in Sacramento county for the purpose of constructing and maintaining upon said lands a canal of a capacity sufficient to convey not less than 1,000 and not more than 2,000 inches of water, measured under a 4-inch pressure, the course of which canal had been located before the making of said contracts. The privilege of entering upon said lands to construct said canal also carried with it the right to enter at all needful times to maintain it. It was agreed that the canal should be constructed by the 15th day of May, 1893, and petitioners were thereafter to be perpetually furnished with such quantities of water as they should require for the irrigation of their lands, or such part thereof as they might desire to irrigate, at a price not to exceed \$5 per calendar year per acre for bearing orchards and vineyards and land irrigated for other purposes, and not exceeding \$3 per calendar year per acre for orchards and vineyards not in bearing. Petitioners were not bound to use any water from said canal, if they did not desire to do so. It was further provided that, should the water company fail to keep the covenants and agreements on its part to be kept, the petitioners should have the right to terminate the rights and privileges granted by them.

It will be necessary only to point out a few of the characterizing features which distinguish the contracts considered in the case of *Allen v. Railroad Commission*, supra, from the contracts before us. There Whittier, the applicant, and his associates, were the owners of a large body of land which was of small value in its arid state, but which the owners believed could be made very valuable if artificially supplied with water. They formed two corporations, to wit, Hemet Land Company and Hemet Land & Water Company. Whenever a parcel of land was sold by the Hemet Land Company the purchaser of such land desiring water thereon was obliged to purchase a water-right certificate from the Hemet Land & Water Company. The land company sold the land and the water company sold so-called "water certificates." These certificates entitled the holder to one miner's inch of water for 8 acres of land. Purchasers paid \$75 an acre for their land and \$75 per acre for their water rights appurtenant to their land. The water right was inseparable and was only transferable with the land. The water-right certificates contained a binding obligation upon the water company to de-

liver to the purchaser a constant flow of one-inch of water for each 8 acres of land. The purchaser paid in addition to \$75 an acre for the water right the sum of \$2 an acre while the contract remained in force. The use of water was limited to described land. The contract bound all assignees or successors in interest, but could not be assigned without the written consent of the company. The quantity of water which appellant could supply was limited. Approximately 94 per cent. of appellant's waters were devoted to use under its water-right certificates, 3 per cent. in supplying the needs of the municipality and citizens of the town of Hemet, leaving 3 per cent. remaining in storage. Whittier, who became the sole owner of said corporations, had for many years sought a repudiation of these contracts and water-right certificates. The opinion expressly states that he "did all that lay in his power to declare the company to be a public service corporation, in order to destroy the water rights of these petitioners, for which water rights he had received the sum of \$438,938.50." The applicant's voluntary submission to the jurisdiction of the commission and its declaration that it was a public utility could not, it was held, affect previously vested water rights of the petitioners. It was properly held that a dedication of $1\frac{1}{2}$ per cent., or at the utmost 3 per cent., of its waters for the use of the town of Hemet for public uses, could not impose upon the 97 per cent. remaining the same servitude.

The facts of that case and others relied upon are so utterly different from those upon which the commission based its order in the instant case, and to which we will later refer, as to afford no precedent for a like finding in this case. A final summary of the material facts upon which the court reached its conclusion to the effect that the applicant was not a public service corporation, none of which appear in this case, follows:

"The character of the contracts evidenced by these water-right certificates, the restriction upon transfer, the fixing of the acreage quantum, the enormous sum in the aggregate paid by these petitioners for their water rights, establish beyond the need of further discussion that the parties to those contracts believed that they were dealing in their private capacities and selling and receiving water for private use. But one suggestion here is sufficient. Is it conceivable that these landowners would have given Mr. Whittier and his associates a bonus of \$438,938.60 for the right to use water, which right the law had given them without the expenditure of one dollar of it?" *Allen v. Railroad Commission*, 179 Cal. 85, 175 Pac. 473, 8 A. L. R. 249.

In the case at bar the water was not conducted to a definite parcel of land for private use, but, on the contrary, the system meandered and was spread over a wide area of country traversing two counties. No bonus was paid by the petitioners for wa-

ter certificates, as none existed. No contract was made as to acreage quantum. In fact, petitioners were privileged to use the water without limitation as to quantity at rates fixed at \$5 and \$3 per acre per annum, or not at all, if they did not desire its use, in which case no charge was made against them. Respondent's right to conduct the water across the lands of petitioners was defeasible. Here no unconscionable advantage was sought to be taken of the contract parties as is emphasized in *Allen v. Railroad Commission*, supra. The only thing parted with by petitioners was a right of way for the canal through the lands of each, the advantages of which they have enjoyed for a period of 30 years. None of the lands owned by the original corporation, as far as the evidence discloses, was placed on the market until 1880—27 years after its incorporation. At that time 1,000 acres were offered for sale, but no offer was made to convey the land with a proportionate share of water appurtenant thereto; the only reference made to water at all was in respect to furnishing purchasers with water for irrigation at very low rates. The offer of sale stated that canals and irrigation ditches had been constructed through the property, thus "insuring a large crop and water will be furnished at reasonable rates for the purposes of irrigation." It cannot be said in this case, as was said in the other, that the intention of the original plan was to "apply the waters to the land which the managers of the enterprise had for sale and to none other, except to the extent of any incidental surplus."

A brief reference only will be made to the evidence, which necessarily is meager on account of passing years. But few persons are likely to be now alive who were then at an age when the mind would have become impressed by the matters before us, and much record evidence has been lost or destroyed.

[5, 6] It is a part of the history of California, of which we take judicial notice, that in the early days of placer and hydraulic mining water power was much prized, as it was indispensable to the operation of such a system of mining. Water was brought from great distances at a great expense to the lower reaches of gold-bearing soils and sold to miners at a profit to its purveyors. The original corporation was organized before the purchase of any land whatsoever. In fact, water had been conveyed to the general locality as early as 1852. It is reasonable to conclude, not alone from the declared purposes of the original corporation, but from the situation itself, that the purposes of the incorporators was to sell water to miners and all others who should apply for it. The sale of water seems to have been its chief purpose. Indeed, the evidence shows that the corporation as early as 1876 was offering its lands free from ground rent to all persons who would go upon them for the purpose of

mining, charging a water rate in case the applicants should be successful in finding gold. As many as 500 persons at one time were thus occupying lands belonging to said corporation. It is the undisputed evidence that 6,000 acres were prospected and mined under this sort of a water rental. Water was also furnished for the irrigation of several hundred acres of vineyard and orchard lands. The town of Folsom and other communities were supplied with water. David W. Finch, who had been the assistant superintendent of the Natomas Water & Mining Company, beginning with 1876 and continuing for 32 years thereafter, when asked concerning mining operations upon the land, replied that people were mining "all over" the property. No charge was made for the use of land during his time. The charge made generally for "drift" mining was "so much a dump. If it was a 2,000 dump we charged him \$75, usually, and for a 3,000 we charged him, proportionately; that is, that was first water. Sometimes with second water it was cheaper." The water was also used for "bank" mining along the different creeks, particularly Willow creek and Alder creek. For this use water was generally sold by the inch.

This system continued until 1906. The company had two bank claims which were worked by it at broken periods. When working its main claim, it used 2,100 inches of water during five days of the week, according to the estimate made by witness Finch, assistant superintendent. The water sales from 1876 to 1886 amounted to \$22,000 a year. The record of the water sales for the year 1892 totals \$14,616.45; for 1893, \$11,469.04; for 1894, \$12,896.61. The decline of mining operations accounts for the falling away of water revenue. The evidence in the record shows that the town of Folsom was supplied by the vineyard company with water in the year 1893. Said company also supplied the railroad company with water. While the witnesses were unable to state definitely the amounts of water furnished for the several uses, they knew the general purposes for which it was supplied. The first pipe system was laid into the town of Folsom in 1889, and from that date forward water was sold for domestic purposes. Prior to the installation of the pipe system, water was conducted in open ditches into said town. One ditch was constructed to the state prison, and some 40 or 50 pipe lines led from the ditch into Chinese quarters. Neither the quantity nor the use of water was anywise limited as to individuals or purposes. Upon the decline of mining operations, in about 1876, the original company began clearing its lands and set out vineyards, to the extent of 1,000 or 1,300 acres. It also at one time conducted a nursery. Such amounts of water were used as were necessary for the irrigation of both, but during all times there was

furnished to a large number of the public, diffusely located and representing various industries, water sufficient for the uses of all. The system was very extensive, and consisted of a main canal and a number of laterals. We think it unnecessary to go further into the evidence, in order to demonstrate the jurisdictional power of the commission to make the order attacked.

[7] Objection has been made to the reception of certain evidence before the commission which, it is claimed, was not legally admissible. Reception of testimony not strictly within the rules of evidence is not of itself a ground for the annulment of an order or decision of the commission. As was said in *Brewer v. Railroad Commission*, supra:

"This is not an ordinary appeal, nor has this court the authority, under its limited powers of review, to set aside orders of the railroad commission in matters over which it has been given jurisdiction, because of errors in the admission or rejection of evidence."

If there is sufficient legal evidence to be found in the record to sustain the commission's order, the requirements of the statute are satisfied. In such a case incompetent or immaterial matter becomes mere surplusage. Grouped under the heading of evidence improperly admitted are excerpts from findings appearing in the reports of this court and in the United States Supreme Court upon review of certain decisions on appeal from state courts in which the Natomas Water & Mining Company is defendant. These decisions review the history of the construction and the purposes of the construction of the water system before us in this proceeding, and tend strongly to support respondent's claim that it has been from its beginning a public utility. It is admitted that the findings in these cases are *res inter alios acta*; but it is claimed they are admissible under a well-recognized exception to the hearsay rule upon the principle that oral declarations and hearsay evidence are admissible to establish matters of general and public interest and as a means, and in many cases the only means, of proving traditionary reputation and ancient documents. Respondent's claim is not wholly without merit, but we feel satisfied that even though the matters complained of, and which were admitted in evidence, be eliminated from the record by us, we would not even then be justified in disturbing the commission's findings.

What has just been said is also applicable to the objection made to the reception of the report made in 1892 from a compilation of various reports of former superintendents of respondent's predecessors, many of whom, if not all, are now deceased, and which show the revenue derived from water charges at a very early period of the system's existence. A refusal in very recent years by the Natomas Water Company of an application made by an irrigationist to transfer the use of wa-

ter from a certain acreage to another of equal area, or to supply additional water to others, is made a ground of complaint. But such refusal was probably justified, or deemed insufficient to overbalance the substantial facts which form the basis of the order.

[8] Petitioners have prepared a table showing the proportions of water furnished to the town of Folsom and devoted to other purposes covering a period of 7 years preceding the year 1921, by which it is suggested that the larger proportion of the water furnished by respondent for all purposes was consumed or used by itself. This table purports to cover only a very recent period, and but a brief portion of the water system's existence, and, giving it its fullest significance for the period covered, it could not control the entire situation, nor is it proof that the corporation was not prior thereto impressed with the character of a public utility.

[9] The point is made by petitioners that, if the Natomas Water & Mining Company was a public utility, it had no right, without legislative sanction, to transfer its properties to the Natomas Vineyard Company. The real question here is not whether the transfers made by one corporation to the other are in any sense defective or wanting in legal requirements, but rather it has to do with the status of the corporation. The title by which it holds its property is not necessary to a decision of the sole issue before us.

[10] We have also considered the omission on the part of the boards of supervisors of the counties in which the public utility maintained its system to regulate the same as provided by article 14, § 1, of the Constitution. This duty was not always performed by the boards of supervisors of the several counties, and the omission of such a duty by a public body at best is only a circumstance which was doubtless considered by the commission.

Upon review of the whole case, we are satisfied that we would not be justified, under the limitations placed upon us by the state Constitution and the Public Utilities Act (St. Ex. Sess. 1911, p. 18), in disturbing the commission's order.

The order is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.

193 Cal. 105

MEYERSTEIN v. BURKE. (S. F. 10270.)

(Supreme Court of California. Jan. 30, 1924.)

1. Reformation of instruments ⚡46—Finding that plaintiff's secretary "negligently" deleted certain words sufficiently followed allegation that he "inadvertently" did so.

Where a complaint for reformation of a contract for mutual mistake alleged that plain-

tiff's secretary "inadvertently" omitted certain words, a finding that "the secretary did delete or strike" certain words and such deletion resulted from the secretary's error and negligence was sufficiently responsive, since "inadvertently" and "negligently" are synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inadvertently; Negligently.]

2. Appeal and error ⚡1071(6)—Failure to find as to plaintiff's mistake rendered harmless by finding no mutual mistake.

In a suit to reform a contract for mutual mistake of fact, a finding for defendant on that issue rendered failure to find on an issue as to a mistake made by plaintiff harmless.

3. Reformation of instruments ⚡46—Finding of no mutual mistake did not contradict finding that plaintiff made mistake.

In a suit to reform a contract for mutual mistake, a finding that the mistake was not mutual did not contradict a finding that plaintiff made a mistake unknown to defendant, since, having found against plaintiff's whole theory, the court properly found that the paper under attack was the real agreement and plaintiff's mistake became immaterial.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Suit by Alfred L. Meyerstein against Frank J. Burke. Judgment for defendant, and plaintiff appeals. Affirmed.

Jos. C. Meyerstein, of San Francisco, for appellant.

John T. Williams and John D. Harloe, both of San Francisco, for respondent.

LENNON, J. Further consideration of the record and the points made in this case satisfies us that the decision in the first instance of the District Court of Appeal as rendered by Mr. Justice Sturtevant is correct, and we hereby adopt his opinion as follows:

"The plaintiff commenced an action against the defendant to obtain a judgment reforming a contract alleged to have been executed through the mistake of the parties. A trial was had before the court sitting without a jury, and thereafter a judgment was entered in favor of the defendant, and the plaintiff has appealed, bringing up a bill of exceptions.

[1, 2] "The contract in question is an executory contract for the purchase and sale of a house and lot known as parts of lots 4 and 5, block 2983, Claremont court, San Francisco. It was the theory of the plaintiff that he sold to the defendant the house and lot for \$7,000 and interest on unpaid installments at 6 per cent. payable \$1,000 in cash and the balance at the rate of \$50 per month. On the other hand, it was the theory of the defendant that he purchased of the plaintiff the house and lot for both principal and interest totaling \$7,000 payable \$1,000 in cash and the balance at the rate

of \$50 per month. The language used in the contract as written was, 'Witnesseth: That the party of the first part hereby agrees to sell and the second party hereby agrees to buy, for the sum of seven thousand dollars (\$7,000) payable as hereinafter provided; * * * that said purchase price of seven thousand dollars (\$7,000) shall be payable * * * in the sum of fifty dollars (\$50) on or before the 30th day of each and every month thereafter until the entire sum of seven thousand dollars (\$7,000) is paid.' But according to the plaintiff's complaint, the language that should have been used is, 'That said purchase price of seven thousand dollars (\$7,000) shall be payable * * * the sum of fifty dollars (\$50) on or before the 30th day of each and every month thereafter, including interest at six per cent. on deferred payments until the entire sum of seven thousand dollars (\$7,000) is paid.' On the trial of the case each party introduced evidence both oral and documentary tending to support his theory. If there is a hopeless conflict in the testimony, it is conceded that this court has no power to interfere. But the plaintiff earnestly contends that if we keep in view an accurately focused picture of the transaction, unblurred by nonessentials, that there is no conflict. We have searched the entire record for that picture, but we are constrained to hold that on the evidence introduced there was a hopeless conflict in the testimony, and the findings of the trial court may not be said to be unsupported by the evidence.

"The plaintiff pleaded his cause of action in two counts. In the first count he pleaded that the mistake was mutual; in the second count he pleaded that the mistake was made by him and that the defendant knew and suspected that the mistake was made. Otherwise the two counts are the same. The defendant denied the allegations of mistake contained in each count, and inserted some new matter by affirmative allegations. The court made findings in favor of the defendant on all issues except as hereinafter specially mentioned.

"In conducting the negotiations leading to the framing of the purported contract, two papers were executed, and these papers were used by the parties as throwing light on the issues. One paper was signed by the broker, J. B. Ephraim, and the other paper is the formal contract which is the subject of controversy in the case. Of and concerning the latter paper, in each count of the complaint the plaintiff alleged: 'That the said actual agreement between the said parties as made on the 30th day of August, 1916, was reduced to writing by plaintiff's secretary, and that through an error of said plaintiff's secretary in reducing the said agreement to writing, said plaintiff's secretary having deleted certain words, viz.: "Together with interest on all unpaid installments from this day until paid, at the rate of six (6) per cent. per annum, payable monthly," appearing in the printed form used by said secretary in reducing said agreement to writing, the said secretary inadvertently omitted to insert after the word "thereafter," as the same appears in the excerpt of said written agreement hereinabove, "including interest at six per cent. (6%) on deferred payments."' In answering that paragraph of the plaintiff's complaint the defendant denied all of the allegations. In making its find-

ings the trial court made a finding as follows: 'That the actual agreement between the said parties as made on the 30th day of August, 1916, was reduced to writing by plaintiff's secretary and said plaintiff's secretary did delete or strike from the printed form of contract used by said secretary in preparing said agreement and reducing it to writing, certain words, viz.: "Together with interest on all unpaid installments from this day until paid, at the rate of six per cent. (6%) per annum, payable monthly," and that such deletion did result from the error and the negligence of plaintiff's secretary. The said secretary did negligently omit to insert after the word "thereafter," as the same appears in paragraph II of plaintiff's complaint the words, "including interest at six per cent. (6%) on deferred payments."' In his brief appellant contends that said finding inadequately responds to the allegations of the complaint. We think the contention is without merit. True, the finding is not couched in the identical words of the complaint. But, for all of the purposes of this case, the words 'inadvertently' and 'negligently' may be said to be synonymous. (See Century Dict.) Moreover, if the finding of the trial court had been made in the identical language of the complaint, and the finding had been made in favor of the plaintiff, that fact alone would have been of no assistance to the plaintiff. The trial court found that no mutual mistake was made and that any mistake made by the plaintiff was neither known to nor suspected by the defendant. Under these circumstances a failure to find on the issue in question was not a reversible error. *Gates v. McLean*, 70 Cal. 42, 46, 11 Pac. 489.

[3] "In each count of his complaint the plaintiff inserted a paragraph in which he alleged (1) the terms of the agreement as actually made according to his theory, and (2) its terms as it was written. In the defendant's answer to each of those paragraphs he inserted (1) a denial of the plaintiff's allegations, and (2) a traverse. In making its findings the trial court found in favor of the defendant and in doing so found in favor of the traverse 'that the actual agreement between the parties at the date of the execution of said written agreement mentioned in said complaint is identical with the agreement mentioned in paragraph I of plaintiff's complaint.' In making its findings as to count one, the trial court wrote the same to the effect that the plaintiff intended to insert the interest clause but that the defendant did not. In other words that the mistake was not mutual. In making its findings as to the second count the trial court wrote the same to the effect that the plaintiff made a mistake but that plaintiff's mistake was not known to, nor suspected by, the defendant. The appellant places his finger on these findings and claims that the same are contradictory. The point is not well founded. Having found against the plaintiff on each theory of mistake as pleaded in the separate counts of the complaint, it was not improper that the trial court should find that the paper under attack was the agreement of the parties. This is so even though it be a fact that one of the parties, or the agent of one of the parties, had made a mistake; because, it will not be contended that a contract can be reformed solely because one of the parties made a mistake. Furthermore, the plaintiff

had pleaded in *hæc verba* the language of the contract as he claimed that it should have been worded. The defendant had answered the allegation with a denial and a traverse. The trial court found on both. In thus framing its findings the trial court committed no error."

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; MYERS, J.; SEAWELL, J.; KERRIGAN, J.

193 Cal. 109

OVERLAND PUB. CO. v. H. S. CROCKER CO., Inc., et al. (S. F. 10079.)

(Supreme Court of California. Jan. 30, 1924. Rehearing Denied Feb. 28, 1924.)

1. Monopolies ☞28 — Individual cannot sue members of trust unless specially damaged.

One in the printing business did not suffer special damages by reason of an organization of other printers under an agreement to increase prices, and could not maintain an action against the members of the organization under the Cartwright Act, as amended by St. 1909, p. 593, as an action because of such a conspiracy can only be brought by the Attorney General or the district attorney.

2. Monopolies ☞28—Complaint by individual held to state cause of action for conspiracy.

A complaint by a printer that the other printers in the city had organized for the purpose of increasing prices and that they entered into agreements with unions for the purpose of destroying the business of all non-members, or of forcing their joining the organization, *held* to state a cause of action for double damages under the Cartwright Act, as amended by St. 1909, p. 593.

3. Monopolies ☞12(2)—Agreement between printers' board of trade and labor unions held illegal.

Agreement between a "Printers' Board of Trade" and labor unions, whereby the unions agreed that their members should work for such concerns only as were members of the "Board of Trade," the primary purpose of the agreement being to create or carry out restrictions in trade or commerce, *held* illegal under the Cartwright Act; the validity of such agreement not being sustainable either as an exercise of the right of every man to work for or refuse to work for any man or class of men, or under the proviso of the Cartwright Act that labor is not a commodity.

4. Torts ☞4—Bad motives do not make legal act illegal.

Bad motives do not of themselves make an otherwise legal act illegal; but, if various acts are done in pursuance of a plan or scheme, the apparently lawful acts become so interwoven with the clearly illegal acts as to render them indistinguishable.

5. Monopolies ☞28 — Damages need not be itemized in complaint.

In an action for double damages under the Cartwright Act, as amended by St. 1909, p.

593, plaintiff must show actual damages; but this is a question of proof, and there is no reason why plaintiff should be required to itemize its damages in its complaint.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Overland Publishing Company against the H. S. Crocker Company, Incorporated, and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Hoefler, Cook & Snyder, of San Francisco, for appellant.

Harry G. McKannay, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment entered upon an order sustaining a demurrer to plaintiff's amended complaint without leave to amend.

Plaintiff in its complaint seeks to allege a cause of action under the Cartwright Act (Act 4166, Gen. Laws of Cal. [1915] Deering, Stats. 1907, p. 984, as amended by Stats. 1909, p. 593) for double damages by reason of certain acts of defendants, who constitute, it is alleged, a trust as defined by that act. Before discussing the many and lengthy allegations of the complaint, we will refer to those parts of the Cartwright Act upon which plaintiff relies.

By this act a trust is defined to be a combination of—

" * * * two or more persons, * * * [or] corporations * * * for either, any or all of the following purposes: 1. To create or carry out restrictions in trade or commerce. 2. To limit or reduce the production, or increase the price of merchandise or of any commodity. 3. To prevent competition * * * 4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise. * * * 5. To make * * * contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell * * * any article of trade, * * * below a common standard figure, or fixed value. * * * " Section 1, as amended by St. 1909, p. 593, § 1.

And by section 11 of the act it is provided that any person who shall be injured by anything declared to be unlawful by this act may sue therefor and recover twofold damages.

With this brief summary of the provisions of the Cartwright Act, we will proceed to examine the various allegations of plaintiff's complaint, in order to ascertain whether it has brought itself within the terms of the act.

The plaintiff alleged that it and the de-

endants are all engaged in the business of selling stationery, letterheads, office supplies, paper, books, etc.; that the defendants control 90 per cent. of said business in the city and county of San Francisco; that the defendants are members of a certain association known as "Printers' Board of Trade"; that plaintiff has been invited and urged to join said association, but has refused to join the same. Details of the practices of said Board of Trade are then pleaded, substantially as set forth in the case of *Overland Publishing Company v. Union Lithograph Co. et al.*, 207 Pac. 412 (hearing denied by this court June 15, 1922).

The allegations as to these alleged unlawful practices are, briefly, that the defendants have unlawfully combined and agreed together to carry out certain restrictions in the printing business; that they unreasonably increase to themselves the prices at which they sell the various articles of stationery mentioned in the complaint and the prices of printing, ruling, and binding which is done by them. It is also alleged that a committee representing the Board of Trade meets daily, and that, according to the rules of said board, each member of the board reports to this committee all their jobs amounting to \$15 or over, and that, in the event that several members have been asked to bid upon the same job, these members and the committee determine the price to be charged for such work. Lots are then cast to determine which member of the board shall do the work at the price previously agreed upon. It is also alleged that the board issues a catalogue of prices of stationery, printing, ruling, and binding and that the defendants have agreed to abide by these prices, which are much higher than would give to the defendants a reasonable profit.

[1] These allegations are of facts which constitute the "Printers' Board of Trade," an association whose purpose is to fix and control the price of the commodities in which the defendants deal at a figure greater than would allow a reasonable profit upon the same to the defendants. However, as pointed out in *Overland Publishing Co. v. Union Lithograph Co.*, supra, such practices as alleged restrict competition among the members of the said "Printers' Board of Trade," but plaintiff, not being a member of said association, is at liberty to bid for printing work freely and without limit as to the price to be charged therefor. Plaintiff, therefore, is not damaged by such action of the defendants, but rather benefited thereby, and consequently cannot show special damages to himself by reason of the existence of these restrictions. Assuming, in passing, that these allegations establish the fact that a conspiracy against trade exists, still, the plaintiff having failed to show that it suffered damages, an action against the defendants because of such conspiracy can only be

brought by the Attorney General or the district attorney. Cartwright Act, § 2. Thus, it has been often held by the federal courts that an individual cannot recover under section 7 of the Sherman Anti-Trust Law (Act of July 2, 1890, 26 Stats. at Large, p. 209, c. 647 [U. S. Comp. St. § 8829]), though the defendants might have been subject to a criminal prosecution by the government. *Keogh v. Chicago & N. W. Ry. Co.* (C. C. A.) 271 Fed. 444; *Motion Picture Patents Co. v. Eclair Film Co.* (D. C.) 208 Fed. 416.

[2] We are of the opinion, however, that the complaint, in its entirety, contains sufficient allegations of unlawful acts claimed to have been done by the defendants, in pursuance of their alleged conspiracy against trade, to state a cause of action under the Cartwright Act for double damages.

The most important of plaintiff's allegations is, substantially, that all the journeymen printers, pressmen, and bookbinders in San Francisco are members of their respective unions, and that it is impossible to secure competent employees in the printing and stationery business without employing members of said unions. Further it is alleged that in pursuance of the unlawful combination and conspiracy, and for the purpose of utterly destroying the business of all nonmembers of their associations, or, as the alternative, of forcing all nonmembers engaged in said business to join said organizations, the defendants, on November 23, 1920, entered into agreements with said unions whereby the unions agreed that their members should work for only such printing, ruling, or binding concerns as belong to and are members of the associations of the defendants, and that the members of said unions should not work for any concern not a member of the associations of the defendants. It is further alleged that the effect of said agreement is to frighten away the customers of such nonmembers by reason of the fact that the defendants could compel the unions to call out the union employees of such nonmembers and thereby prevent orders from being filled; that during the month of January, 1921, the defendants did threaten the plaintiff that, unless plaintiff should join the associations of the defendants, the defendants would have the union employees of the plaintiff called out; that upon plaintiff's refusal to join said associations the defendants ordered said unions to call out plaintiff's union employees, and on the first day of February, 1921, solely pursuant to an order of the defendants, and for no other reason whatsoever, the officers of said unions ordered plaintiff's union employees to cease their employment with plaintiff, and thereupon, on said date, solely by reason of said order of the defendants and for no other reason whatsoever, plaintiff's union employees ceased their employment with the plaintiff.

It is true that in *Overland Pub. Co. v.*

Union Lithograph Co., *supra*, there is some language which apparently upholds the legality of the alleged agreement between the "Printers' Board of Trade" and the unions, but it otherwise appears that the basis of the conclusions of the District Court of Appeal in that case was that—

"There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the Printers' Board of Trade."

If this be the correct interpretation of the decision in that case, and we believe that it is, it was unnecessary to pass upon the legality of this agreement, because, assuming that it was illegal, the complaint as there framed did not show the causal connection between the methods of the "Printers' Board of Trade" and the withdrawal of the union men in pursuance of their agreement with the board. The complaint in the case now before us does allege the necessary causal connection. It alleges the agreement between the "Printers' Board of Trade" and the labor unions. Then it alleges that the defendants, in order to force the plaintiff into its association (and it had previously been alleged that this association constituted a conspiracy against trade), ordered the unions to call out the union men in plaintiff's employ. If further allegations are needed in order to connect the practices of the alleged conspiracy and the withdrawal of the plaintiff's men, it is contained in allegation XVIII of the complaint, which is:

"That each and every and all of the acts and things hereinabove alleged to have been done by the defendants, and each and every and all of the acts and things hereinabove alleged as now being done by the defendants, have been done and now are being done by them in pursuance of the said unlawful combination, conspiracy, confederation and agreement of the defendants hereinbefore alleged, and in carrying out the same and the purposes thereof."

Since the plaintiff sufficiently connects the action of the union men in leaving its employ with the alleged conspiracy, it becomes necessary to pass upon the legality of the agreement between the "Printers' Board of Trade" and the labor unions.

[3] There is no question in our minds but that the primary purpose of this agreement was to create or carry out restrictions in trade or commerce, and as such was tainted with illegality. As was said in *Brescia Construction Co. v. Stone Masons' Contractors Association*, 195 App. Div. 647, 651, 187 N. Y. Supp. 77, 80:

"The essential facts here appearing differ radically from those cases which have frequently arisen which involved the right of members of labor unions to refuse to work for those who do not employ union labor, or to

pursue lawful means for inducing those who do not engage labor union men to do so, or to pursue lawful methods for securing betterment of conditions under which to work, including such matters as hours of work and wages. In the instant case we find that the defendant labor unions, in effect, entered into an alliance with the Contractors' Association under which the members of the union agreed to work exclusively for members of the Contractors' Association and to help it to enforce its decrees against expelled members, or, for that matter, perhaps against any persons or firms engaged in the mason trade who were not members of the Contractors' Association. The defendant unions had no grievance against the plaintiff. The grievance was that of the Contractors' Association, which utilized the labor unions to enforce its mandates against other contractors who were not affiliated with it."

Again, in *Campbell v. People*, 72 Colo. 213, 210 Pac. 841, 842, the court said:

"As to the first point, the only question under the first count is whether the agreement of the members of the Master Plumbers' Association and the members of the local union that they should neither employ nor be employed by any one except each other was a restriction on 'the full and free pursuit' of the business of plumbing. If the pursuit of the business is, by reason of the restriction, not full, or not free in any respect, the combination to 'create or carry out' the restriction is unlawful. That the business, under the restriction, is not full or free seems clear."

Notwithstanding the difference in wording in the Colorado anti-trust law and the Cartwright Act, the last-cited case is in point, and it correctly characterizes such agreements between employers and labor unions as illegal.

Defendants urge, however, that provisions substantially the same as herein pleaded were considered in *People v. Epstein*, 102 Misc. Rep. 476, 170 N. Y. Supp. 68. In that case there was an agreement between the Photo-Engravers' Board of Trade and the Photo-Engravers' Union, in many respects similar to the one herein alleged to be in effect between defendants and the various unions. The defendants were indicted under the Donnelly Anti-Trust Act of New York (Gen. Bus. Law [Consol. Laws, c. 20], §§ 340, 341), declaring contracts creating a monopoly illegal and void and prescribing a penalty. The court held that this law extended only to such contracts as affected the price of an article or commodity in common use, which terms do not include photo-engraving. If the photo-engraving trade was not within the scope of the New York anti-trust laws, it necessarily follows that an agreement between employers and employees, even though it prevented competition in this trade, would not be illegal. It is manifest, therefore, that the decision in that case is to be limited to the situation as there presented, and that whatever the court may have said with re-

spect to such agreements in general between employers and labor unions, by which the latter agree that union men shall only work for employers belonging to an employers' association, was mere dicta.

It is interesting to note the subsequent history of the relations of the Photo-Engravers' Board of Trade and the Photo-Engravers' Unions in the courts of New York. An appeal in the case of *People v. Epstein*, supra, was dismissed on the sole ground that the order sought to be appealed from was not reviewable. 179 N. Y. Supp. 941. Subsequently the so-called Donnelly Anti-Trust Law, supra, was amended to bring within the purview thereof "any article or product used in the conduct of trade, commerce or manufacture." In *Standard Engraving Co. v. Volz*, 200 App. Div. 758, 193 N. Y. Supp. 831, the court held that this anti-trust law, as amended, prohibited the labor unions from establishing a minimum price at which the photo-engraving producers could sell their products. This minimum price had been established after the decision in *People v. Epstein*, supra, and in pursuance of the agreement between Photo-Engravers' Board of Trade and the Photo-Engravers' Union, as alleged in that case. In the course of its opinion in *Standard Engraving Co. v. Volz*, supra, the court quoted from *Curran v. Galen*, 152 N. Y. 33, 37, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496, as follows:

"The social principle which justified such organizations [referring to labor unions] is departed from, when they are so extended in their operation as either to intend, or to accomplish, injury to others."

In view of the decision and the language of the court in *Standard Engraving Co. v. Volz*, supra, it may be seriously questioned whether the courts of New York would be inclined to follow the dicta in *People v. Epstein*, supra, tending to support the position of the defendants.

Likewise, the validity of this agreement between the defendants and the labor unions cannot be sustained upon the authority of such cases as *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, which hold that it is the right of every man to engage to work for or to deal with or to refuse to work for or to deal with any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. The principle laid down in those cases only applies where the employees are pursuing lawful means to secure a betterment of their working conditions, or where they have in fact a grievance against the employer. *Brescia Construction Co. v. Stone Masons Contractors' Association*, supra. Furthermore, the proviso

in the Cartwright Act that labor, skilled or unskilled, is not a commodity within the meaning of the act, does not authorize any such agreement as was here made between employers and employees. In *Duplex P. P. Co. v. Deering*, 254 U. S. 443, 469, 41 Sup. Ct. 172, 177 (65 L. Ed. 349, 16 A. L. R. 196), Mr. Justice Pitney, in speaking of section 6 of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stats. at Large, 730 [U. S. Comp. St. § 8835f]), which declares, as does the Cartwright Act, that the labor of a human being is not a commodity or article of commerce, said:

"The section [section 6] assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws."

Therefore, as this agreement between the labor unions and the defendants resulted in a combination or conspiracy in restraint of trade, it fell within the operation of the Cartwright Act, supra, notwithstanding the fact that some of the parties to the agreement were labor unions. And plaintiff, by alleging that it has been damaged by reason of the union men in its employ being called out in pursuance of this alleged agreement, stated a cause of action under this act for twofold damages.

There are also allegations in the complaint that the defendants in order to destroy the business of plaintiff and other nonmembers of the "Printers' Board of Trade," solicit the customers of plaintiff and other nonmembers and offer to do work for such customers at prices below the cost of production. It is also alleged that plaintiff and certain other printers do not possess all the necessary machinery to do certain portions of printing work, and that plaintiff and these other printers are compelled to let out this work to or purchase materials from such of the defendants as are equipped therefor; that the defendants have charged and do charge the members of said association much lower prices for such work and materials than they charge the plaintiff and other nonmembers. It is then averred that the defendants charge plaintiff and other nonmembers of the "Printers' Board of Trade,"

ters' Board of Trade" unreasonable and exorbitant prices for such work, all for the purpose of destroying the business of plaintiff and other nonmembers, or, as the alternative, of forcing plaintiff and other nonmembers to join said associations.

The plain inference from these allegations is that these acts were done by the defendants for the purpose of forcing the plaintiff into the alleged unlawful combination and thus strengthening their illegal organization and its potentialities for accomplishing its alleged objects. It may well be that these various acts in and of themselves are innocent and lawful. Certainly, for instance, the solicitation of trade is not prohibited by the Cartwright Act. Nor is such solicitation prohibited merely because the person so soliciting the trade is a member of a trust or conspiracy in restraint of trade. But these various acts of solicitation, as well as the other acts alleged to have been done by the defendants, if done by the members of a trust, as defined by the Cartwright Act, in pursuance of their unlawful conspiracy and to effectuate its illegal objects, may become unlawful. Thus in *Swift & Co. v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), Mr. Justice Holmes, discussing a demurrer to the bill in equity filed by the government for the purpose of enjoining the "meat trust" for alleged violation of the federal anti-trust statute, said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. *It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.* *Aikens v. Wisconsin*, 195 U. S. 194, 206." (Italics ours.)

Commenting upon this, and other quotations to the same effect, the court in *Monarch Tobacco Works v. American Tobacco Co.* (C. C.) 165 Fed. 774, 780, observed that:

"The reasons for the rule do not seem to lie very deep, it being conceivable that the object of every such combination could, and probably would, be consummated by acts which would be perfectly lawful if not done with the design to put the unlawful scheme into successful operation. The conspiracy and combination, though themselves unlawful, cannot injure any person either in his business or property so as to give him a cause of action under section 7 [of the Sherman Anti-Trust Law] unless something be done to make the combination and conspiracy effective; but whatever is done by those engaged in the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme, however innocent it might otherwise have been, the separate acts becoming thereby

so interwoven with the unlawful scheme as to cause the injury 'by reason' of the combination, within the language of section 7. It therefore seems that a series of acts, each of which may be innocent in itself, may be wrongful if the direct object, purpose, and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the states or the liberty of a trader to carry on his business be obstructed. * * * Sometimes an unlawful act may be done by means that appear to be lawful, just as a lawful act may be accomplished by means that are manifestly unlawful."

[4] It is the contention of the defendants that so long as they were doing lawful acts, their motives in so doing these acts were immaterial. This court has often expressed the fundamental rule that bad motives do not of themselves make an otherwise legal act illegal. *Union Labor Hospital Ass'n v. Vance Lumber Co.*, 158 Cal. 551, 112 Pac. 886, 33 L. R. A. (N. S.) 103; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. But, as pointed out by Mr. Justice Holmes in *Swift & Co. v. United States*, supra, if various acts are done in pursuance of a plan or scheme, the apparently lawful acts become so interwoven with the clearly illegal acts as to render them indistinguishable. This we believe is the situation here presented, assuming, of course, that plaintiff's allegations are true, and it would in effect emasculate the anti-trust law to say that various acts done by the members of an alleged trust, in pursuance of the conspiracy against trade, do not lose their innocent character and become illegal. The view which we take is well illustrated by the following quotation from *Munter v. Eastman Kodak Co.*, 28 Cal. App. 60, 667, 153 Pac. 737, 740:

"In other words, it was and is within its legitimate province as a manufacturer and wholesale vendor to select its own customers, and moreover, to sell at higher prices to one than to another, *provided, of course, that such discrimination in prices is not the result of a combination, agreement, or conspiracy between it and others, the object of which was or is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public, the protection of whose welfare is the first consideration of all anti-trust legislation,*" citing cases. (Italics ours.)

Applying these principles to this case, the defendants could select their customers, or refuse to sell to plaintiff or any one else, except on their own terms and prices, just so long as they were not acting in pursuance of a conspiracy to restrain trade. In other words acts having a direct causal connection or relation to the existence of a trust, when done by such a trust may lose their legal character and become illegal. And it is the theory of the plaintiff, and it so alleges, that the defendants constitute a trust, as defined by

the Cartwright Act, with its dominant purpose to sell its goods at increased prices, and that all of the acts alleged to have been done by the defendants were done by them as members of this alleged trust, and to further the illegal object of the alleged trust. We are of the opinion that in these allegations the plaintiff has brought itself within the purview of the Cartwright Act.

[5] While it is necessary for the plaintiff, in order to recover under the Cartwright Act, to show that actual damages were sustained—damages in some amount which are susceptible of expression in figures and not dependent upon the conjecture of a jury (*American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 143 C. C. A. 353)—this is a question of proof, and we see no reason why the plaintiff should in this action be required to itemize its damages in its complaint. See *Monarch Tobacco Works v. American Tobacco Co.*, supra, page 783.

For the reasons above indicated we are constrained to reverse the judgment, with directions to the trial court to overrule the demurrer.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.; LENNON, J.

193 Cal. 62

MILLER v. GERMAIN SEED & PLANT CO.
(L. A. 6985.)

(Supreme Court of California. Jan. 30, 1924.)

1. Sales ⚡273(4)—Warranty of seeds usually implied.

Where a purchaser asks a seed dealer for a certain variety of seed, and, in pursuance of that request, seed is furnished, in the absence of any additional facts the law will, from the transaction, imply a contract of warranty.

2. Customs and usages ⚡12(2)—Party bound by general custom, though ignorant of it.

A party to a contract may be bound by a custom not inconsistent with the terms of the contract, even though he is ignorant of the custom, if that custom is of such universal application that he may be conclusively presumed to know of it.

3. Sales ⚡261(1)—What representations constitute warranties.

Under Civ. Code, §§ 1763, 1764, in order that a sale shall be upon a warranty, there must be two factors present, first, an affirmation of a fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that the affirmation shall be a warranty to the buyer, and the affirmation of the fact is shown by direct evidence, and the intent to warrant is inferred from the facts and circumstances surrounding the sale.

4. Sales ⚡261(4)—Representations constituting "warranty" in sale of seed.

In the case of sale of seed for planting, description of the seed by the seller is an af-

firmation of a fact concerning the thing sold, and the intent on the part of the dealer to warrant that vital fact to the buyer is inferred.

5. Customs and usages ⚡17—Effect of custom upon "warranty" of seed sold.

If there is a general custom among sellers of seed not to warrant the seed sold by them, the court cannot infer an intent on their part to warrant the seed from the facts and circumstances of the sale, because among these facts and circumstances is the custom of nonwarranty, and in such case proof of the custom does not contradict or vary the terms of an express warranty, but establishes that there never was any warranty at all.

6. Customs and usages ⚡11—Custom and usage considered in determining whether warranty implied.

Under Civ. Code, §§ 1619–1621, 1637, 1647, 1655, 1656, 1763, in determining whether or not a contract of warranty is to be implied the court may consider general custom or usage.

7. Customs and usages ⚡12(1)—Buyer of seed bound by custom not to warrant.

A buyer of celery seed was bound by general custom of nonwarranty on the part of seed dealers, though he was ignorant of it.

Seawell and Lawlor, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Ben Miller against the Germain Seed & Plant Company. Judgment for plaintiff, and defendant appeals. Reversed.

Eugene Daney, of San Diego, for appellant.

E. L. Johnson, of San Diego, for respondent.

WILBUR, C. J. The plaintiff purchased celery seed from the defendant. The seed turned out to be a different variety from that ordered. This action was brought to recover the damages suffered by the plaintiff. Judgment was rendered in favor of the plaintiff, and the defendant appealed. The main question presented by the record is whether or not there was a warranty of the seed and a consequent responsibility for the damages suffered by the plaintiff.

The plaintiff was engaged in raising celery for the market, and the defendant was engaged in the sale of seeds and plants. On March 16, 1920, the plaintiff ordered \$20 worth of celery seed of the Golden Yellow California stock, and on April 8, 1920, he ordered \$12 worth of celery seed of the Golden Yellow Celery California stock. The orders were by letter. The defendant complied by forwarding two bags of celery seed. Aside from the address of the purchaser and seller, the only marking upon the seed was the following: "Germain. Germain Seeds Germinate. Seeds. Los Angeles, Cali-

fornia." The seeds were not the character of seed ordered, but were of a variety known as Green celery seed. The two varieties of seed were indistinguishable one from the other, and the celery plants could not be distinguished until approaching maturity; when the bleaching process was applied, it was discovered by reason of the fact that they would not bleach properly, that they were of the variety known as Green celery seed.

The plaintiff claimed to be damaged in the sum of \$11,900, but the jury returned a verdict in plaintiff's favor for the sum of \$4,000 only. The most serious question raised by the appeal is as to whether under all the facts and circumstances shown in the case there was a warranty by the defendant of the character of seed supplied by it to the plaintiff. This question turns largely upon the claim of the appellant that under the general custom of seed dealers there is no warranty of the character of the seed sold and that the defendant in the conduct of its business makes every effort possible to apprise the purchaser of seed of that fact. The trial court instructed the jury that if there was a custom of nonwarranty on the part of seed dealers, the plaintiff could not recover upon the alleged warranty if he had notice or knowledge of such custom; but the trial court refused to instruct the jury as requested by the defendant that, if there was a general custom of nonwarranty, the plaintiff would be bound thereby even if he did not in fact know of such custom or usage. To state it more concretely, the question arises upon the refusal of the trial court to give the following instructions proposed by the defendant:

"Where there is a general custom and usage appertaining to a business, which custom or usage is so universal in its application that it is presumptively known to all who have dealings in the business to which it is applicable, then I charge you that unless there is a contract to the contrary, such general custom or usage is presumed to be taken into consideration by all parties in entering into the transaction, so that if in this case it should appear from the evidence that there is a general custom or usage of the seed trade that no seeds are warranted as to name, description, productiveness, or other matter, and if you find from the evidence that such custom is so universal that it must be presumed to have been known by people who have transactions in the seed business, then I charge you that such custom or usage is as much a part of the contract of purchase and sale as if it had been expressly so stipulated."

"If you find from the evidence in this case that it is, and has been for many years, the general custom of the seed trade in the state of California not to warrant either the description, quality, productiveness or any other matter of seeds, then I charge you, as a matter of law, that the plaintiff in this case is presumed to have known such custom, and it will be presumed, in the absence of any express under-

standing to the contrary, that such custom is a part of any dealings in such trade or business, and in such case it is not necessary that there should be on or in the package containing the seed any notice of nonwarranty, nor is it necessary if such notice of nonwarranty is on, or in the package containing such seed that it be read by the buyer, because the custom of the trade is part of the contract unless excluded by an expressed agreement to the contrary."

"If you find from the evidence in this case that it is the custom of the seed trade in California, and has been the custom for many years, not to warrant the description, quality, or productiveness of seeds bought or sold, and that this custom is a well established one, and well known to those either buying or selling seeds, then I charge you that notwithstanding the fact, if it be a fact, that the plaintiff may have not seen the disclaimer notice which the defendant used in his business, or if he did see it that he did not read it, or even if the defendant entirely omitted to inclose one with the seeds, still the general custom and usage of the seed business would control the transaction unless there was an express contract to the contrary."

Testimony was introduced by the defendant upon the subject of custom which would require the giving of these instructions if they are correct statements of the law. The question for determination then is whether or not from the facts and circumstances shown there was a contract of warranty between the purchaser and seller of the seeds. If it was the general custom of all seed dealers, including the defendant, to refuse to warrant the character of the seed sold by them, and if the price for seed was fixed in view of this uniform custom, it is evident that if we hold that the seller is, under the circumstances, liable upon a warranty of the character of the seed, we thereby hold the defendant to the terms of an agreement which it did not in fact intend to make. It is clear that if the purchaser of the seed had inquired of the seller whether or not it would warrant the character of the seed that the seller would have replied in the negative. It may be conceded that where a purchaser asks a seed dealer for a certain variety of seed, and in pursuance of that request seed is furnished, in the absence of any additional facts the law will, from the transaction, imply a contract of warranty. This warranty partakes of the nature of both an express and implied warranty. It is express in the sense that it is based upon the express language used by the purchaser in his order or request; it is implied in the sense that results from the circumstance that the request for seed is from a grower of celery to a seller of celery seed for the purpose of raising celery plants, and therefore the character of the seed is an essential and vital provision of the contract between the parties. It is, of course, conceded that if there had been a written warranty or an expressed oral war-

ranty of the character of the seed, the custom of the dealer in other cases not to give such a warranty would have no bearing upon the terms of the express warranty. The question here is somewhat different, namely, whether or not in determining the contract between the parties we should consider, not only the character of the business conducted by the purchaser and by the seller, but also the general custom of seed dealers not to warrant the character of seed sold by them.

The Supreme Court of the state of Wisconsin had occasion to consider the subject now before us in the case of *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N. W. 1124, in 1914. The court in that case said:

"There is still another insurmountable difficulty in the way of plaintiff's recovery. The jury found that at the time of the sale there was 'a general custom in the Northwest, including Wisconsin, among seedsmen such as the defendants, to refuse to warrant seeds.' The jury also found that the plaintiff did not know of such custom. The jury made no such finding in reference to Morton. There is no evidence to show whether he knew of such custom or not. He did testify that he had no notice from any source that the defendant would not sell its seeds with a warranty. This might all be true and still the general custom such as the jury found might not only exist, but Morton might have knowledge of it. It is probable that, had he been asked the direct question, he would have denied all knowledge of the custom, and we will assume that on the evidence referred to the court might have found lack of knowledge, and that it actually did so find.

"It is not the law that ignorance of a general trade custom relieves a party from the effect of it. If there was a general custom among seedsmen such as was found, Morton as a retail dealer in seeds was bound to know of it.

"The object of proving a general custom is not to contradict or change a contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made; and this evidence of a general custom, when it does not contradict or change the express terms of the written contract, is admitted for the purpose of showing what the real contract between the parties was * * * And, when it is clearly proven, the parties are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract.' *Hewitt v. John Week L. Co.*, 77 Wis. 548, 556, 46 N. W. 822, and cases cited.

"A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the majority of such transactions are had in view of the custom, and the agreement on which the minds of the parties actually met will thereby be carried into effect. * * * Where the custom is proved to be known to both, it may even add terms to the contract. * * * Where the custom is general, it will be presumed to have entered into the contract, and one may be bound thereby although ignorant, unless the other party be

shown to have knowledge of his ignorance.' *Gehl v. Milwaukee P. Co.*, 105 Wis. 573, 580, 81 N. W. 666.

"Replying to the argument of counsel in another case, that a custom in order to be binding must be known to both parties to the contract, or it must have existed a sufficient length of time to raise a presumption of knowledge, the court said:

"That rule of course prevails in case of an attempt to annex to a contract some incident not expressed therein, as in the case of *Hewitt v. John Week L. Co.*, 77 Wis. 548, 46 N. W. 822, where the question was whether the owner of a sawmill, under his contract to saw logs by the thousand, was entitled to the slabs. There is a difference between evidence of usage to establish a custom for the purpose of annexing that as an incident to a contract, and the same kind of proof to show the meaning of some word or term used in a contract. In the latter situation the meaning of the term as understood at the time and place of the contract governs, whether both of the parties knew of such meaning or not. They are presumed to contract with reference to the meaning of words and terms used by them, as such words and terms are understood at the place of their contract.' *Shores L. Co. v. Stitt*, 102 Wis. 450, 455, 78 N. W. 562.

"The case at bar is in its facts very much like one recently decided by the Supreme Court of Iowa, from which we quote the following:

"The alleged liability of the Younkerman Seed Company may be considered first. The evidence that a general custom, such as pleaded, prevails in the seed trade was conclusive. The particular package had the printed matter thereon, and, though this may not have been noticed, the sale is presumed to have been negotiated with reference to the general custom of the trade. * * * This being so, a warranty that the seed was true to name could not be inferred, and the court rightly found in favor of the Younkerman Seed Company.' *Blizzard Bros. v. Growers' C. Co.*, 152 Iowa, 257, 132 N. W. 66, 67."

The Supreme Court of Iowa rendered a decision to the same effect which is cited and quoted in the decision by the Supreme Court of Wisconsin. *Blizzard Bros. v. Growers' C. Co.*, *supra*.

[1, 2] The rule seems to be uniform that a party to a contract may be bound by a custom not inconsistent with the terms of the contract, even though he is ignorant of the custom, if that custom is of such general and universal application that he may be conclusively presumed to know of the custom. See 2 Page on Contracts, § 604, p. 925. The author of this text-book states the rule in that regard as follows:

"To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements. (1) It must be actually or constructively known; and (2) it must be consistent with the contract. If either of these elements is lacking the usage or custom cannot be regarded as part of the contract. If the usage is neither actually or constructively known to one of the parties to the contract, it is not binding upon him."

In the case of *Rauth v. Southwest Warehouse Co.*, 153 Cal. 54, 109 Pac. 839, it was assumed that a seller of seed would be bound by "a custom or usage so notorious that defendant must be presumed to have known it, for actual knowledge was not shown, to the effect that the term 'barley' did not include barley exactly like the common bearded variety ordinarily grown in Orange county."

The rule that a person will be presumed to have contracted with reference to a general custom or usage whether he knew of that custom or not has frequently been invoked. In *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84, pages 88, 89, 84 N. E. 640, 642, it was said:

"A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general, usage or custom relating to such business. (*Collins Ice Cream Co. v. Stephens*, 189 Ill. 200; *Chisholm v. Beaman Machine Co.*, 160 Id. 101; *Leavitt v. Kennicott*, supra.) And this is so whether he knew of the custom or not. (*Samuels v. Oliver*, 130 Ill. 73; *Taylor v. Bailey*, 169 Id. 181; *Lyon v. Culbertson*, 83 Id. 33; *Doane v. Dunham*, 79 Id. 131; *Bailey v. Bensley*, 87 Id. 556.) Such general custom and technical meaning of words may be proved without being specially pleaded. (*Stewart v. Smith*, 28 Ill. 397; *Lowe v. Lehman*, supra.) The evidence offered should have been admitted."

The Court of Appeals of Maryland, in *Lyon v. George*, 44 Md. 295, said:

"The defendant not being able to offer direct proof of the contract between himself and the plaintiffs, was seeking to establish it by indirect and circumstantial evidence. The usage offered in evidence, had certainly an important bearing upon the issue on trial. Where uniform and well established, it has been held to shape the contracts of parties, and serve as a guide to their true meaning and understanding. However well established, it may undoubtedly be controlled by a special contract, but in the absence of evidence of such special contract, where services are rendered, and a uniform usage is shown to exist in regard to such services, it will be presumed that they are rendered in accordance with the usage. In the case of *Given v. Charron*, 15 Md. 507, the identical question arose. There the action was brought to recover for an alleged wrongful dismissal of the plaintiff from the employment of the defendant. No direct evidence was offered of the contract between the parties. But to show what the contract was, the plaintiff proposed to offer testimony of a usage among dry goods jobbers, such as the defendant, in regard to the terms upon which they employed their clerks. This court speaking through *Le Grand, C. J.*, say in regard to the admissibility of the evidence: 'We think the testimony was properly admitted. It was pertinent to the contract declared upon, and a link in the chain of evidence, to establish a custom existing among dry goods jobbers, as to the time for which they were to be understood as employing clerks, when nothing was said in regard to it.' In the case of *Renner v. Bank of Columbia*, 9 Wheat. 548,

evidence of the usage of banks in the District of Columbia, in regard to the day of demanding payment upon bills of exchange and promissory notes, was held to be admissible for the purpose of explaining the understanding of parties as to their contracts. This authority was recognized and followed in the case of *Bank of Columbia v. Magruder*, 6 H. & J. 180, and in the case of the *Bank of Columbia v. Fitzhugh*, 1 H. & G. 248.

"The objection to the admissibility of the evidence, that its offer was not accompanied with an offer to prove that the usage was known to the plaintiffs cannot be sustained. The defendant was under no legal obligation to offer such proof. The contract was entered into with a member of the plaintiffs' firm, since dead, and the knowledge of the usage, on his part, when the agreement to employ the defendant as agent was made, will be presumed in law. This doctrine is so strongly recognized in the case of the *Bank of Columbia v. Fitzhugh*, [supra] that it may now be considered a settled question in this state, and it is unnecessary to refer to other cases in support of it."

The Supreme Court of Michigan, in *Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350, said:

"The rule is that the custom must be one so well settled and notorious as to raise the presumption that it was known to buyer and seller. *Mechem, Ag. § 348*. This presumption was not, therefore, rebutted by defendant's testimony that he was not aware of such custom, although it might have been, had the custom been shown to have been a purely local one. This was shown to be a general custom pertaining to the glass trade in this country, and not confined to any particular locality, as was the case in *Pennell v. Transportation Co.*, ante, 247."

In *Laver v. Hotelling*, 5 Cal. Unrep. 534, 46 Pac. 1070, this court held that the custom or rule of an architects' association fixing their compensation was not binding upon a layman ignorant of the rule, but distinguished the case from the rule concerning a general custom, as follows:

"It was not accompanied by any proof that the rule or usage of architects was known to the defendant at the time of the alleged contract with plaintiffs, nor that it was so generally accepted and acted upon by the public as to give it the standing of a custom, reasonable, uniform, and notorious, knowledge of which was to be imputed to him. In the absence of such complementary proof, the law, as we understand it, does not allow that a rule for professional guidance, adopted by organizations or societies of the members of any profession, is competent evidence in their favor in controversies with lay employers regarding the quantum of their compensation. * * * We do not deny the principle illustrated by *Sewell v. Corp.*, 1 Car. & P. 392; *Thomas v. Brandt* (Md.) 26 Atl. 524, and other cases, that, if there is a general usage, applicable to the charges of a particular profession, it may be looked to in order to determine the compensation to be paid by one who employs an individual of that profession; but we hold that such a usage cannot be proved for that purpose against laymen by

showing a rule adopted within the profession only."

This court in a number of cases has held a party to a contract bound by general usage or custom, although he did not know of it. We have held that a general usage cannot become ineffective merely because of an actual or professed ignorance of that custom. *Nicoletti v. Bank of Los Banos* (Cal. Sup.) 214 Pac. 51. In that case we said:

"This court in *Davis v. First National Bank of Fresno*, 118 Cal. 600, 50 Pac. 666, held that the usage of the bank to send its commercial paper to its correspondent banks for collection was binding upon the customer, even if he was ignorant of the usage and made no inquiries in reference thereto. In that regard the opinion states as follows:

"The court should also have permitted the defendant to show by the witnesses, which it called for that purpose, the usage of banks in regard to the collection of paper presented by persons who were unknown to them, and that the defendant conformed to that usage (*Warren Bank v. Suffolk Bank*, 10 Cush. 582). If such usage was reasonable and did not contravene any principles of law, the fact that the defendant followed it would tend to show that it exercised reasonable care in seeking to collect the draft. One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law. (*Morse on Banking*, § 9; *Bank of Washington v. Triplett*, 1 Pet. 25.) "The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection, without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued." See, also, *San Francisco National Bank v. American National Bank*, 5 Cal. App. 408, 190 Pac. 558."

There seems to be no good reason why the rule applied in the case of *Nicoletti v. Bank of Los Banos*, supra, and in the cases therein cited, should not apply to the purchase of seeds from a person engaged in the business of selling seed.

In connection with the effect of custom upon the transaction here in question, it is suggested, however, that inasmuch as the warranty of the seller of seed to the buyer of seed is an "express" warranty, that such warranty cannot be contradicted or modified by a custom of the seed trade not to warrant their seed sold. This suggestion requires a consideration of the meaning of the

term "express warranty" as applied to sales of personal property. In *Benjamin on Sales* (7th Ed.) §§ 610, 613, pp. 610, 611, 612, it is said:

"Sec. 610. A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of the warranty. But it is a collateral undertaking, forming part of the contract by the agreement of the parties express or implied. [*Foster v. Smith*, 18 C. B. 156; *Mondel v. Steel*, 8 M. & W. 858; *Street v. Blay*, 2 B. & Ad. 456; *Chanter v. Hopkins*, 4 M. & W. 399.] It follows, therefore, that antecedent representations made by the vendor as an inducement to the buyer, but not forming part of the contract when concluded, are not warranties. * * *

"Sec. 613. No special form of words is necessary to create a warranty. It is nearly two hundred years since Lord Holt first settled the rule, in *Cross v. Gardner* [*Carthew*, 90; 3 Mod. 261; 1 Show. 68], and *Medina v. Stoughton* [1 Lord Raym. 593; L. Salk. 210], which Buller, J., in 1789, laid down in the opinion given by him in the famous leading case of *Pasley v. Freeman* [3 T. R. 51, at p. 57; 2 Sm. L. O. p. 74 (Ed. 1887)], as follows: 'It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended.'

"And in determining whether it was so intended, a decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter not."

[3-5] Our Civil Code (section 1763) defines a warranty in somewhat different terms, as follows:

"A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future."

This general statement is broad enough to cover mere representations of any fact, unless the word "assures" is given a more limited meaning than the word "represents." The general statement in section 1763, Civil Code, is also limited by the provisions of the next section (1764), as follows:

"Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty."

The rule for determining whether a representation of a fact is to be treated as an assurance to the buyer, that is, as a warranty, is stated in the articles on "Sales" in Cyc., as follows (35 Cyc. p. 374-5):

"4. Intention of Parties. An affirmation made by the seller with respect to the thing sold amounts to a warranty if it appears to have been so intended and understood by the parties, and not as a mere matter of opinion or judgment. The rule is broadly stated in most deci-

sions that a mere affirmation does not constitute a warranty unless shown to be so intended and understood by the parties, and not as a mere matter of opinion; that in the contract of warranty, there must be an agreement of the minds of the contracting parties as in all other contracts. And while there are decisions to the effect that the actual intent of the seller to warrant the thing sold is immaterial if the affirmations made—whether written or oral—and relied on by the buyer as an inducement to purchase, import a warranty, that the seller is responsible for the language he uses. * * * The true aim in construing every agreement, that of warranty included, is of course, to reach the real intention of the parties to it. This is accomplished, not by taking what they may afterward say their intentions were, but what they appear to have been from the words employed, the occasion of using them, and all accompanying facts and circumstances explanatory thereof. * * *

This court has adopted the rule as stated in Benjamin on Sales and in Cyc. In *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687, it is said:

"To create an express warranty, the word 'warrant' need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale as to the quality or condition of the thing sold will be treated as a warranty, *if it was so intended*, and the purchaser bought on the faith of such affirmation; and whether it was so intended, and the purchaser acted upon it, are questions of fact for the jury." (Italics ours.)

This decision followed the earlier case of *Polhemus v. Heiman*, 45 Cal. 573, where the rule was stated as follows:

"It is certain that no particular words are necessary to create a warranty. Any affirmation made at the time of sale as to the quality or condition of the thing sold will be treated as a warranty *if it was so intended*." (Italics ours.)

See, also, *Hackett v. Lewis*, 36 Cal. App. 687, 688, 173 Pac. 111, and *Firth v. Richter*, 49 Cal. App. 545, 196 Pac. 277.

It is established by the foregoing authorities that in order that the sale shall be upon a warranty there must be two factors present, first, an affirmation of a fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall be a warranty to the buyer. The affirmation of the fact is shown by direct evidence, and the intent to warrant is inferred from the facts and circumstances surrounding the sale. In the case of the sale of seed for planting, the description of the seed by the seller is an affirmation of a fact concerning the thing sold. From the fact that seed is sold for planting and that the description of the seed is therefore a vital element in the contract, the intent, on the part of the dealer, to warrant that vital fact to the buyer is inferred. We thus have the two essentials of a warranty.

If, however, there is a general custom among sellers of seed not to warrant the seed sold by them, we cannot, in the face of this universal custom, infer an intent on their part to warrant the seed from the facts and circumstances of the sale, because among these facts and circumstances is the custom of nonwarranty, which precludes the inference of an intent to warrant. In such a case the proof of the custom does not contradict or vary the terms of an express warranty, but establishes that there never was any [express] warranty at all, for the intent to warrant was absent. It is conceded in this case that if the purchaser knew of the custom he could not recover, and the court so instructed the jury. This being conceded, the only remaining question is whether a purchaser who contracts with dealers in seed is bound by such a general custom of the seed trade, even if ignorant of the custom. A customer cannot by his mere ignorance of a general custom of nonwarranty impose upon a dealer a contract of warranty which he never intended to make and which the slightest inquiry would disclose to the purchaser was not intended to be made.

[6, 7] Our Code points to the same conclusion we have reached by a consideration of the decisions from this and other states, and from the fundamental principles involved in the transaction. "A contract is either express or implied." Civ. Code, § 1619. "An express contract is one, the terms of which are stated in words." Civ. Code, § 1620. "An implied contract is one, the existence and terms of which are manifested by conduct." Civ. Code, § 1621. So far, then, as a warranty is based upon the language used by the parties, it is an express contract, and so far as it is "manifested by conduct," it is an "implied contract." From other Code sections it is clear that in determining whether or not a contract of warranty is to be thus implied we may consider general custom or usage. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ. Code, § 1647. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civ. Code, § 1648. "Stipulations, which are necessary to make a contract * * * conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Civ. Code, § 1655. (Italics ours.) "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." Civ. Code, § 1656. (Italics ours.)

The foregoing Code rules are laid down

"for the purpose of ascertaining the intention of the parties to a contract. * * * " Civ. Code, § 1637. It is clear, then, that general custom or usage must be considered in determining the intent of the parties, and are in effect a part of the contract unless the contract manifests a contrary intention. Civ. Code, § 1655, supra.

It should be noted that we are discussing proposed instructions to a jury concerning a general custom, and not an undisclosed custom of an individual seller, or a purely local custom, of which the buyer was ignorant.

The court erred in refusing the defendant's proposed instructions.

Judgment reversed.

We concur: MYERS, J.; WASTE, J.; KERRIGAN, J.; LENNON, J.

SEAWELL, J. I dissent. The indisputable facts of this case are that defendant is a corporation, doing a general seed and plant business throughout Southern California, with its principal place of business at Los Angeles, this state. Plaintiff was engaged in raising for sale in the market of San Diego and vicinity a variety of celery known as the Golden Yellow. Eight acres of his 18-acre holding situate at Chula Vista, San Diego county, were devoted to this use. He had been a grower of celery for something like 40 years.

On March 16, 1920, through the United States mail, he forwarded from Chula Vista to defendant the following order, written on plain letter paper:

"Germain Seed Company: Please send me twenty dollars worth of celery seed, the Golden Yellow Cali stock. Inclosed find money order for same. From the French stock I also have a bal due me for \$20 & 10 cents for seed I sold to Brackenhoff. He refers me to you for payment for same. He claims you have taken over the seed when he sold. Please let me know what I can do about it & oblige. Res. Ben. Miller. Nat. Ave & B St. Chula Vista, Cali."

A second letter was as follows:

"April 8, 1920. Germain Seed Co.: Please send me 12 dollars worth of celery seed of French Golden self-bleaching Cali stock, and oblige Ben Miller, National & E St. Chula Vista, Cal. Inclosed find money order for same."

No reply by letter was made by defendant to either of said orders, but in response thereto defendant forwarded to plaintiff's address by common carrier two bags of celery seed which were received by him in the due course of transportation. The first order was for the use of plaintiff. The second order was for the use of his son, Fred Miller, and Oscar Lehner. Written or printed on the forwarding tags were the words:

"Ben Miller. National Avenue at E Street, Chula Vista, California. From Germain Seed and Plant Co., Los Angeles, California."

Upon each bag there was stamped the word "Germain," beneath which appeared the words "Germain Seeds germinate. Seeds. Los Angeles, California." Neither the tags nor the bags bore any other words or marks.

The seed forwarded was not true to the variety ordered, but was a different and inferior variety known as Green celery seed. Relying upon defendant to furnish the variety ordered, and believing the seed received to be of such variety, plaintiff in good faith planted said seed in beds prepared for that purpose, raising 240,000 plants, 80,000 of which were transplanted in four acres of soil prepared to receive them, and 180,000 of said plants were reserved to be planted later on an additional four acres which also had been prepared for that purpose, but which were not subsequently planted because it became apparent that the plants were not of the Golden Yellow variety, but were of a worthless variety and possessed no market value whatsoever. Plaintiff suffered a substantial loss. The soil had been fertilized and carefully prepared for celery raising. Considerable care and attention is required to successfully plant, cultivate, bleach, and prepare this plant for the market. In addition to the expense of putting the soil in condition to receive the plants, plaintiff sustained the loss of the use of his land for farming or other profitable uses, and his time and labor. He was further damaged by being deprived of the gains which he would have received had the seed been true to variety. It was shown that had the celery seed been of the Golden Yellow variety the acreage sown by plaintiff should have yielded a crop of 75,000 bunches of Golden Yellow celery, which would have brought a return of \$1.25 per dozen bunches; but, being of a kind that was not marketable, the entire crop was lost. Plaintiff placed his loss at \$11,900. The jury returned a verdict in his favor in the sum of \$4,000.

The second bag of seed was planted by Oscar Lehner and Fred Miller with like disastrous results. The evidence fully sustained the claim that the Green variety of celery was of no market value while the Golden Yellow was readily marketable and brought a good price. It is admitted that there is no known test by which any one of the several varieties of celery seed may be distinguished from any other variety. The true character of the plant cannot be readily determined until it reaches an advanced stage of development known as the "bleaching period."

Defendant admits that for a period of 15 years it had supplied plaintiff with celery seed. Also that it knew that plaintiff grew and raised Golden Yellow celery. This admission goes to the point that the defendant had knowledge of the special use that was to be made of the seed, to wit, planting.

Such knowledge on the part of the seller is a highly important factor and furnishes a very strong reason, as pointed out by the leading authorities on this subject, for the application of the principle of warranty to cases in which the seller, such as here, assumed from the nature of his business, a superior knowledge of the thing sold.

Defendant admits that the celery seed furnished by it to plaintiff was not of the variety ordered and by way of answer alleges that it attempted in good faith to fill said order in compliance with plaintiff's directions and that it believed and had good reason to believe that the seed shipped to plaintiff was Golden Yellow celery seed, and if not of that variety the defendant was ignorant of the fact. By way of avoidance it is alleged to be the "general established usage and custom of the seed business in the state of California, and in compliance with and in conformity to its own usage and custom in that behalf, the said defendant inclosed with each package containing said seed a slip upon which was printed the following: "The Germain Seed and Plant Company gives no warranty, express or implied, as to description, quality, productiveness or any other matter, of seeds, bulbs, plants, or trees they send out and they will not be responsible in any way for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned."

Defendant further alleges that for a period of 15 years prior to the commencement of the action plaintiff had at various times purchased seed from defendant, and in each instance there was inclosed in the package containing said seed a slip upon which was printed the notice of nonwarranty as above set out; that plaintiff at the time of ordering said Golden Yellow celery seed and at the time of the receipt of the packages containing said seed well knew and was fully advised that it was the established usage and custom of the seed trade in the state of California and also of the defendant not to warrant, expressly or impliedly, any seed as to description, quality, or productiveness. The knowledge on the part of plaintiff of the existence of usage and custom as pleaded was denied by plaintiff, as was the allegation that any such usage or custom prevailed.

The small loose-leaf slips, one of which it is claimed was inclosed in each bag of seed, contained the following nonwarranty notice:

"Germain seeds germinate. The Germain Seed and Plant Company gives no warranty, express or implied, as to description, quality, productiveness or any other matter, of seeds, bulbs, plants, or trees they send out and they will not be responsible in any way for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned."

The same notice closely printed appears in appellant's elaborate catalogue and was

printed on the order blanks and on other stationery used by it. Respondent denied that he was at all familiar with appellant's catalogues or had ever seen said notice, printed or published, and had no knowledge, either directly or indirectly, of said disclaimer notice. Respondent, his wife, and his son, testified that the seed bags contained no nonwarranty notice or disclaimer and that there was nothing inside the bags except the celery seed, and nothing by way of notice on the outside of the bag or container—the place where the public have become educated to look for directions and instructions—save that which has already been set out. All disputed questions of fact were passed upon adversely to appellant's contention by the jury and finally by the trial court in denying appellant's motion for a new trial. There is sufficient evidence in the record to sustain a finding supporting the contention of respondent on questions of disputed facts and the jury's findings in this respect cannot be disturbed.

In view of the fact that the opinion of the court does not definitely decide—omitting from a consideration of the case all questions of custom—whether or not the main facts of the case which are practically agreed upon constitute a warranty as that term relates to sales of seed when sold with the knowledge on the part of the seller that they are to be planted by the purchaser, justifies an extended review of the general subject. An apparent distinction is observed by the authorities in cases where seed or grain or corn is bought without a knowledge of the use to be made of it and cases where the seller has knowledge that it is to be planted for a specific purpose of husbandry. In the latter case the rule is given stricter application.

The second distinction, which must also be kept in mind, is the one made by the decisions and text-writers between a warranty as to kind—the thing itself—and the quality of the thing sold. It is true that the terms "express warranty" and "implied warranty" are frequently loosely used by courts and by text-writers, but in the final analysis a warranty is but what the term implies and the means by which it is established do not create degrees of warranty, that is to say, one of a higher and another of a lesser degree. The Code of this state (section 1764, Civ. Code) makes no such distinction and goes no farther than to say that a warranty is not implied (established) except as prescribed by the articles defining warranty. This particular subject will hereafter be adverted to.

In addition to the principal authorities cited in the main opinion a few others not directly cited therein, but which are relied upon by appellant, will be noticed. An examination of the cases cited to support the main opinion and which involve the question of warranty as to sales of seed, exclusively,

will show that not one rests its decision upon the sole ground that general custom furnished an absolutely satisfactory answer to the claim of warranty. The conclusion in each case consists of a grouping of composite elements. In some of the cases cited to that end it will appear that the purchaser was directly or indirectly chargeable with notice of nonwarranty which was brought to his attention in some form. In others the contract of sale contained a nonwarranty clause or the case showed that the buyer, so far as knowledge of the transaction was concerned (perhaps through agencies) stood on an equal plane of vantage with the seller. In other words, there is to be found in said cases some consideration which differentiates the facts of those cases from the instant case.

The two cases most carefully considered and widely cited in American jurisdictions on the subject of warranty of seed and the seller's liability thereunder and which have been cited by this court with favor are *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Id.*, 38 N. J. Law, 496, 20 Am. Rep. 425, and *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13. Each is an example of exhaustive research, and the soundness of the principles enunciated by their respective authors remain unshaken to this day. The first may be thus stated: *Mount*, a market gardener, applied to *Wolcott & Co.*, merchants, who kept agricultural and other seed for sale, for "Early strap-leaf red-top turnip seed." *Wolcott* sold him seed which he said was of that kind and which was bought by *Mount* as such. *Mount* informed *Wolcott* at the time of purchase that he wanted the kind of seed described to raise a crop for the early market. *Mount* sowed the seed, and it turned out to have been another kind of turnip seed of an inferior quality. The representation was made in good faith, *Wolcott & Co.* having purchased the seed as "early strap-leaf red-top" turnip seed. In an action by *Mount* for a breach of warranty, it was held that the question whether the statements made by *Wolcott* were merely an expression of opinion or a warranty was one of fact in the court below, and the evidence tending to show that a warranty was made, the finding could not be reviewed. The measure of damages was there held, as it is in this state, to be the difference between the value of the market crop raised and the same crop from the seed ordered. The seed sold to *Mount* by *Wolcott* was sown upon ground which he had prepared with care and great expense for the purpose. He had been in the habit, year after year, to sow early strap-leaf red-top turnip seed to produce turnips for the early New York market, such kind and description of turnips yielding a large profit and at the time of purchase he stated that he wished this description and kind of seed for that

purpose. The turnips produced from the seed purchased and sown were not early strap-leaf red-top turnips, but of a kind and description not salable and fit only for cattle feed, and his entire crop was lost. It was agreed that *Wolcott* did not know that the seed sold was not the kind ordered and no fraud is charged in the transaction. It was also agreed that the kind of turnip seed attempted to be purchased could not be known or distinguished by examination through sight or touch from other kinds, but only by the kind of turnips it produced after sowing. It is a case in all respects applicable to the facts here presented. The close resemblance of the facts of that case with the case at bar and its able and excellent review of our earlier American and English cases is a sufficient justification for the extended quotation which follows:

"In the well-known case of *Chandelor v. Lopus*, Cro. Jac. 4, it was decided that a bare affirmation that a stone sold was a bezoar stone, when it was not, was no cause of action.

"The cases cited fairly present the negative of the proposition on which the plaintiff's right of action depends. *Chandelor v. Lopus* was decided on the distinction between actions on the case in tort for a misrepresentation, in which a scienter must be averred and proved and actions upon the contract of warranty. 1 *Smith's Lead. Cas.* 283. Chancellor Kent, who delivered the opinion in *Seixas v. Woods*, in his *Commentaries* expresses a doubt whether the maxim, caveat emptor, was correctly applied in that case, inasmuch as there was a description in writing of the article sold, from which a warranty might have been inferred. 2 *Kent*, 479. And in a recent case before the commission of appeals of New York, *Earl, C.*, declared that *Seixas v. Woods* had been much questioned and could no longer be regarded as authority on the precise point. *Hawkins v. Pemberton*, 51 N. Y. 204. In the later English cases some criticism has been made upon the application of the term 'warranty' to representations in contracts of sale, descriptive of articles which are known in the market by such description, per Lord Abinger in *Chanter v. Hopkins*, 4 M. & W. 404; per Erle, C. J., in *Bannerman v. White*, 10 C. B. (N. S.) 844. But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate in toto, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefore has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by *Williams, J.*, in *Behn v. Burness*, as established on principle and sustained by authority, 3 B. & S. 755.

"In *Bridge v. Wain*, 1 *Starkie*, 504, no special warranty was proved, but the goods were described as scarlet cuttings, an article known in the market as peculiar to the China trade. In an action for breach of warranty, Lord Ellenborough held that if the goods were sold by the

name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. In *Allan v. Lake*, 18 Q. B. 560, the defendant sold to the plaintiff a crop of turnips, described in the sold note as Skirving's Sweetes. The seed having been sown, it turned out that the greater part was not of that kind, but of an inferior kind. It was held that the statement that the seeds were Skirving's Sweetes was a description of a known article of trade and a warranty. In *Josling v. Kingsfold*, 13 C. B. (N. S.) 447, the purchaser recovered damages upon a contract for the sale of oxalic acid, where the jury found that the article delivered did not, in a commercial sense, come properly within the description of oxalic acid, though the vendor was not the manufacturer, and the vendee had an opportunity of inspection (the defect not being discoverable by inspection), and no fraud was suggested. In *Wieler v. Schillizzi*, 17 C. B. 619, the sale was of 'Calcutta linseed.' The goods had been delivered, and the action was in form on the warranty implied from the description. The jury having found that the article delivered had lost its distinctive character as Calcutta linseed, by reason of the admixture of a foreign substance, the plaintiff recovered his damages upon the warranty.

"The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. S. 668; *Barr v. Gibson*, 3 M. & W. 390; *Chanter v. Hopkins*, 4 id. 399; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 E. & B. 849; *Azemar v. Casella*, Law Rep., 2 C. P. 431, 677; and has been approved by some decisions in the courts of this country. *Henshaw v. Robins*, 9 Metc. 83; *Borrekins v. Bevan*, 3 Rawle, 23; *Osgood v. Lewis*, 2 Harr. & Gill, 495; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595.

"The right to repudiate the purchase for the nonconformity of the article delivered to the description under which it was sold is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason, supported by principle, can be adduced why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the nonperformance of a contract, is entirely immaterial.

"The contract which arises from the description of an article on a sale by a dealer not being the manufacturer, is not in all respects co-extensive with that which is sometimes implied, where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case, a warranty, under

some circumstances, is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase was made. *Chanter v. Hopkins*, 4 M. & W. 414; *Ollivant v. Bayley*, 5 Q. B. 288; *Windsor v. Lombard*, 18 Peck. 55; *Mixer v. Coburn*, 11 Metc. 559; *Gossler v. Eagle*, etc., Co., 103 Mass. 331. The cases on this subject, so productive of judicial discussion, are classified by Justice Mellor, in *Jones v. Just*, Law Rep. 3 Q. B. 197. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations might be regarded as embodied in the contract, contrary to the intentions of parties, is without reasonable foundation. It is always a question of construction or of fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract when concluded. If the contract is in writing, the question is one of construction for the court. *Behn v. Burmiss*, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. *Lomi v. Tucker*, 4 C. & P. 15; *De Sewhanberg v. Buchanan*, 5 Id. 343; *Power v. Barham*, 4 A. & E. 473. In the case last cited, the vendor sold by a bill of parcel, 'four pictures, views in Venice-Canaletto;' it was held that it was for the jury to say, under all circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

"The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on certiorari, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred."

The case of *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, is equally direct to the is-

sue of warranty. The question was whether there had been a warranty by the defendants that the seed sold to plaintiff was "genuine large Bristol cabbage seed." The facts follow:

"The defendants were growers of garden seeds for sale, and the plaintiffs were market gardeners raising vegetables for sale in the market. In 1867 they bought of the defendants cabbage seed, of the variety known as large Bristol cabbage seed, which produced Bristol cabbage. In the fall of 1867 Miller, one of the trustees of the defendants, informed the plaintiffs that they had raised that year 200 pounds of Bristol cabbage seed, like that the plaintiffs had had, and solicited them to come early if they wished any."

The defendants knew that plaintiffs were market gardeners and desired a particular variety of seed that would produce Bristol cabbages which were a valuable variety for market. The plaintiffs in making the purchase of said seed went to the store of the defendants following the conversation above related and on making known their business to the defendants' clerk the latter produced a printed catalogue of the seeds the defendants had for sale and exhibited it to the plaintiffs; among the seeds in the list was large Bristol cabbage seed. Plaintiffs then ordered, among other seed, six pounds of Bristol cabbage seed. Some days afterwards the seed was delivered at a store for plaintiffs. In the bill the cabbage seed was described as six pounds large cabbage seed.

It is true that the opinion states that the "grower of seeds must be presumed to be cognizant of any omissions or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use"; but the decision nevertheless is placed upon the general principle that a bargain and sale of a chattel of a particular description imports a contract of warranty that the article sold is of that description and it matters not whether it be an article manufactured by another than the seller or whether it be seed sold by one who was not the grower. The authorities cited in the opinion support this view. It is there said:

"The doctrine that a bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description, is sustained by a great weight of judicial authority. The cases of *Seixas v. Wood* (2 Caines, 48) and *Swett v. Colgate* (20 J. R. 196), based mainly upon the authority of the case of *Chandelor v. Lopus* (Cro. 1, 4), are, it must be admitted, adverse to this view. The case of *Chandelor v. Lopus* has been overruled in England, and the cases in this state referred to have been often questioned, and Chancellor Kent, who took part in deciding *Seixas v. Wood*, intimates in his commentaries a doubt whether the case was correctly decided. (2 Kent, 479.) The case of *Hawkins v. Pemberton* (51 N. Y. 198), adopts, as the law in this state, the doctrine upon this subject now prevailing else-

where, that a sale of a chattel by a particular description, is a warranty that the article sold is of the kind specified; and this case was recognized in *Dounce v. Dow* (64 N. Y. 411), as modifying the doctrine of *Seixas v. Wood* and *Swett v. Colgate*. We think the modern doctrine upon the subject is reasonable, and proceeds upon a just interpretation of the contract of sale. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described; and this constitutes a warranty. We content ourselves without further argument, with referring to some of the cases bearing upon this question, which must, we think, be regarded as decisive. (*Barr v. Gibson*, 3 M. & W. 390; *Budge v. Main*, 1 Har. 505; *Shepherd v. Kain*, 5 B. & Ald., 210; *Baker v. Barness*, 3 B. & S. 749; *Allan v. Lake*, 18 Ad. & El. [N. S.] 561; *Powder v. Barbour*, Ad. & El. 473; *Bomerkin v. Bevan*, 3 S. & R. 37; *Henshaw v. Robbins*, 9 Met. 83; *Hawkins v. Pemberton*, supra.)

"The referee was, therefore, justified in finding that the defendants warranted the seed sold to the plaintiffs to be large Bristol cabbage seed, from the fact that the plaintiffs applied to purchase that description of seed; and that the seed delivered was designated in the bill of parcels as large Bristol cabbage seed. * * * Aside from the warranty raised in this case by the description in the bill of parcels, there was, also, upon the sale in question, within the authority of *Hoe v. Sanborn* (21 N. Y. 552), a warranty implied by law, that the seed sold were free from any latent defect arising from the mode of cultivation. It was decided in *Hoe v. Sanborn*, that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor; and there seems to be the same reason for implying a warranty on a sale of seeds by the grower, that they are not defective from improper cultivation, as to imply a warranty of freedom from defects in the manufacture, on a sale by a manufacturer of the article made by him. The grower of seeds must be presumed to be cognizant of any omissions or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use."

In this case it will be observed that Miller was not only the seller of the seed, but also had raised it. The seed was grown upon Bristol cabbage stocks, but the stocks had been planted in the vicinity of stocks of other varieties of cabbage, had become fertilized by the pollen therefrom, and in consequence of the crossing of the varieties, the seed grown upon the Bristol cabbage stock became hybridized and were not genuine Bristol cabbage seed, but had lost their character and quality and the plants raised by the plaintiff from the seed purchased from defendants in consequence of such crossing were of no known variety of cabbage and were of no value except as food for cattle. The misfortune of the situation was not

deemed sufficient to relieve defendants of the obligation of their warranty.

In the footnote to the case of *Meehan v. Ingalls*, Ann. Cas. 1918B, pp. 71, 75 (91 Wash. 86, 157 Pac. 217), it is said:

"The courts are not altogether agreed as to whether the warranty which results from the furnishing of seed in response to a request for a particular variety is express or implied. * * * The weight of authority is however that in any sale of seed specifically designated by name or variety the seller warrants that it is in fact of the kind or variety indicated."

See *Sanford v. Brown Bros.*, 208 N. Y. 90, 101 N. E. 797, 50 L. R. A. (N. S.) 778; *Jones v. George*, 61 Tex. 345, 43 Am. Rep. 280; *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710; *Edgar v. Breck & Sons Corporation*, 172 Mass. 581, 52 N. E. 1083 (opinion by Mr. Justice Holmes).

Another judicial landmark in this country as to what words or acts amount to an express warranty in this class of cases is *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916. This is one of the leading cases on the subject and is known in the books as the "rape seed case." The facts were: The plaintiff, a farmer, sent his son to defendant's store to purchase rape seed. The merchant kept seed for sale. The son asked the clerk if they had rape seed for sale and the latter replied that they had and weighed out the amount desired. Neither the son, the clerk, the defendant, nor the plaintiff knew rape seed from wild mustard seed, which the article sold proved to be, and each was wholly unaware of the ignorance of the others. The son relying upon the fact that the seed sold to him was what he called for; the plaintiff planted the seed, relying upon the fact that it was sold as rape seed. The wild mustard seed fouled plaintiff's lands to his injury. A nonsuit was granted and the Supreme Court of Wisconsin reversed it. A very thorough and interesting review is made of the many authorities bearing on the subject. We quote from the closing portion of the opinion:

"With but few exceptions, which we shall not take time or space to refer to specifically, the judicial authorities and the text writers as well are in harmony with the foregoing. *Biddle, Warranties*, § 108. That rule is just. It holds a dealer responsible for breach of contract when he sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false, but relying upon them as true. There is no good reason why a dealer should be permitted to exhibit seed to his customers, asserting it to be rape seed when it is something else, and then protect himself from the consequences of his falsehood by a plea of ignorance. The injury by the deception is just as great whether it be wilful or innocent. The customer has the same right to rely upon the representation in the one case as in the other. Knowledge on the part of the ven-

dor is not essential either to actionable fraud or a contract of warranty.

"Applying the principle stated to the facts of this case, what was the contract between the parties? Upon what did their minds meet? The answer must be, that the defendant would sell to the plaintiff rape seed and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not being chargeable with negligence because he did not know. In such a case the doctrine of *implied warranty* does not apply, but the doctrine of *express warranty* does. No particular form of expression or words is necessary to make an express contract of warranty. The word 'warranty' is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject. In *Benj. Sales* (6th Ed.) 623, 625, as conclusions from a review of authorities in this country and England, including the New York cases overruling *Seixas v. Woods*, it is said: 'All agree that any positive affirmation of a material fact as a fact, intended by the vendor as and for a warranty, and relied upon as such, is sufficient' to constitute a warranty. 'The better class of cases hold that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not.' The latter is the doctrine of this court, as indicated by numerous cases where it has been applied. *Austin v. Nickerson*, 21 Wis. 542; *Giffert v. West*, 33 Wis. 617; *Neave v. Arntz*, 56 Wis. 174; *White v. Stelloh*, 74 Wis. 435.

"It follows from the foregoing that the decision of the trial court that the doctrine of caveat emptor applies to the facts of this case, and that the evidence does not justify a finding that the defendant warranted the seed to plaintiff to be rape seed and that he was entitled to recover for a breach of it, was erroneous, and the nonsuit was improperly granted." (Italics ours.)

Mr. Williston, in his work on *Sales*, at page 224, says:

"In the early English law it is probable that all warranties were collateral in form, but in the early English law promises implied in fact were not recognized and the doctrine of caveat emptor was carried so far that unless the seller expressly said that he warranted the goods there was no obligation imposed upon him in regard to their quality. In the nature of the case, therefore, the seller had to make a separate and distinct promise; that is, a promise collateral in form. At the present day, however, it is clear in England and elsewhere that a promise need not be collateral in form in order to constitute a warranty. When A. contracts to sell B. a sound horse, there is no collateral promise. Yet if A. delivers to B.

an unsound horse and B. takes title to him, A. is a warrantor of the horse's soundness with precisely the same consequences as if he had sold the horse with a separate statement, 'I warrant him sound.' Further, it may be supposed that specified goods are sold in compliance with an order describing the goods desired. A buyer asks for 'strap-leaf red-top turnip seed' or 'large Bristol cabbage seed' or 'rape seed' or bulbs of a named variety. No agreement to sell precedes the actual sale, but when the seller furnishes goods, he is said to warrant that the goods are of the kind asked for, yet the description is not collateral in form."

Mr. Benjamin, in his work on Sales (7th Ed. 611), under the chapter of express warranty, quotes from *Pasley v. Freeman*, 3 T. R. 51, the following:

"It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, providing it appear in evidence to have been so intended."

Continuing, he says:

"And in determining whether it was so intended, a decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter not. * * * In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect, and in some cases, even where the alleged warranty was expressed in writing, it has been left to the jury to say whether the intention of the parties was that the representation or affirmation should constitute a warranty or not, for *simplex commendatio non obligata*."

The more recent cases hold that a positive affirmation understood and relied upon as such by the vendee is an express warranty. *Fairbanks Canning Co. v. Metzger et al.*, 118 N. Y. 260, 265, 23 N. E. 372, 16 Am. St. Rep. 753. See, also, *Gubner v. Vick*, 42 Hun (N. Y.) 657, 6 N. Y. St. Rep. 4.

Appellant cites a line of cases to the effect that personal property may be sold with or without warranty. This point is conceded. An examination, however, of the cases cited by appellant to sustain the contention that the rule of caveat emptor applies to the case at bar will show that in practically every one there exists some fact or condition which clearly distinguishes the instant case from those cited. We will briefly refer to a few of them.

In *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, Ann. Cas. 1912D, 1077, plaintiff agreed to sell defendant a certain variety of peas. Among other things, plaintiff agreed to furnish a thousand bushels of "Advancer"

peas and guaranteed 75 per cent. delivery. Said peas were to be grown during the season of 1909. The peas were sold by defendant to farmers for the purpose of planting under contracts by virtue of which the farmer agreed to sell the peas raised from such seed to defendant. Defendant had given its promissory notes in payment for the seed. Plaintiff brought an action upon said notes. Defendant interposed a counterclaim that said peas were not "Advancer" peas and were received without knowledge of that fact and that there was no means of discovering that they were not "Advancer" peas until the seed had germinated. The contract of sale of the peas contained a provision of nonwarranty very similar to the provision which it is alleged in the instant case was printed on a slip and enclosed in each bag of celery seed. The court held in that case that a dealer could by contract exempt itself from warranty.

In *Seattle Seed Co. v. A. Fujimori*, 79 Wash. 123, 139 Pac. 866, it was held that the sale and delivery of "Alaska" or "Early Alaska" garden pea seed was made subject to the printed condition contained in the seed bag which the trial court found to be a condition of the sale. There was also in the record evidence that "a general custom prevails in the seed trade of making all sales subject to the conditions named on the printed slips." The court said:

"This, coupled with the evidence that the printed slips were placed in each bag of seed, is sufficient to support the finding that the sale was made without warranty or condition, and warranty or condition that the seed was true to name could not be inferred," citing as authority *Leonard Seed Co. v. Crary Canning Co.*, supra, and *Blizzard Bros. v. Growers' Canning Co.*, 152 Iowa, 257, 132 N. W. 66.

It would seem from the quoted language that neither one of the two elements standing alone was quite sufficient to support the court's conclusion.

In *Blizzard Bros. v. Growers' Canning Co.*, supra, the plaintiff entered into a contract with the defendant "to plant and properly cultivate three acres of pumpkins, all of which he agrees to deliver to the factory of said company in good condition for canning purposes." The seed was to be furnished to the growers by the company. No particular variety of seed was named. The company being out of pumpkin seed inquired of the *Younkerman Seed Company* if it had the large cheese pumpkin seed and was informed that it had. *Blizzard Bros.* were directed to said seedhouse and inquired if a package of large pumpkin seed was there for them. A clerk of the company responded in the affirmative and handed them a pound package on which was written, "Large cheese pumpkin seed." The seed was planted, but proved to be of an inferior pumpkin and the can-

ning company refused to accept them. Suit was filed against the canning company and the seed company was made a party defendant. The canning company denied liability and in a cross-petition alleged the fault to be that of the seed company and prayed for such judgment against it as might be entered against the cross-petitioner. The seed company pleaded that it was the general custom of dealers in seed to sell with disclaimer as to quality or whether true to name, and on all packages there was customarily printed a nonwarranty notice similar to the notice brought to our attention in the instant case. It is there said:

"The evidence that a general custom, such as pleaded, prevails in the seed trade was conclusive. The particular package had the printed matter thereon [nonwarranty notice], and, though this may not have been noticed, the sale is presumed to have been negotiated with reference to the general custom of the trade."

Three Iowa cases are cited, two of which deal with mining customs. The court held, however, that inasmuch as the canning company undertook to furnish seed of no specific kind, but such as was suitable for canning purposes, the clear implication was that the seed furnished should have been such as would produce that quality of pumpkin. It will be borne in mind that the contract out of which the suit sprang was as to quality and not as to variety. In fact, the contract between plaintiff and defendant called only for any variety of pumpkin seed suitable for canning purposes. The case cited under its own peculiar facts is not authority against the principle contended for by appellant in the instant case.

Perhaps as strong a case as can be found in appellant's favor and upon which much reliance is placed is *Ross v. Northrup*, King & Co., 156 Wis. 327, 144 N. W. 1124. The principle there announced is in the main essentially in line with the *Walcott*, *Miller*, and other approved authority. It expressly recognizes the rule to be, leaving any question of custom out of consideration, that where a certain variety of seed is called for and is furnished in response to such call, there is a warranty that it is true to description unless the seller advises the purchaser that the sale is made without warranty. The facts stated are entirely different from the facts of the instant case. There the seed was ordered from the printed catalogue, upon a printed blank order sheet, upon each of which was printed a disclaimer of warranty, and upon one side of the shipping tag attached to the bag of seed was conspicuously printed in red letters a specific refusal to warrant as to description, quality, productiveness, etc. In addition to this, the invoice contained a statement similar to that in the catalogue as to nonwarranty. There was convincing evidence to show that

a disclaimer or nonwarranty was printed on the bag containing the tobacco seed also. Here the facts are altogether different. The seed was not ordered from a printed catalogue nor was the order given upon a blank order sheet containing a nonwarranty or disclaimer notice. On the contrary, the bag containing the seed bore the suggestive words, "Germain seeds germinate." The court, after disposing of the question that was fully determinative of the case, to wit, that the sale was made without warranty by reason of the circumstances above related, proceeds to discuss the special finding of the jury and holds that at the time of the sale there was "a general custom in the Northwest, including Wisconsin, among seedsmen such as defendant, to refuse to warrant seeds," and holds that the evidence was sufficient to warrant the finding by the jury of a general custom. The plaintiff's agent, who was held to have been charged with knowledge of general custom, was a seller of seeds. The *Leonard Seed Case* and the *Blizzard Case* are cited as authorities, and, strange as it may appear, the case of *Hoffman v. Dixon*, supra, is also cited with approval. The latter is a leading case, to the effect that where a certain variety of seed is called for and purchased in response to such call that this constitutes not an implied warranty but an express warranty. The economical reasons which received the attention of the court in the case of *Ross v. Northrup* are by no means persuasive, as surely sounder reasons resting upon economical grounds could be stated in behalf of the claim of the planter and producer than any that may be advanced in favor of the seller of seed.

The case of *Kircher v. Conrad*, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. Rep. 731, is inapplicable to the facts before us. It is not a case in point. But the law, as stated by the Supreme Court of the state of Montana, in *Keeler v. Green*, 51 Mont. 42, 149 Pac. 286, decided later, is important to a consideration of the instant case. It is there said that it is the duty of the seller to know that the wheat which he sold was of the character represented and if it was not the responsibility is the seller's in the absence of an acceptance with knowledge by the buyer, citing *Wolcott v. Mount*, supra; *Hoffman v. Dixon*, supra.

Lord v. Grow, 39 Pa. 88, 80 Am. Dec. 504, is a case of a sale of wheat. The tendency of the modern cases to the doctrine that in sales of articles in regard to which the seller is presumed to have superior knowledge, is a warranty that the thing sold shall be of the kind which it is represented to be is there recognized. The opinion states that neither the contract of sale nor the identity of the article was defined by a bill of parcels. Nor was the subject of the contract a manu-

factured article ordered and supplied for a particular purpose. The buyer insisted on seeing and actually inspected the wheat. The court, observing that the difference between spring wheat and other wheat is not ascertainable by inspection, holds that the case is one of a purchase by inspection of an article of which the vendor's means of knowledge were no greater than those of the vendee and the rule of caveat emptor applied. This case is out of line with the greater array of authorities and has not escaped the criticism of Mr. Biddle on Warranties (section 125), and the American editor of Benjamin on Sales (6th Am. Ed. 843, n. 23). *Shisler v. Baxter*, 109 Pa. 443, 58 Am. Rep. 738, follows *Lord v. Grow*, supra. *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607, rests upon the doctrine announced in *Chandelor v. Lopus*, *Sexias v. Woods*, supra, *Snell v. Moses*, 1 Johns. (N. Y. 96), which hold that the vendor of personal property is not liable for defects of any kind, in the thing sold, unless there is express warranty or fraud of the seller. This doctrine was later repudiated in *Miller v. White*, *Wolcott v. Mount*, supra, and numerous other cases which followed.

The court has kept in line with the courts generally throughout the nation by recognizing the rule as stated in *Wolcott v. Mount*, supra, and *White v. Miller*, supra, in practically every instance in which it has been called upon to express itself upon the subject. A few of the authorities applicable to the specific subject are: *Flint v. Lyon*, 4 Cal. 17; *McLennan v. Ohmen*, 75 Cal. 588, 17 Pac. 687; *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125; *Rauth v. Southwest Warehouse Co.*, 158 Cal. 54, 109 Pac. 839; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380; *Newhall v. Hogue-Kellogg Co.*, 56 Cal. App. 90, 204 Pac. 562.

In the very recent case last above cited *Mr. Justice Kerrigan* upon a review of the authorities of this and other states correctly stated the rule in the following language:

"Where an article of a particular variety or type is ordered by name and the seller purports to furnish the same, with or without any express statement that the article furnished is of the kind ordered, a warranty of the identity of the variety or kind arises."

It is conceded that the case of *Nicoletti v. Bank of Los Banos*, 214 Pac. 51, is all that is claimed for it. It is not to be assumed that this court is willing to apply the rule there announced to every situation that may be presented. That case speaks for itself and must make its own defense. The subject-matter of that case is wholly foreign to and different from the subject-matter of the instant case. The *Nicoletti Case* dealt with a business almost as ancient as civilization itself and with which every citizen, however impecunious he may be or however limited may have been his business sphere, has

had some experience. Banking is a universal business. It is regulated by the laws of the land and there is scarcely issued a publication of any sort which does not discuss some feature of the banking system. Here we have an alleged trade usage prevailing among growers and sellers of seed who, it is claimed, as between themselves, have agreed not to warrant the kind of seed sold, the essence of the contract itself. Appellant offered evidence in the court below to prove what it contends to be a general custom prevailing among dealers and growers of seed not to warrant the kind of seed sold. A number of seed sellers and growers, members of the American Seed Trade Association, a protective organization, testified that such was their custom. A number of catalogues of seedsmen of various states were received in evidence. For years it has been the purpose of the seed trade under the direction of the American Seed Trade Association to create a trade custom which would have the effect of contravening the ordinary contract of sale and protect its members from liability as to the kind of seed or plants sold. No member of the public not interested in the sale of seed was called upon to testify as to his knowledge of the existence of any trade custom for the reason that it is highly probable that he would have no knowledge whatsoever on the subject. The rule is in such cases that the public is not chargeable with knowledge of general usage applicable only to a particular business or profession or protective organization and that such a usage cannot be proved against a layman by showing a rule adopted within a particular business or profession only. *Laver v. Hotaling*, 5 Cal. Unrep. 534, 46 Pac. 1070. There is nothing better offered in this case to establish a general custom than trade catalogues of dealers, small slips placed inside of seed bags, printed notices on private letter and bill heads, and possibly one or two other similar methods of conveying notice to the public. From such a class of evidence it cannot be claimed that a usage or custom has been established of such universality and notoriety as to justify a court in taking judicial cognizance of it as such. Appellant therefore was called upon to prove that respondent had actual knowledge of the existence of the usage or that it was made to appear from the evidence that it was so general and notorious that knowledge of it will be imputed to him as matter of law. In both there is a failure of evidence to justify such a conclusion. As a matter of law the evidence was insufficient to justify the court in holding that the custom was so universal as to imply knowledge and the jury having found under proper instructions that respondent had no knowledge of such usage no injury was done by the refusal to give the requested instructions.

In *Powell v. Thompson*, 80 Ala. 51, noted also in 17 C. J. 495, it is pertinently said:

"The tendency of modern authorities is strongly against the loose policy of the English courts, as manifested in their earlier decisions, admitting inconclusive facts in proof of local usage, and thereby contradicting the necessary implications of written agreements, under the pretext of annexing incidents. * * * Thompson v. Riggs, 5 Wall. 663, 18 L. Ed. 704; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463."

In *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184, 17 C. J. 496, Judge Cooley said:

"Special customs are so liable to create confusion * * * in directions not contemplated in their adoption, that they are admitted into the law with great reluctance; and it is not often a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit to do so."

Mr. Justice Storey, in *Donnell et al. v. Columbian Ins. Co.*, Fed. Cas. No. 3987, 2 Sumn. 366, remarked:

"I am among those judges, who think usages among merchants should be very sparingly adopted, as rules of law, by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views, of the full bearing of principles."

It is conceded that custom must yield to a written contract or to an expressed oral warranty. The following quotation from *McLennan v. Ohmen*, supra, seems to be regarded as placing an insurmountable obstruction in the way of respondent's cause:

"To create an express warranty, the word 'warrant' need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale as to the *quality* or *condition* of the thing sold will be treated as a warranty, if it was so intended, and the purchaser bought on the faith of such affirmation." (Italics ours.)

It is also the law that representations made by a vendor may be sufficient to create a warranty if the vendee so understood them and acted upon them whether the vendor intended such representations to be a warranty or not. *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595. The issue here is not as to quality or condition, but is whether appellant furnished the specific variety of seed ordered and paid for by respondent. It is not a question whether the seed was a good or bad quality or whether it was in good or poor condition, but rather did appellant furnish the specific thing which respondent sought to buy. There is but one answer to the question. No distinction is recognized by the main opinion between a transaction in which a purchaser is led into the belief that he is buying grain and is in fact sold tares and one involving the simple question of good or bad quality of a designated commodity.

The tendency of the main opinion is to place the laboring oar throughout the entire transaction and in every phase of it in the hands of respondent, as is illustrated by the assumption as to how appellant would have conducted itself under the following test:

"It is clear that if the purchaser had enquired of the seller whether or not it would warrant the character of the seed that the seller would have replied in the negative." It is inconceivable that respondent would have assumed the risk of incurring such losses in preparing and fertilizing his land, and also in labor, time, use of his land and profits of anticipated crops which he has in fact sustained if he had not been made to feel secure by the assurances of the seller which the relations of the contracting parties inspired that he had been furnished the thing which he had in writing contracted for. The purchase money for the seed was retained and a bag containing the seed was sent with an assurance written upon the bag that "Germain seeds germinate."

The planting of the seed was the natural result of the transaction. The response of appellant cannot be set aside as being without meaning or significance. If it did not intend to convey any assurance whatever to respondent that the thing sent was the thing purchased or was not willing that it should be so understood, or if it entertained doubt in the matter, its duty unquestionably was to have replied to respondent's letter informing him that it did not warrant its seed. Where the circumstances are such as amount to a representation of fact on the part of the vendor that an article sold is of a particular kind or description, as, for instance, where the buyer in terms asks for a particular kind and the seller purports to comply with his request, he warrants the article as being of that kind, although he may not have made any declaration in words to that effect. *Firth et al. v. Richter*, 49 Cal. App. 545, 196 Pac. 277.

Under the title of "Warranty," the term is defined by section 1763, Civil Code, to be "an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present or future." "Assure" is thus defined by the Standard Dictionary:

"To offer assurances to; endeavor to impart conviction to; to assert something earnestly to as a ground of confidence; to cause to feel certain; give confidence to," etc.

No good reason for a limitation of the meaning of the word in its application to warranty has been shown to exist. Under the circumstances of the transaction the sale was as clearly an express warranty as though respondent had specifically inquired of appellant whether or not it had for sale for planting purposes Golden Yellow Celery seed and the reply had been "Yes," and respondent, acting under such assurances, was misled to his damage. The conduct and acts

of appellant cannot be regarded in any other sense than an affirmation made by it to respondent in regard to a matter about which it assumed to have superior knowledge.

The Code sections governing warranty are sought to be modified by certain sections of the Code dealing with the general subject of contracts. Much importance is attributed to the fact that a contract is defined as either express or implied. It is express when its terms are stated in words and implied when the existence of terms of the contract are manifested by conduct. Sections 1619 and 1620, Civ. Code. An implied contract is in no less degree a contract than an express contract. The only difference between the two is in the mode of proof by which they are respectively established. *Smith v. Moy-nihan*, 44 Cal. 53. Other Code sections providing for the explanation of contracts by reference to the circumstances under which they are made and stipulations which are necessary to make the contract conformable to usage or as necessary to carry them into effect are cited to sustain the ruling that the issue of warranty presented by the facts of this case is amenable to said sections. The contract under consideration is brief, clear, and unambiguous in its terms, and there is no reason to resort to usage as an instrument of interpretation.

The effect of usage as evidence is limited by the provisions of section 1870, subdivision 12, Code of Civil Procedure, as follows:

"Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is *never admissible*, except as an instrument of *interpretation*." (Italics ours.)

Usage of trade cannot be proved contrary to the clear meaning of unambiguous contracts. *Holloway v. McNear*, 81 Cal. 156, 22 Pac. 514; *Polhemus v. Heiman*, 50 Cal. 438; *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. 7; *Langenberger v. Kroeger*, 48 Cal. 149, 17 Am. Rep. 418. A clear, certain, and distinct contract cannot be modified by proof of custom inconsistent with it or which expressly or by necessary implication contradicts it. *Champion Mach. Co. v. Ervay* (Tex.) 16 S. W. 172; *Globe Mill Co. v. Minneapolis Elevator Co.*, 44 Minn. 153, 46 N. W. 306.

Appellant relied upon its printed catalogue as a basis for the establishment of custom by which it also sought to bind the respondent on the question of notice. While the catalogue contains the nonwarranty notice heretofore set out, there is also set out on the same page a statement or notice that appellant maintains at a great expense trial grounds where extensive tests are made of seeds. On another page, under the caption of "Celery," printed in bold-face type, appears the following:

"Golden Self-Blanching California Stock. Similar to French stock; seed raised in California from selected plants."

Directly beneath in the same style of type are printed the following words: "Golden Self-Blanching French Stock. See specialty opposite." In another column, on the same page, in bold-face type, appear the words, "Golden Self-Blanching Celery Seed (French stock)." The body of the article follows, a portion of which is general as well as specific:

"The trial ground test in comparison with samples of seed from thirty growers should prove the selected lot to be as fine seed as can be produced. This is exactly the test we applied to this year's stock of this variety, and even at the present high price of celery seed we are satisfied we are offering the greatest value for the money in this tried and true sort. Celery seed has for many years been a strong item with Germain's for purity and high quality, but with the establishment of our testing ground we are in a better position than ever to praise this item. * * *

These statements are not by way of inducement, but are positive statements of material existing facts. Surely, if respondent is to be bound by the catalogue offered in evidence as to the nonwarranty notice, he should be entitled to the benefit of those portions which have the direct effect of neutralizing the force of the nonwarranty clause. Two important statements are there made: First, that the seed sold was raised in California from selected plants; second, that trial grounds are maintained where tests are made of seeds. These statements, as set out in the catalogue, were well calculated to lead a buyer into the belief that if the seed was not grown by appellant it had at least been tested and found true to variety. They surely amount to an assertion of superior knowledge on the part of the seller which is one of the underlying principles that support the rule of warranty.

The question of whether a vendor merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion, and to exercise his judgment, is not an issue in this case.

The instant case must be solved by the following legal test: Was the sending of the seed in response to the written order, in the light of all the circumstances of the transaction, intended to cause the sale, and was it operative in causing it? To my mind "yes" is the only rational answer that can be given to the question.

Upon a consideration of this very interesting subject, I am of the opinion that there was a warranty of the celery seed sold by written request and assent thereto so clear and unambiguous as to leave no room for the introduction of usage as a means of interpretation; that if a local custom or usage prevailed it was not sufficiently shown by the evidence offered for that purpose to be of that general or notorious character as to

charge the public with notice thereof. The jury was fully instructed as to the effect of custom or usage and its binding effect upon respondent if they should find that the existence of either or both was brought to the attention of respondent. If any error was committed, it is not so serious but that it may be brought within the provisions of article 6, § 4½, of the State Constitution. I think the judgment should be affirmed.

I concur: **LAWLOR, J.**

193 Cal. 782

LEHNER et al. v. GERMAIN SEED & PLANT CO. (L. A. 7229.)

(Supreme Court of California. Jan. 30, 1924.)

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for damages for breach of implied warranty in sale of seed by Oscar Lehner and another against the Germain Seed & Plant Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Eugene Daney, of San Diego, for appellant.

E. L. Johnson, of San Diego, for respondents.

PER CURIAM. This case is similar in its facts to the case of *Miller v. Germain Seed & Plant Co.* (L. A. No. 6985), 222 Pac. 817, this day decided, and upon the authority of that case the judgment is reversed.

WILBUR, C. J., and MYERS, WASTE, KERRIGAN, and LENNON, JJ., concur.
SEAWELL and LAWLOR, JJ., dissent.

64 Cal. App. 775

BEVERLY v. GUERIN, Superior Court Judge. (Civ. 4619.)

(District Court of Appeal, Second District, Division 1, California. Dec. 17, 1923.)

1. Divorce ☞ 283—Appellant held entitled to have amount of stay bond fixed.

Where at the time of modification of an interlocutory decree of divorce as related to community property, so as to require plaintiff to deliver possession of both real and personal property to defendant, such decree had become final with respect to such matters, on an appeal from such modifying order, plaintiff was entitled under Code Civ. Proc. §§ 943, 945, 947, to have the amount of a stay bond fixed by the trial court.

2. Mandamus ☞ 57(2)—Writ of mandate warranted after refusal to fix amount of stay bond.

Improper refusal of court to fix amount of stay bond on appeal from an order modifying a divorce decree held to warrant issuance of writ of mandate, under Code Civ. Proc. § 1085; there being no other plain, speedy, or adequate remedy in the ordinary course of law.

Application by Johanna Beverly for a writ of mandate, to be directed to Hon. C. W. Guerin, Judge of the Superior Court in and for the County of Los Angeles. Writ granted.

Fred J. Spring, Samuel H. Garrett, and William Crop, all of Los Angeles, for petitioner.

Cooper, Collings & Shreve and Leslie S. Bowden, all of Los Angeles, for respondent.

CONREY, P. J. In this proceeding an alternative writ of mandate was issued requiring respondent judge of the superior court to fix the amount of a stay bond on appeal, or show cause why he should not be required so to do.

From the petition and the return to the writ we understand that in a certain action, wherein petitioner, Johanna Beverly, is plaintiff, and Chester Beverly is defendant, the superior court on the 10th day of May, 1923, determined that the defendant, as cross-complainant, is entitled to a divorce by reason of extreme cruelty on the part of the wife, as charged in the cross-complaint. The interlocutory decree entered at that time, in addition to establishing cross-complainant's right to a divorce, awarded to Mrs. Beverly the custody of their minor child; provision being made for a monthly allowance to be paid by Mr. Beverly to Mrs. Beverly for the support of said minor child. The parties owned certain community property, concerning which the decree ordered:

"That the comparatively small equity in the property, which both sides agree is community property, will be and is assigned to the defendant, with the exception of the property consisting of the lot with three houses located at 1414 East Twenty-Third street in the city of Los Angeles, Cal., and described as lot 4, block 8, Geo. Dalton Sr. Tr., recorded in said county, one of which is now occupied by the plaintiff, and which shall be assigned to her together with the furnishings; the other property consisting of the equity in the vacant lot on East Washington street in the said city of Los Angeles, Cal., is hereby assigned to the defendant, Chester Beverly."

On the 1st day of October, 1923, pursuant to a petition of Mr. Beverly and an order to show cause, and after a hearing thereon, the court ordered:

"That the interlocutory decree concerning the maintenance and support of the minor child of the plaintiff and defendant, and the assignment of the property of plaintiff for her maintenance and support, be and the same is hereby modified as follows, to wit: The equity in the property known and called 1414, 1414½, and 1416 East Twenty-Third street, Los Angeles, Cal., consisting of three (3) houses, be and the same is hereby reassigned to the defendant, said property being hereby declared to be community property, subject to the further order

and disposition of this court. Upon such property so reassigned to the defendant, the defendant is to pay all the upkeep, interest on mortgage, taxes, and necessary expenses incident thereto. That plaintiff is to have the right to live and reside, with her minor child, in either one of the two houses in the rear, known as 1414½ and 1416 East Twenty-Third street, as she may desire; such election to be made within two days after the service of this order upon her or her attorneys, such selection to be made by serving on the attorneys for the defendant herein a written notice of such selection. That in addition thereto, for the maintenance and support of herself and minor child, defendant is to pay plaintiff, on the 10th day of each and every month, the sum of fifty (\$50.00) dollars a month. This change of possession is to be made in this way: That until the tenants now occupying houses 1414½ and 1416 shall be legally removed therefrom by the defendant, that the order heretofore made by the court is to stand in full force and effect; that is to say, that defendant is to pay the sum of thirty-five (\$35.00) dollars a month, and plaintiff is to receive the rents and income from the profits above described. Defendant is hereby directed to give legal notice to the tenants now in possession of 1414½ and 1416 East Twenty-Third street, to remove therefrom, and plaintiff, as soon as such house of her selection is vacated, is to immediately remove from premises known as 1414 East Twenty-Third street, and to surrender possession thereof to the defendant, including the furniture and furnishings therein located."

On November 3, 1923, plaintiff duly served and filed her notice of appeal from said order entered on the 1st day of October, 1923, and said appeal is now pending. On the 12th day of November, 1923, pursuant to notice duly given, the plaintiff made application to respondent to fix the amount of the stay bond on appeal required on the part of the plaintiff to stay the execution of said order of October 1, 1923, for the delivery of possession thereunder of the property therein mentioned, during the pendency of said appeal. The court, without passing upon the question as to the amount for which the bond should be given, decided as a matter of law that appellant was not entitled to any order fixing the amount of said bond, and thereupon the court denied said application. Hence this application for a writ of mandate.

[1] Prior to the 1st day of October, 1923, the interlocutory decree had become final with respect to those portions thereof relating to the division of the community property between the plaintiff and the defendant. Such, at least, is the theory of appellant, which, for the purposes of the present proceeding, we think should be assumed to be correct. *Newell v. Superior Court*, 27 Cal. App. 343, 149 Pac. 998; *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. Therefore, with reference to the provisions of law applicable

to a stay bond, appellant has whatever rights are incident to the prosecution of an appeal from a final judgment, or from an order made after final judgment. Since the order from which the appeal is taken requires appellant to deliver up possession of personal property, and also to deliver up possession of real property, she is entitled to give an undertaking to stay the execution of the same in such sum as shall be fixed by the judge of the trial court. Therefore she is entitled to an order fixing the amount in which such bond shall be given. Code Civ. Proc. §§ 943, 945, and 947.

[2] The judge having refused to perform the duty thus imposed upon him by law, and it appearing that there is no other plain, speedy, or adequate remedy therefor in the ordinary course of law, a proper case is shown for the granting of a writ of mandate. Code Civ. Proc. § 1085.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

64 Cal. App. 745

BENIOFF et al. v. BENIOFF et al.
(Civ. 4677.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1923.)

1. Trade-marks and trade-names and unfair competition ⇨31 — Right to protection of trade-name does not extend beyond market of claimant.

The right to the protection of a trade-name, not constituting a trade-mark, does not extend beyond the market of the person claiming such protection, since the use of such trade-name in another market would not constitute unfair competition.

2. Trade-marks and trade-names and unfair competition ⇨73(2) — Facts held to establish unfair competition in fur business.

Where a partnership was engaged in the fur business under the name of the "Hudson Bay Fur Company" in one of the principal cities of the state with a branch in another city and with a state-wide business and customers in all of the principal cities of the state, the organization of a corporation under the name of "Hudson Bay Fur Company" to engage in the fur business in a third city constituted unfair competition, and equity will enjoin such corporation from engaging in such business under that name.

3. Trade-marks and trade-names and unfair competition ⇨73(1) — Equity will protect person first in field doing business under a given name.

In the interest of fair dealing equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon the public, and will enjoin a second person from using the name even though the principal places of business are at considerable distance from each other.

4. Trade-marks and trade-names and unfair competition — 39—Permission to engage in business under trade-name held subject to revocation.

Where a copartnership, engaged in the fur business in a principal city of the state under a trade-name with a state-wide business, granted to a certain person the right to engage in the fur business in another city under such name without receiving any consideration for permission so granted, and where such person did not avail himself of the privilege so granted, the copartnership could revoke the permission and was entitled to an injunction restraining a corporation subsequently organized, of which such person was one of the incorporators, from engaging in the fur business in such town under such name.

Appeal from Superior Court, City and County of San Francisco; Daniel O. Deasy, Judge.

Action by George H. Benioff and another against David Benioff and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Fred Horowitz, of Los Angeles, for appellants.

Fred L. Dreher, of San Francisco, for respondents.

NOURSE, J. Defendants appeal from a judgment enjoining them from engaging in the fur business in the state of California under the name of Hudson Bay Fur Company, or any similar name, claiming that the judgment is erroneous "in so far as it prohibits the defendants from engaging in the fur business in Los Angeles" under that name. The action is not based on the ground that plaintiffs have any trade-mark or exclusive right to the name, but is predicated on the common-law right to protection against unfair competition in trade.

The plaintiffs, who are husband and wife, have, since about June 1, 1915, conducted a fur business in San Francisco under the name of Hudson Bay Fur Company. They at first operated through a corporation and continued, as partners, under the same name after its voluntary dissolution March 15, 1918; the business at all times being under the exclusive management of plaintiff George Benioff. At the time the business was commenced no other person, firm, or corporation was transacting any business in the state of California under the name of Hudson Bay Fur Company, and their right to the use of the name is unquestioned.

The evidence shows, among other things: That from a small retail business in 1915, with its debts exceeding its assets, the Hudson Bay Fur Company developed into an extensive and profitable general wholesale and retail fur business, carrying a stock worth from \$110,000 to \$125,000 cost price, with the annual sales amounting to from about \$300,-

000 to \$400,000. That the main store was maintained in San Francisco, with a branch in Oakland. That the business included "repairing, making up and handling of furs, tanning and so forth. Anything and everything in the fur line, pertaining to furs," dealing in raw skins, and buying and selling all kinds of furs and fur garments. That the business was extensively advertised through the medium of newspapers (chiefly San Francisco and Oakland), circulars, and catalogues. That the circulars and catalogues were mailed throughout the state as far south as Bakersfield, but no attempt was made to advertise locally in Los Angeles. That the catalogues solicited a mail order business. That all the garments from their stores, both repaired and new, were labeled with the name of Hudson Bay Fur Company. The evidence further shows that, through their advertising, sales were made to people outside of the state in addition to those within; that within the state sales were made to people both north and south of San Francisco, including Los Angeles and points south thereof; that a portion of this business was sent out on mail orders. Plaintiffs were considering opening a store in Los Angeles and to that end, in January or February, 1921, had their attorney in Los Angeles investigate certain property there for the purpose of leasing. Plaintiff George Benioff and the individual defendants are brothers. Defendants David Benioff and Fred Benioff are engaged in the wholesale fur business in San Francisco under the name of Benioff Bros. In June, 1921, defendants, without the knowledge or consent of plaintiffs, incorporated under the name of Hudson Bay Fur Company. The incorporation was effected by the attorney above referred to who had a few months previously acted for plaintiffs in investigating a Los Angeles location. He had also at various times, among other matters, represented plaintiffs in preventing others in the southern part of the state from using that or a similar name, of which defendant David Benioff was aware. The articles of incorporation, which were filed with the county clerk of Los Angeles county on June 8, 1921, named Los Angeles as its principal place of business and stated its purpose was to engage in the fur business. Plaintiffs first learned of the organization of the corporation November 23, 1921. They immediately objected and offered to reimburse defendants for all expenses incurred in incorporating. Defendants refused the offer and plaintiffs filed this suit.

Appellants' main contention is that respondents' business is confined principally to the San Francisco Bay district and that their market does not extend to Los Angeles; that therefore any business conducted by appellants in Los Angeles would not be in competition with respondents at all, and hence could not be unfair competition. They then argue

that the right to protection of a trade-name does not extend beyond the market of the person claiming the same; and that therefore respondents are not entitled to protection against the use by others of their trade-name in Los Angeles.

[1] We agree with the rule stated by appellants, but in its application they have assumed a state of facts directly contrary to the findings of the trial court. The findings are, in part, to the effect that plaintiffs' business extends over the whole of the state of California and that they have customers in all the principal cities of the state; that the business conducted by the said plaintiffs has been and is known to all persons dealing with them and throughout the whole of the state of California as the Hudson Bay Fur Company; "that as a result of the care, attention, skill and strict adherence to their said business and through their honesty and fair dealing the said plaintiffs have under the name of Hudson Bay Fur Company established throughout the state of California a wide and honorable reputation as a fair and reliable business and firm to deal with and the said plaintiffs under said trade-name now enjoy throughout the whole of the state of California, and elsewhere, a good reputation and credit." The court further finds that "the said defendants organized the said defendant corporation under the name and style of Hudson Bay Fur Company with the intention of engaging in business under the said firm name to trade on the credit and reputation of the said plaintiffs, to pass off their goods as those of the plaintiffs herein, and to deceive the public into believing that the business conducted or to be conducted by the said defendant corporation was the business or a part of the business conducted, owned, and controlled by the plaintiffs herein"; that it is not true that defendants intended to engage in business solely in the county of Los Angeles or that if they do engage in business solely in the county of Los Angeles they will not be competing with plaintiffs; and that defendants intended to engage in the fur business in competition with plaintiffs.

[2, 3] We are satisfied upon reviewing the evidence that it supports these findings, and that the two concerns, engaged in the same character of business, under identical names, would be competing for the same patronage. It can scarcely be doubted that this would result in deceiving and confusing the public to respondents' detriment. This is held to be unfair competition. In the interest of fair dealing, courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. *Yellow Cab Co. of San Diego v. Sachs* (Cal. Sup.) 216 Pac. 33. For this purpose the second comer may be enjoined from using the name (*Morton v. Morton*, 148 Cal. 142, 82 Pac. 664, 1 L. R.

A. [N. S.] 660; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* [C. C.] 121 Fed. 357; *Ball v. Best* [C. C.] 135 Fed. 434; *Juvenile Shoe Co. v. Federal Trade Commission* [C. C. A.] 289 Fed. 57; and this is true even though, as in this case, the principal places of business are at a considerable distance from each other (*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* [C. C.] 121 Fed. 357, 371; *Northwestern Knitting Co. v. Garon*, 112 Minn. 321, 128 N. W. 288, 291; *Ball v. Best* [C. C.] 135 Fed. 434; *Juvenile Shoe Co. v. Federal Trade Commission* [C. C. A.] 289 Fed. 57).

The second point made by appellants is that, if respondents ever had any right to use the trade-name referred to in Los Angeles, they lost it by giving David Benioff the right to use the name in Los Angeles, and that such permission amounted to a gift and could not be revoked.

The permission relied on is contained in the following letter which respondent George Benioff wrote to his attorney in Los Angeles, heretofore referred to, on March 14, 1918, the day before the dissolution of the corporation Hudson Bay Fur Company under which respondents were at that time conducting business:

"Dear Cousin Fred: Will you kindly file a notice with the county clerk that David Benioff will use the name of Hudson Bay Fur Co. You know what I mean, some one else wants to use the name, and as Dave may want to open a store in your city, I want to protect him. You can give uncle's address as temporary, or any other it won't matter, just so that no one else will use that name. * * *

Pursuant to this letter a certificate of doing business under a fictitious name was prepared on behalf of David Benioff and filed with the county recorder of Los Angeles county on or about August 17, 1918. No business was ever transacted by appellant David Benioff, or any of the appellants, in Los Angeles or elsewhere under the name of Hudson Bay Fur Company. No consideration was given by David Benioff or received by respondents for permission to use said name. Subsequently, about June 21, 1919, and thereafter on many occasions, respondent George Benioff told David Benioff that he could not use the name in Los Angeles or elsewhere. Respondent George Benioff testified regarding his reasons for writing the above-quoted letter to his attorney that he and appellant David Benioff had previously discussed going in business in Los Angeles together; that the letter was written the day before the dissolution of the Hudson Bay Fur Company, the corporation under which respondents had been conducting business; that he was advised that unless such certificate was filed, any one could go down to Los Angeles and

use the name, and the certificate was filed to prevent any one else appropriating the name in Los Angeles; that this was prior to the time that they had expanded their business through the state to the extent that they now have done.

[4] It is clear from the evidence that both George and David Benioff understood that the former did not intend this permission to extend to any one other than David Benioff; that he did not intend that any one else should use the name; and consequently that he did not intend to give David Benioff any right in the name which could be transferred to others. In other words, it appears to have been intended and understood by both parties merely as a personal privilege or license to David Benioff alone, which, however, he never acted upon, and for which no consideration was paid. As such it was subject to revocation, and the trial court found that the respondents did so withdraw said consent and permission.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

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MAGUIRE v. CUNNINGHAM (BOLD et al., Interveners). (Civ. 4096; L. A. 7291.)

(District Court of Appeal, Second District, Division 2, California. Nov. 27, 1923. Hearing Denied by Supreme Court Jan. 25, 1924.)

1. Dismissal and nonsuit ⚡55—**Motion to dismiss denied where one cause of action good.**

Motion to dismiss action on the ground that it involved title to real estate lying in another county must be denied where one count seeks recovery as for money had and received.

2. Appeal and error ⚡185(1)—**Objection to jurisdiction of court may be first made on appeal.**

In view of Code Civ. Proc. § 434, objection can be first made on appeal that the trial court had no jurisdiction, at least in favor of a defendant.

3. Appeal and error ⚡1078(2)—**Question of jurisdiction considered, though not presented in briefs on appeal.**

Appellate court could consider question of jurisdiction as arising upon appeal, notwithstanding the fact that it was not presented in the briefs on appeal, but only briefs under a motion to dismiss for lack of jurisdiction, especially as the point was one arising under Const. art. 6, § 5, and Code Civ. Proc. § 78.

4. Venue ⚡5(1)—**Actions affecting real property to be commenced in county where property situated and cannot be waived.**

Actions to quiet title, and certain others which affect real property, must be commenced

in the county in which the real property is situated, and the question is one which cannot be waived.

5. Parties ⚡48—**Interveners could object to jurisdiction.**

Objections to jurisdiction that a complaint does not state facts sufficient to constitute a cause of action are always open to the defendants, under Code Civ. Proc. § 434, and, since the objection that there is no jurisdiction of the subject-matter cannot be waived, interveners in a suit to quiet title were entitled to object that the court had no jurisdiction in that the land was situated in another county.

6. Quieting title ⚡28—**Action must be commenced in county where land situated, and if brought in other county venue cannot be changed.**

Under Const. art. 6, § 5, and Code Civ. Proc. § 78, an action to quiet title must be brought in the county where the land is situated, and an action brought in any other county is so completely a nullity that the venue cannot be changed to the county in which the land lies.

7. Action ⚡38(1)—**But one cause of action presented where several parcels of land included.**

But one cause of action is presented where complaint seeks to quiet title to many parcels of land, even if they be noncontiguous, provided only that the conflicting claims to all the parcels be between the same parties.

8. Pleading ⚡64(2)—**Complaint may combine in one count both personal and real property.**

Under Code Civ. Proc. § 738, a complaint may seek in one and the same count to quiet title to both real and personal estate.

9. Pleading ⚡406(8)—**Misjoinder waived by failure to demur.**

Misjoinder of causes of action was waived by failure to demur, under Code Civ. Proc. § 434.

10. Husband and wife ⚡262(1)—**Presumption that property belonged to wife's separate estate only part of evidence.**

In an action to quiet title, presumption arising from deeds of gift to wife that the property conveyed thereby was her separate estate was merely a part of the evidence in the case, tending to show that it was not community property.

11. Husband and wife ⚡264—**Evidence held to show property community and not separate estate of wife.**

In action to quiet title evidence held to sustain a finding that land involved was community property, notwithstanding presumption that it was wife's separate estate.

12. Witnesses ⚡133—**Husband could testify in action against administrator of wife to quiet title.**

A husband in an action to quiet title against wife's administrator is not incompetent to testify as a witness, under Code Civ. Proc. § 1880, subd. 3.

13. Executors and administrators ⇨431(2)—Husband could maintain suit to quiet title against administrator without filing claim or demand.

Under Code Civ. Proc. § 1500, a husband could maintain an action to quiet title against his wife's administrator without filing a claim or demand against the estate.

14. Evidence ⇨157(8)—Entries in books not best evidence.

Entries in books of account are never the best evidence in the sense that they are primary to the testimony of men who have participated in events of which a record has also been made in the books, nor are they primary to the testimony of parties who have witnessed the occurrence of the events.

15. Evidence ⇨157(8)—Book entries receivable as evidence of equal value.

Book entries, if sufficiently vouched for, are receivable as evidence of equal value with that of witnesses to occurrences, on the score of admissibility.

16. Statutes ⇨270—Amendment permitting action to quiet title to personal property applicable to existing claim and pending actions.

The amendment of Code Civ. Proc. § 738 by St. 1921, p. 542, § 1, permitting action to quiet title to personal property, is purely remedial, and will support an action upon a claim or demand existing at the time the amendment took effect, and also applies to pending actions.

17. Statutes ⇨267(2)—Statutes affecting procedure or allowing new remedy applicable to actions pending.

Statutes affecting procedure, or allowing a new remedy for the enforcement of existing rights, are justly and properly applicable to actions pending when such statutes become effective.

On Hearing in Supreme Court.

18. Venue ⇨4—Action involving money held in personam of transitory character.

An action involving a sum of \$3,000 on deposit in a certain bank was an action in personam of a transitory character, whether it be regarded as a suit to impress and enforce a trust or as an action to recover the possession of personal property under Code Civ. Proc. § 1582.

19. Courts ⇨2—Court not deprived of jurisdiction because complaint defective.

The mere fact that a complaint was in some respects defective would not of itself deprive the court of jurisdiction, if it stated, though imperfectly, a cause of action the subject-matter of which was within the jurisdiction of the court, and if the defects therein were capable of being cured by amendment, and this was applicable to a complaint which sought to quiet title to land in another county and to recover or determine the ownership of money on deposit in a bank, being good as to the part relating to the money.

Appeal from Superior Court, Los Angeles County; T. N. Harvey, Judge.

Action by Michael Edward Maguire against Thomas J. Cunningham, in which Anna Maguire Bold and others intervened. From the judgment, interveners appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Meserve & Meserve, of Los Angeles, for appellants.

Ford & Bodkin, of Los Angeles, for respondent Michael Edward Maguire.

WORKS, J. This action was commenced in the county of Los Angeles. The complaint consists of three counts. The first of these is in the ordinary form of a complaint to quiet title, but the real property involved lies in the county of Alameda and in the city and county of San Francisco. The second count partakes of a hybrid character, being in form a complaint to quiet title to the real property described in the first count and to personal property consisting of \$3,000 in cash. The third count is for the recovery of money had and received in the sum of \$3,000. Plaintiff had judgment, and the interveners appeal.

Before disposition is made of the appeal a preliminary matter engages our attention. Appellants move the court "to dismiss the * * * action, and for an order * * * ordering and directing" the trial court "to dismiss said action, and for an order and decree therein that" the trial court, "and, therefore the above entitled court, never had jurisdiction of said action or right or power to try the same." The motion is made "on the ground that said action involves the title to real property, all of which is situated, lying, and being in the county of Alameda, * * * and that said action was commenced in the superior court in and for the county of Los Angeles, * * * and not commenced in the superior court in and for the county of Alameda. * * *"

[1] Whatever may be said of the first and second counts of the complaint, it is at once evident that the grounds upon which the motion is based do not reach the third count. The cause of action there pleaded, plainly, does not involve the title to real property, situate in the county of Alameda, or elsewhere. Accordingly, the motion, addressed as it is to the action in its entirety, falls to the ground. As we cannot under the motion dismiss the cause of action pleaded in the third count, we cannot dismiss the action as a whole.

There may be some question whether the motion made by appellant is proper practice. We are, therefore, not to be understood as passing upon that point. It is also to be understood that we are not determining several questions which appear to present themselves on the face of the complaint: (1) Does the second count set forth two causes of action without separate statement? (2) If it does

not, is the first count properly joined with the other two? (3) Is the third count properly joined with the other two? These questions will receive mention later.

[2-4] The motion made by appellants was an afterthought; that is, the notice of the motion was served and filed long after the filing of both appellants' opening brief and the brief of respondent Michael Edward Maguire. Respondent Cunningham, administrator, has filed no brief. The point made in support of the motion is under the statute available on appeal, for the right to object to the jurisdiction of the court is always open (Code Civ. Proc. § 434), at least, in favor of a defendant and we state this qualification, for reasons which will hereafter appear, because the presentation of the point under the motion here is made by appealing interveners. We are now confronted with the question whether we shall consider the question of jurisdiction as arising upon the appeal, notwithstanding the fact that it is not presented in the briefs on appeal, but only in the briefs under the motion. We have concluded that it is our duty to do so. In the first place, the point is one which arises under the Constitution of the state (article 6, § 5), the provision also finding its echo in the Code of Civil Procedure (section 78). It is the settled policy of the state that actions to quiet title, and certain others which affect real property, shall be commenced in the county in which the real property is situated. Moreover, the question is one which cannot be waived. *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867. Further, by the presentation of the motion appellants have indicated a desire to avail themselves of this state of the law, and it appears to us that we should allow the point the same effect upon the appeal—provided, of course, that it possesses merit—that it would have had under the motion if the latter had been addressed to the separate counts of the complaint, and not to the pleading as a whole. Again, the point has been argued under the motion and it is therefore fully before us, in form at least. For these reasons we shall proceed to consider it upon the appeal, after we have made disposition of a point made by the appearing respondent, to whom we shall hereafter refer as if he were the sole respondent.

[5] Respondent contends that appellants, being interveners, may not raise the question of jurisdiction, because of the well-established rule that an intervener must take the action into which he projects himself as he finds it. This principle has found expression in many cases, but none of them supports the contention made by respondent here. In fact, the statement of the rule, in terms—that is, that an intervener must take the action "as he finds it"—would seem to exclude the contention of respondent. Objections to the jurisdiction and the objection that a complaint does not state facts suffi-

cient to constitute a cause of action are always open to the defendants (Code Civ. Proc. § 434), and we have already seen that the objection that there is no jurisdiction of the subject-matter cannot be waived (*Fritts v. Camp*, supra). So the interveners "found" this action when they were permitted to intervene. As the original defendants could have objected to the jurisdiction as well after the intervention as before, it seems that the same right must inhere in the interveners. From an examination of the authorities on the subject we are satisfied that the rule for which respondent contends is correctly stated in a note to *Walker v. Sanders*, 123 Am. St. Rep. 276, 292, thus:

"It is sometimes said that an intervener must take the case as he finds it, and by this is generally meant that he cannot avail himself of or urge * * * irregularities in the proceeding which the original parties have expressly or impliedly waived, nor of defenses which are personal to them."

Later on in this same note are one or two general statements which seem to uphold the contention of respondent, it is true; but an examination of the cases cited in support of them will show that the editor in making them did not have in mind such a question as is presented here, that is, whether the trial court had jurisdiction of the subject-matter. It certainly cannot be the law that an intervener cannot object that the complaint in the action in which he intervenes fails to state a cause of action. The contrary has been directly decided. *Hanchett v. Gray*, 7 Tex. 549. We are convinced that the right to object to the jurisdiction must be placed in the same category.

[6] It cannot be questioned that appellants' objection to the jurisdiction, as applied to the first count of the complaint, taking it alone, is good; and we say "taking it alone" for the reason that we shall later have something to say of the pleading in its entirety as made up of three counts. It will be remembered that the first count was presented to the superior court in and for the county of Los Angeles for the purpose of quieting title to real property in the county of Alameda and in the city and county of San Francisco. Under both Constitution (article 6, § 5) and Code (Code Civ. Proc. § 78) an action to quiet title to the Alameda property could have been commenced only in that county, and a similar action involving the San Francisco property could have been commenced only in that city and county. The presentation of the first count of the complaint to the Los Angeles superior court, remembering still that we are considering it alone, was an idle act, as that court had no jurisdiction to receive it, nor to try the issues tendered by it after receiving it (*Urton v. Woolsey*, 87 Cal. 38, 25 Pac. 154; *State v. Royal Consol. Min. Co.*, 187 Cal. 343, 202 Pac. 133. In fact, the filing of

such an action in a county other than that in which is situated the real property involved is so completely a nullity that the venue cannot be changed to the county in which the property lies, for no court can have jurisdiction of such an action unless it was commenced in the county where the land is situated. *Urton v. Woolsey*, supra. See, also, *Fritts v. Camp*, supra; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 433. The trial court had no jurisdiction over the subject-matter of the first count of the complaint, standing alone.

[7, 8] We meet a greater difficulty when we come to consider the second count, which has for its purpose the quieting of title to the Alameda and San Francisco parcels of real property and also to personal property consisting of \$3,000 in cash. Does this count state but a single cause of action, or does it in its essence include two causes of action? This question is one of great moment, for it is settled that an action "must be wholly local in its nature to require it to be brought in the county" wherein is situated the property which is the subject-matter of the action. *Weyer v. Weyer*, 40 Cal. App. 765, 182 Pac. 776. See, also, *State v. Royal Consol. Min. Co.*, supra. The right to maintain an action to quiet title to personal property is of recent origin in this state, having been created in 1921 by an amendment to Code of Civil Procedure, § 738 (St. 1921, p. 542), and whether a claim to quiet title to both real property and personal property may be included in the same complaint without separate statement has never been determined here, nor in fact, so far as we can discover, elsewhere. It is the rule in this state, however, as to actions to quiet title to real property, that but one cause of action is presented where a complaint seeks to quiet title to many parcels of land, even if they be noncontiguous, provided only that the conflicting claims to all the parcels be between the same parties (*Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398), and the same rule seems also to prevail in Colorado (*Mitchell v. Knott*, 43 Colo. 135, 95 Pac. 335). Is there not in these cases a condition which is analogous to the subject of our present inquiry? It is the same section of the Code of Civil Procedure, § 738, that confers the right to maintain actions to quiet title to both real and personal property. Before the amendment of 1921, the opening language of the section was:

"An action may be brought by any person against another who claims an estate or interest in real * * * property, adverse to him," etc.

The amendment consists in the insertion of the words "or personal" between the words "real" and "property." If under this provision a conflict may be waged, under the same complaint, between those who have opposing

claims to many parcels of real property, no matter how different the chain of title of each claimant to each parcel may be—and nothing on this latter head is shown in the ordinary complaint to quiet title—we can see no good reason why a similar contest may not be carried on, under the same complaint, between parties who hold adverse claims to a city lot and to a piano. It has been said in a case in which the right to maintain an action to remove a cloud on the title to personal property was in question:

"Any distinction between real estate and personal property in this respect must be purely artificial and tend to hinder the practical administration of justice." *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012.

The court then upheld the right to maintain the action, independent of statute. That right did not exist in this state until section 738, Code of Civil Procedure, was amended in 1921, but by that amendment the Legislature yielded recognition to the fact that in respect to the right to maintain actions to quiet title the distinction between real property and personal property is artificial. At any rate, if it did not recognize that artificiality, the Legislature by the amendment wiped out any distinction which had theretofore existed in that respect between the two kinds of property. Under section 738, property is property, whether it be realty or personalty, and the logic of *Pennie v. Hildreth*, supra, compels us to hold that in the second count of the complaint now before us there was properly included respondent's right to quiet title to both the real property and the personal property mentioned therein. Therefore, as the cause of action stated in that count was not wholly local, the trial court had jurisdiction of the entire subject-matter of it.

[9] We find the complaint, then, in this condition, disregarding for the moment any possible question of misjoinder of causes of action and considering each count as if it stood alone: The trial court had no jurisdiction of the subject-matter of the first count, while it had jurisdiction of the subject-matter of both the second and third. We need not consider the question of joinder as between the first and second counts for the reason that the latter included the entire subject-matter of the former. Touching the question of joinder as between the second and third counts—granting for the sake of argument, which we do not decide, that there is such a question—no demurrer on that ground was ever interposed. There being no question of jurisdiction involved in the point, it was waived by failure to demur. Code Civ. Proc. § 434. It therefore appears, to sum up the situation, that the trial court had jurisdiction to quiet title to real property described in the second count, to quiet title to personal property in the form of

\$3,000 in cash, and to determine whether respondent was entitled to judgment for money had and received in the sum of \$3,000. It is to be noted that throughout the foregoing discussion we have assumed, without deciding, that cash is personal property within the meaning of section 738, Code of Civil Procedure. This we have done for two reasons: First, the point that cash is not such personal property is not made in the briefs on appeal; second, those briefs assure us that the \$3,000 mentioned in the second and third counts is one and the same sum of money. This latter reason is controlling because evidence entitling respondent to judgment quieting title to the money would also entitle him to judgment for money had and received, and the trial court made its findings of fact, conclusions of law, and judgment in favor of respondent, as to the \$3,000, upon each of the two theories.

[10] We now take up the questions presented by the briefs upon the appeal. The case was one in which a surviving husband sued the administrator of the estate of his deceased wife for the purpose of procuring decree that the property mentioned in the three counts of the complaint was the community property of the spouses before the death of the wife, and not her separate estate, as claimed by the administrator. The interveners were nieces and nephews of the decedent, the Maguires never having had children of their own. The interest of the decedent in a part of the real property described in the complaint, laying aside for the moment the question as to the nature and character of the funds by means of which it was acquired, arose because of the fact that her husband has made to her conveyances of that part of the property by way of deeds of gift. The record title as to this property stood in the wife at her death under these deeds of gift. One of the contentions of appellants is that the evidence was insufficient to overcome the presumption, arising from the deeds of gift to the wife, that the property conveyed thereby was her separate estate. The point really is, in effect, that the evidence was insufficient to support a finding of the trial court that the property mentioned was community property, for under the issues framed upon the complaint the presumption was merely a part of the evidence in the case tending to show that it was not community property. *Fowler v. Enriquez*, 56 Cal. App. 107, 204 Pac. 854. In order to determine whether the court's finding in this regard is supported by the evidence it will be necessary for us to recapitulate a part of the testimony concerning the property covered by the husband's deeds of gift to the wife. In doing so we shall refer to it by parcel numbers, as far as may be, in accord with the designation employed in respondent's brief, although it will be observed that testimony quoted as to specific parcels will in

part often refer to the entire property. To avoid more than a mere statement of the testimony we shall resort frequently to the use of italics. Respondent himself testified as to parcel I:

"At the time that that property was bought * * * I was interested in playing the races in Oakland. I had this amount of money, * * * and, for fear I would spend the money at the race track, I bought the property. * * * I thought it was better to buy the property than to take a chance to spend it on the races, * * * and I thought it would be a little nest egg * * * for my wife, *in case anything was to happen to me*. That was the whole reason I gave it to her *while she was living*, but I never intended—and everything we ever had, * * * *it was always between us*; if she had a thousand dollars and I says, 'Give me \$990,' she would give me \$990; I would give the same thing to her. * * *"

Respondent testified concerning parcel II:

"As I deeded the other property to her prior to that time—to *protect myself*—to protect myself and to give the property to Mrs. Maguire for fear that at any time—my name was good in Oakland, sir—I could bet on the races at \$5,000, if I wanted to, without having to put up any cash, * * * but for fear I would bet and lose *our* property, I gave it to the wife; I made the deed to her in order to *protect myself*. That was the whole, sole reason for it all."

Respondent had the following to say as to parcel III:

"*I wanted to secure my wife*. I was an extravagant man, and in case anything happened to me in my extravagance, I want to have her secure *while she lived*, that everything I had belonged to her. * * * Q. That was the only reason you put it in her name? A. The only reason in the world I put it in her name; she never asked me to put it in her name, but *I wanted to secure her*."

The property can be treated no further as to specific parcels, the remainder of the testimony being either general as to all three parcels, or relating to some one piece or other which we are unable to identify from the briefs as any particular one of the designated parcels. It is to be observed, however, as an aid to an understanding of the testimony, that the three parcels constitute the whole of the Alameda county property, all of which lies in Oakland. The whole of the San Francisco property was held by the husband and wife, in her lifetime, under deeds running to them both, as tenants in common. To proceed with the testimony: Respondent testified that one of the pieces of Oakland property had buildings on it when it was purchased; that certain improvements on the buildings were paid for by him in cash; that whenever any repairs had to be made tenants came to him about them; that he hired carpenters, plumbers, painters, or paperhangers whenever anything was to be done and paid them in cash which he either took from his pocket or drew

from the bank; that he paid taxes on the property with cash which was "Michael and Bridget Maguire's; it was my cash at the time"; that later the taxes were taken care of by an agent (whose testimony will be mentioned later); and that respondent attended to the insurance on the buildings. Respondent also testified:

"Q. Was there ever any conversation between yourself and your wife as to what would become of this property in case she should outlive you?
* * * A. Well, she said—she would always say, 'If I die first, the property goes to you, and if you die first the property goes to me.'
* * * She said, *being as it is community property*, then the property goes to the one that is living. That is what she always said."

Respondent further testified that during all the time that he and his wife lived in Oakland he collected all rents on the rented property there, and that at other times the rents were collected by the agent already mentioned. This agent, one George D. Troy, of Oakland, testified that Mr. and Mrs. Maguire removed from Oakland to Los Angeles in the latter part of 1918. The record shows that Mrs. Maguire died in the latter place on June 15, 1920. Mr. Troy further testified that he collected the rents on the Oakland rented property from the time that the husband and wife removed to Los Angeles until the trial of the present action, in July, 1921; that when he collected rents during the entire time, about three years, he mailed to respondent drafts for amounts collected, together with statements showing collections; that on an occasion in March, 1919, when Mrs. Maguire was in Troy's office while on a visit to Oakland he showed her one of these statements which he had just made out; that then, to quote him, "I told her I had a certain amount of money here and didn't care to keep it and I would give it to her, and gave her a copy of the statement." He also read the statement to her and she made no objection to its form. This paper was introduced in evidence at the trial. It was headed "Rents Collected to Date for M. E. Maguire." Then followed eight items of rent collected, with a total of \$380. Next came the heading "Money Paid Out on Account of M. E. Maguire," followed by nine items of expenditure, totaling \$160. A balance of \$219.90 was then struck and the statement closed. Mr. Troy also testified that Mrs. Maguire once said to him, after she had received the deeds of gift from respondent, that the property was earned by Michael and it was only right that he should have it should anything happen to her, and that she talked to him, Troy, about making deeds of gift back to respondent before she should die.

[11] The above is a goodly portion of the evidence pointed to by respondent as bearing upon the finding that the property in question was the community property of the spouses, despite the fact that deeds of gift

had been made by the husband to the wife. We have found it unnecessary further to refer to or quote from the evidence. No matter what the opposing showing may have been, in addition to the presumption arising from the deeds of gift, we are satisfied that the finding receives a substantial support from the evidence to which we have adverted.

[12, 13] Appellants contend that the filing of a claim or demand against the estate of his wife, pursuant to the terms of Code of Civil Procedure, § 1500, to the effect that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first filed with the clerk, or presented to the executor or administrator, except," etc., was a necessary prerequisite to the maintenance of this action by respondent. As no such claim was filed, they ask for a reversal on that ground. Appellants also insist that the trial court erred in overruling objections made to the competency of respondent as a witness under the language of Code of Civil Procedure, § 1880, subd. 3, providing that parties to an action cannot be witnesses if the action is "against an executor or administrator upon a claim, or demand against the estate of a deceased person," and if the testimony of such party relates "to any matter of fact occurring before the death of such deceased person." These two points may be treated together, as they are both concluded by *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108. The legal question in that case was identical with the last of the two which we have just stated—that is, the one arising under Code of Civil Procedure, § 1880—and the case was in principle like the present one. The court said:

"We are of opinion that the witness was competent and the evidence properly admitted. The controversy is not concerning a claim or demand against the estate of deceased within the meaning of the section. It is concerning the property of plaintiff and to quiet a claim or demand or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased under the deed is the property of the estate or the property of plaintiff. If it is not the property of the estate, then the action does not involve a claim or demand against the estate. To hold that the claim or demand in controversy here was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question at issue."

The point in the case cited, it is true, relates specifically to the question presented here under section 1880, only, but the reason of the opinion is directed as clearly at the point raised under section 1500. This is shown by the sentence:

"If it [the property involved] is not the property of the estate, then the action does not involve a claim or demand against the estate."

We are aware that the question of the applicability of section 1500 has often been held to turn on the question whether a money judgment was sought to be obtained in the action in which the application was attempted to be made. This fact would seem to lend some plausibility to a contention that the section applies to so much of the present action as relates to the sum of \$3,000 in cash. It is to be remembered, however, that the action, considering now the second count of the complaint, is to quiet title to the sum named, as personal property. Under all the authorities, and especially under *Bollinger v. Wright*, supra, the section cannot apply to actions to quiet title to real property. With equal reason it cannot apply to an action to quiet title to personal property in the shape of a herd of cattle. It seems to follow clearly, as well, that it cannot apply to an action to quiet title to personal property in the form of cash. The reasoning of *Bollinger v. Wright* seems to fit all three classes of cases, or, rather, to show that there are not three classes, but only one. No claim need have been filed prior to the commencement of the action. Respondent was a competent witness to all the matters concerning which he testified.

[14, 15] Respondent testified to deposits and withdrawals of various amounts from a bank. This testimony was received over the objection that the books of the bank were the best evidence on the subject, and the appellants insist here that the objection was good. Entries in books of account are never the best evidence in the sense that they are primary to the testimony of men who have participated in events of which a record has also been made in the books, nor are they primary to the testimony of third parties who have witnessed the occurrence of the events. In truth, upon the basic principles of evidence it is the testimony of the actors in any occurrence, or of those who see their acts or hear their words, which is primary to any record kept in books. It has long been the law, however, that book entries, if sufficiently vouched for, are receivable as evidence of equal value, upon the score of admissibility, with the testimony of the real witnesses to the occurrences recorded in the entries. For a statement of the theory upon which books of account are received as evidence, generally, see 22 C. J. 861-864. See, also, *Landis v. Turner*, 14 Cal. 573; *Severance v. Lombardo*, 17 Cal. 57; *White v. Whitney*, 82 Cal. 163, 22 Pac. 1138. The objection was properly overruled.

Many points attempted to be made by appellants are so casually mentioned that we are unable to ascertain from the brief what they are. To illustrate the method of presentation of these points, we quote a portion of appellant's brief which covers but a part of them:

"'Error No. 2' speaks for itself. It certainly was incompetent for Maguire, and calling for his conclusion, to testify as to what his wife owned when they were married, or at any other time. The same point is presented in 'Error No. 3' (folio 183). 'Error No. 4' (folio 186), 'Error No. 5' (folio 187), 'Error No. 5A' (folios 198 and 199) all speak for themselves: Ruling 8 (folios 201 and 203) speaks for itself. This line of evidence, as this court can readily see, was very dangerous: Ruling 9 and 16 likewise speak for themselves."

The reports of the decisions of both the Supreme and appellate courts of the state are full of cases in which there has been a refusal to consider points no better identified than are those referred to in the above quotation. This court had the following to say in a similar situation:

"Appellant makes at least eight points upon rulings during the trial, each of them stated in this manner: 'The court erred in overruling defendant's objection,' followed by a reference to the transcript. Not only, in each instance, does counsel fail to state the question to which objection is made, or the objection itself, but none of the points is argued, and no authority is cited in support of any of them. Such a casual presentation of points, if followed up, would impose upon us a labor which is within the peculiar province of counsel, and which does not come within the range of our duty. We are not called upon to consider points so presented. *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278." *People v. Zarate*, 54 Cal. App. 372, 201 Pac. 955.

It is true that in two or three instances appellants' meager statement of points is aided to some extent by comments in respondent's brief which serve in some measure to identify the points made. From what we are able to gather as to those two or three points, however, from both briefs, we are unable to perceive that they merit a particular discussion.

The foregoing is the text of an opinion rendered by us on a former hearing of the cause, with the exception of the judgment pronounced, and it is now adopted as a part of our opinion upon the present hearing.

Within the proper time after the filing of the former opinion appellants made application for a rehearing of the cause upon various grounds. A rehearing was granted for the reason, solely, that in disposing of the appeal we had not paid regard to the fact that section 738 of the Code of Civil Procedure, as amended in 1921, did not take effect until after the action was commenced. What bearing that situation has upon the cause must now be considered.

[16] The complaint was filed December 7, 1920. Section 738, as amended, became effective on or about July 29, 1921 (Stats. 1921, p. 542). The findings and judgment in the action were filed August 24, 1921, and the judgment was entered August 27. In a brief pre-

sented since the rehearing was granted, respondent contends that the amendment to section 738, authorizing actions to quiet title to personal property, is remedial in character and that it therefore applies to the present action, pending, as it was, at the time the amendment took effect. That the amendment is purely remedial does not admit of doubt, as it afforded merely a new means of enforcing an existent right. See 36 Cyc. 1173; *Denning v. State*, 123 Cal. 316, 55 Pac. 1000. It seems also reasonably clear that the amendment applies to the present cause. That such an enactment will support an action upon a claim or demand existing at the time it takes effect, but upon which no suit has theretofore been commenced, is well settled in this state (*Gilman v. County of Contra Costa*, 6 Cal. 676; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; *Buck v. Canty*, 162 Cal. 226, 121 Pac. 924), and, upon principle, it is difficult to perceive how such a proposition could be questioned. However, this proposition, simple as it appears to be, was announced by the Supreme Court, in the opinion in the case first cited, upon a contention which gives the decision a bearing upon the exact question now present—that is, does an enactment like the amendment to section 738 apply to pending actions? The appellant in *Gilman v. County of Contra Costa* argued:

“Though it may be contended that the act of 1854 is a remedial statute, and that remedial statutes may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, still the act in question, if construed to give the plaintiff the right to maintain an action against the county upon a demand which accrued entirely before its passage, is open to the objection that it does impair the vested right enjoyed by the county in its sovereign nature of exemption from actions, and of its power to postpone payment or to refuse to pay at all.”

This argument was a most cogent one, the state of the law prior to the enactment then in question and subsequent to the accrual of the claim upon which the action was commenced apparently having been that, while the claimant might have presented his demand to the board of supervisors, and in that sense had a “remedy,” he must have been satisfied with a rejection of the demand and had no remedy in the courts. In response to the argument of appellant the court pronounced an opinion which is, in full:

“The act prescribing the manner of commencing and maintaining suits by or against counties, passed May, 1854, applies as well to claims existing before its passage, as those which arose afterwards.”

A similar condition of affairs is presented by *Chapman v. State*, *supra*. The action

was commenced to recover damages for breach of contract. The court said in its opinion:

“At that time,” that is, at the date of the breach, “the only remedy given the citizen to enforce the contract liabilities of the state, was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the Legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and, in so far as that act gives the right to sue the state upon its contracts, the Legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the Constitution. ‘The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him. It only shows that he cannot enforce against the state his claim, and make it answer in a court of law for its liability. What is made out by this objection is not that there is no liability and no claim, but that there is no remedy.’ *Coster v. Mayor of Albany*, 43 N. Y. 407.”

These cases, while not directly touching the question before us, are surely not without value in solving it. There appears to be no difference, in principle, between them and the present case. At any rate, they show how far the Supreme Court has gone in construing remedial statutes to be retroactive where the dictates of natural justice impel such a construction and where the constitutional guaranties concerning vested rights are not infringed by it.

[17] When we resort to other jurisdictions we find no lack of authority upon the exact question now before us. It has been held in a number of cases that statutes affecting procedure or allowing a new remedy for the enforcement of existing rights are justly and properly applicable to actions pending when such statutes become effective (*Lew v. Bray*, 81 Conn. 213, 70 Atl. 628; *Cahill v. Wissner*, 183 App. Div. 659, 170 N. Y. Supp. 1000; *City of Chicago v. Industrial Commission*, 292 Ill. 409, 127 N. E. 46; also see 36 Cyc. 1215); and an early case in this state is to the same purport, although the point is not discussed in the opinion (*Dent v. Holbrook*, 54 Cal. 145; see, also, *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90). We must conclude that justice requires that the amendment to section 738, Code of Civil Procedure, be construed to have a retroactive effect to the extent that actions pending when it became operative are brought within its purview. This conclusion gives to the section the force which we ascribed to it in our original opinion in this cause.

The motion to dismiss and the motion for a

direction to the trial court to dismiss are denied.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for transfer and decision by this court after judgment by the District Court of Appeal is denied. We do not, however, approve that portion of the opinion of the District Court of Appeal which seems to hold that the amendment of 1921 to section 738 of the Code of Civil Procedure operated retrospectively to confer jurisdiction upon the superior court of Los Angeles county to entertain and dispose of this action, assuming said court to have had no such jurisdiction at the time of the commencement of the action and at the time of the trial thereof. As to this question we express no opinion, as we do not deem its determination necessary to a disposition of this appeal. Under the facts alleged herein, we are satisfied that said superior court had jurisdiction of this action from the time of its commencement, wholly regardless of said amendment.

[18, 19] In so far as this action involved the sum of \$3,000, which was identified in the complaint as a specific fund on deposit in a certain bank in the maiden name of the deceased, it was an action in personam of a transitory character which could be lawfully commenced in the superior court of Los Angeles county. This is true whether it be regarded in this aspect as a suit to impress and enforce a trust (*Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22), or as an action to recover the possession of personal property (*Hillyer v. Eggers*, 32 Cal. App. 764, 164 Pac. 27; Code Civ. Proc. § 1582). The mere fact, if it be a fact, that the complaint was in some respects defective, would not of itself deprive the court or jurisdiction, if it stated, though imperfectly, a cause of action, the subject-matter of which was within the jurisdiction of the court, and if the defects therein were capable of being cured by amendment.

64 Cal. App. 750

EVANS et al. v. SHACKELFORD et al.

STONE v. SAME.

(Civ. 2637.)

(District Court of Appeal, Third District, California. Dec. 15, 1923. Hearing Denied by Supreme Court Feb. 11, 1924.)

1. Schools and school districts *§*81(2)—Matters considered in determining whether building bond given under Public Works Act or Code of Civil Procedure.

In action on bond, the fact that it referred to contract for construction of school building

and was executed at the same time, and that the contract related to a public building and the bond was given to insure payment by the contractor for work and labor performed, may be considered in determining whether the bond was given under and in accordance with the terms of the Public Works Act, or Code Civ. Proc. § 1183.

2. Schools and school districts *§*81(2)—Finding that bond of contractor was given under Public Works Act sustained.

In action on bond given by contractor, constructing school building, signed and delivered on the same day that the contract for construction of the building was executed, *held*, that the court was warranted in finding that the bond was given under Public Works Act approved May 10, 1919, and not under Code Civ. Proc. § 1183, and the former statute controlled time for filing claim and suit.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Actions by H. C. Evans and Herbert Newby, copartners doing business under the firm name and style of the Tulare Planing Mill Company, and by Fred W. Stone, respectively, against F. H. Shackelford and others. From adverse judgments, plaintiffs appeal. Affirmed.

Le Roy McCormick and J. A. Chase, both of Visalia, for appellants.

Power & McFadzean, of Visalia, Guy Knupp, of Porterville, and Earl W. Westcott, of Visalia, for respondents.

PLUMMER, J. For the purposes of this appeal the above cases are consolidated and heard as one. The plaintiffs in the two cases began their actions to recover on a certain bond given to secure payment for materials furnished and work done on a certain school building about to be erected by F. H. Shackelford, one of the defendants, for the Saucelito school district; said bond being dated the 23d day of September, 1920. The defendants Retherford and Swanson, the sureties on said undertaking or bond, had judgment, and from this judgment the plaintiffs appeal.

It appears from the transcript that F. H. Shackelford, a contractor, on the 23d day of September, 1920, entered into a contract with the board of trustees of the Saucelito school district in the county of Tulare for the erection of a certain school building; that upon this day there was made, executed, and delivered to the board of trustees of said Saucelito school district a bond, signed by the defendants Retherford and Swanson, in the following words and figures, to wit:

"Know all men by these presents that F. H. Shackelford (contractor), as principal, and B. F. Retherford and J. E. Swanson, as sureties, are held and firmly bound unto any and all persons performing labor upon or furnishing materials to be used in the work described in the

building contract hereinafter mentioned, or in any modification thereof, in the sum of sixty-one hundred ninety-one and 25/100 dollars, lawful money of the United States, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

"Signed and sealed with our seals, and dated the 23d day of September, 1920.

"The condition of the above obligation is such that—

"Whereas, a certain building contract, dated September 23, 1920, was made and executed by board of trustees of Saucelito school district, as owner, the party of the first part therein, and the above-named F. H. Shackelford as contractor, the party of the second part therein, which contract is hereby referred to; and

"Whereas, in and by said building contract, said contractor agreed to furnish the necessary labor and materials to complete the work described in said contract, upon the real property therein mentioned, in accordance with plans and specifications referred to in said building contract, and for the contract price therein set forth:

"Now, therefore, should said F. H. Shackelford, contractor, well and truly pay or cause to be paid all claims against him for such labor or materials, or either or both, so performed or furnished, as the case may be, then this obligation to be null and void; otherwise, to be and remain in full force and effect, and the same is hereby expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in the said contract, or in any modification thereof; and any and all such persons shall have and are given a right of action to recover upon this bond against the said principal and sureties, or either of them, in any suit brought to foreclose mechanics' liens, which may be filed by such persons, or any of them, upon the property mentioned in said contract, or in a separate suit brought upon this bond, and may recover in such action or actions the value of such labor done or materials furnished, or both, not exceeding, however, in the aggregate of said recoveries, the amount of this bond as above specified.

"B. F. Retherford. [Seal.]

"J. E. Swanson. [Seal.]"

The contract for the erection of the school building and the bond just referred to appear to have been signed and delivered on the same day. On the 16th day of April, 1921, the contract and bond were recorded in the office of the county recorder of Tulare county. The amount of the bond is exactly one-half of the amount of the contract price for the erection of the school building. The contractor failed to complete the building, failed to pay for all the materials furnished and work and labor performed, and this action was begun by the plaintiffs against the defendants upon the bond referred to to recover the amount due for work and labor performed and materials furnished. The court found that the bond in question was given under the provisions of the act ap-

proved May 10, 1919, known as the Public Works Act (St. 1919, p. 487); that plaintiffs had failed to file a statement of their claims within the time provided by section 2 of said act, and also had failed to institute this action within the time provided by said section 2; and hence that the cause of action against the defendants was barred. It is admitted that, if the Public Works Act applies to this case, the judgment in favor of the defendants should be affirmed. On the part of the appellants, however, it is contended that section 1183 of the Code of Civil Procedure applies, and hence that the action is not barred, and that the plaintiffs are entitled to judgment. As heretofore stated the court found that the Public Works Act applies, and not section 1183 of the Code of Civil Procedure.

The bond in question is phrased very similar to the provisions of section 1183 of the Code of Civil Procedure, and also to the wording of the Public Works Act. In the case of *Miles v. Baley*, 170 Cal. 151, at pages 156 and 157, 149 Pac. 45, at page 47, the Supreme Court of this state quotes with approval the opinion of this court, written by Associate Justice Hart, stating rules by which it may be determined whether any particular bond has been executed and delivered under the provisions of the Public Works Act or under section 1183 of the Code of Civil Procedure. The opinion just referred to was dealing with section 1 of the act of 1897 (St. 1897, p. 201), which was superseded by the act of 1919, the provisions of which, however, so far as material to this case, are almost identical. The opinion of this court, approved by the Supreme Court, as applicable to this case, is as follows:

"Comparing the undertaking with the statute, it will readily be noted that that part of the former which specifies the conditions to be fulfilled by the contractors to render the undertaking inoperative or without effect is in the precise language of the statute. It is also to be observed that the amount of the bond is approximately that prescribed and required by the statute. There is no conceivable substantial difference, in substance and legal effect, between the conditions of the bond and those prescribed by the statute. Moreover, the presumption is that the board of trustees, as a public official body, performed every duty imposed upon it by law, and that therefore it exacted from the contractors the bond required by the statute in such cases. 'The language of the statute is that the contractor 'shall, before entering upon the performance of such work,' make, give, and file the bond, and appears to impose upon the governing board a mandatory duty in that regard. Furthermore, the bond especially refers to the building contract, makes it a part and the consideration for the execution of the bond. *Martin v. McCabe*, 21 Cal. App. 658, 662, 132 Pac. 606. And it may be remarked, as a circumstance of more or less significance in this connection, that the bond was executed on the same day that the building contract was executed.

"It is obviously not necessary that the bond should expressly refer to the statute in order to constitute it a statutory bond. A bond, though not in the words of the statute requiring it to be given, if its substance and legal effect is the same as the form prescribed by such statute, is a statutory bond. *McCracken v. Todd*, 1 Kan. 148; *Brandt on Suretyship and Guaranty* (3d Ed.) § 615. 'A recital in such a bond that it was executed by virtue of a given section of the Code is not controlling or conclusive. It simply furnishes prima facie evidence of the fact. When the same fact is apparent otherwise than by the recital, it is as available for all purposes as if recited.' *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964; *Martin v. McCabe*, 21 Cal. App. 658, 132 Pac. 606."

The bond in question is signed only by the sureties. It refers to the building contract entered into on the same day by F. H. Shackelford, a contractor, with the board of trustees of the Saucelito school district, whereby the contractor agreed to furnish the necessary labor and material to complete the work described in said contract. The bond then follows more nearly the provisions of section 1183 of the Code of Civil Procedure than the provisions of the Public Works Act, in that some of the provisions of the Public Works Act are omitted which are not contained in the section of the Code referred to. Section 1183 of the Code of Civil Procedure differs little in its terms from the Public Works Act in the form of the bond to be executed. The section of the Code, as to the bond to be given, reads as follows:

"* * * In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent." etc.

It will be noted that this provision reads "*bond of the contractor*."

The Public Works Act, in relation to the giving of the bond, is as follows:

"* * * Before entering upon the performance of such work, filed with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council or other body by whom such contract was awarded a good and sufficient bond to be approved by such contracting body," etc. "Such bond shall be executed by the contractor, and either at least two sureties or by corporate surety as provided by law. * * *"

[1] The bond in question was delivered to the board of trustees of the school district coincident with the execution of the contract and was not filed with the county recorder until the 16th day of April, 1921, or approximately seven months after the execution of the contract and the beginning of the work called for by the contract just referred to. It will be noted that the language of section 1183 of the Code of Civil Procedure calls for the delivery of a bond "*of the contractor*"; the

the Public Works Act provides for the giving of a bond "*executed by the contractor*." The bond in question in this particular does not conform to the requirements of either the section referred to or the Public Works Act, as it was not signed by him. The Public Works Act also provides that, unless a bond is given as therein provided, no claim in favor of the contractor shall be audited, allowed, or paid. However, the board of trustees allowed and paid under the contract a sum aggregating nearly \$9,000. While this act would not be controlling in and of itself, it does indicate the intention and understanding of the parties in executing the contract and bond, and the conditions under which the bond was executed and received.

The bond itself, as before stated, refers to the contract, and, being executed at the same time, may be considered as one transaction; in other words, that the contract and bond were both intended to be executed under and in conformity with the provisions of the Public Works Act. The fact that the contract related to a public building, and the bond was given to insure payment by the contractor for work and labor performed upon such public building, are also matters which we think the court below was justified in considering, in determining whether the bond in question was given under and in accordance with the terms of the Public Works Act. It will also be noted that the Public Works Act provides that, unless such bond is given to persons who have in good faith performed work, they may be entitled to payment of their claims upon giving the notice prescribed in section 1 of the act. This section specifies the time of giving this notice, and also the time within which action may thereafter be begun upon any bond. As heretofore stated, these provisions were not complied with in point of time, and appellants' claims were held barred by the trial court on account of such failure.

Appellants call attention to the case of *General Electric Co. v. American Bonding Co.*, 180 Cal. 675, 182 Pac. 444. This case, however, has to do with a private enterprise, and not any public work. The court in the *Bonding Company Case* points out the distinction between that case and the case of *Miles v. Baley*, supra, and calls attention to the fact that the case of *Miles v. Baley* had to do with the claims of materialmen and workmen employed upon a public work, and that the requirements of certain sections of the Code are not applicable where the contract and bond relate to the erection of public buildings.

Whether the failure of the contractor to execute the bond in any way affects the validity of the instrument need not be considered, because of the fact that the bond in question fails to comply in this respect with the provisions of section 1183, and also the provisions of the Public Works Act, as hereto-

fore stated, and therefore does not indicate anything as to the act under which the bond was executed.

[2] Being of the opinion that the principles set forth in the case of *Miles v. Baley* are applicable to the case at bar, and that the trial court was justified in holding that the bond in question was given under the terms and provisions of the Public Works Act, the judgment of the trial court must be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

65 Cal. App. 1

RANDOLPH MARKETING CO. v. STEVENSON. (Civ. 2657.)

(District Court of Appeal, Third District, California. Dec. 20, 1923.)

1. Landlord and tenant ⇨72—Verbal lease reserving annual rental held for term of one year only.

That an oral lease agreement reserved an annual rental, under Civ. Code, § 1943, warrants the conclusion that it was for the term of but one year, particularly in view of section 1624, subd. 5, limiting the terms of verbal leases to one year.

2. Landlord and tenant ⇨161(1)—Lessee held to have lost right to remove machinery on expiration of term and renewal of lease.

Under a lease from year to year of a packing house, which provided for the installation by the lessee of machinery and an annual rental, which might be paid in cash or by the lessee's leaving the machinery, *held*, under Civ. Code, § 1019, that the expiration of a year without the payment of a cash rental and the renewal of the lease divested the lessee of the right to remove the machinery, so that a subsequent attempted transfer of title to the machinery was without legal force, nor did the taking of possession of the packing house and its operation by such transferee as successor of the lessee operate to divest the lessor of title previously accrued.

3. Landlord and tenant ⇨161(1)—Judgment denying lessee's right to remove articles not fixtures held erroneous.

A judgment denying a lessee's right to remove machinery which he had installed, after divestiture of his title to fixtures, *held* erroneous, for the inclusion therein of movable articles not attached to building, so as to become fixtures.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Randolph Marketing Company against G. F. Stevenson. Judgment for defendant, and plaintiff appeals. Reversed in part, and affirmed in part.

C. W. Braswell, of Lindsay, for appellant. Lamberson & Lamberson, of Visalia, for respondent.

HART, J. This action is in claim and delivery, and is for the recovery of certain packing house equipment installed by the predecessor in interest of the plaintiff in the packing house of defendant, situated at Woodlake, Tulare county, designated and known as the "Rose Street Packing House." The various articles constituting the equipment referred to, according to the complaint and the findings, were: One double stand grader, together with the partition boards, bins, sprocket wheels, and other attachments; one 30-inch Miller elevator, 5-foot delivery tables; one two-way stem and brushes and floor hopper, shafting, and pulleys; one convey press, plain top, two men, with strapping attachment; two No. 18-5-4 Center hanger clamp trucks; one No. 18-4-4 Center spring clamp truck; fifteen plain-top packing stands.

The complaint alleges that, on or about the 1st day of August, 1919, and a long time prior thereto, the plaintiff was and now is the owner, and entitled to the possession, of said personal property, the same being a complete packing house equipment, etc.; that said property is of the value of \$1,200; that on or about the 1st day of August, 1919, without the consent of the plaintiff and wrongfully, the defendant obtained possession of said property, and, claiming the right to the possession thereof, has refused and still refuses to deliver the same to the possession of the plaintiff; that prior to the commencement of this action, to wit, on or about the 1st day of August, 1919, the plaintiff demanded of the defendant the possession of said personal property, but that the defendant refused and still refuses to comply with said demand; that plaintiff, by reason of the alleged wrongful detention of said property by the defendant, has been damaged in the sum of \$1,500. The prayer is for a return of said property to the plaintiff, or for the recovery of the sum of \$1,200, the alleged value thereof, together with damages in the amount stated as the extent of the injury claimed.

The answer, after denying each and all of the allegations of the complaint, sets up a special defense substantially as follows: That the plaintiff leased from defendant the packing house above referred to at an agreed rental of \$360 per year, and thereafter placed the personal property mentioned in the complaint in said packing house, and used the said packing house under said agreement of lease until the month of October, 1916; that during said period of time the plaintiff packed the fruit of this defendant, for which the former was paid the current market value; that the plaintiff did not at any time pay to the defendant any rental for the use of said packing house until said month of October, 1916, and that at said last-mentioned time there was due from plaintiff to defend-

ant for such rental the sum of \$1,080; that in the month of October, 1916, plaintiff and defendant entered into an agreement, by the terms of which the said personal property described in the complaint, and the whole thereof, was sold by plaintiff to defendant for and in consideration of the said sum of \$1,080, then due from plaintiff to defendant for the said rental of said packing house as aforesaid, and thereupon and in said month of October, 1916, the said defendant went into possession of the said personal property and the whole thereof, and ever since said time has continued to remain in the possession thereof and used the same as his own openly, continuously, and adversely as against the plaintiff, "and as against the whole world claimed, occupied, and possessed the said personal property and every part thereof, with the knowledge, acquiescence, and consent of the said plaintiff, up to the time of the commencement of this action and for more than three years prior to the commencement of the said action." The answer also sets up the special plea that the action of the plaintiff is barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure.

The court found that the plaintiff was not the owner or entitled to the possession of the personal property above described; that on or about the 1st day of August, 1919, the plaintiff demanded of defendant possession of said property and the defendant refused to deliver possession of the same to the plaintiff; that the plaintiff has not been damaged by reason of the detention of said property in any sum whatever or at all; that said action is not barred by the provisions of subdivision 3 of section 338 of the Code of Civil Procedure; that said property is of the value of \$1,000. The findings proceed as follows:

"(4) That about the month of September, 1914, the Randolph Fruit Company, a corporation, entered into an oral contract with the defendant, under and by the terms of which the said Randolph Fruit Company placed the said property described in the complaint into a packing house owned by the defendant, situated near the town of Woodlake, in said county of Tulare, and agreed to pay a rental therefor, and securely attached the said property to said real estate by means of bolts and nails.

"(5) That thereafter the Randolph Fruit Company sold its interest in the said property to the Randolph Marketing Company; that there never was any agreement between plaintiff and defendant as to the payment of rent for the said packing house, or as to the removal of said fixtures or machinery, being the property sued for herein; that said property was so attached as to become a part of the real property upon which said packing house was situated, and thereupon became and was the property of the defendant.

"(6) That either the Randolph Marketing Company nor the Randolph Fruit Company ever paid any rent for the use of said packing house.

"(7) That about the month of April, 1917,

the defendant gave notice to the agent of the plaintiff that the said defendant would thereafter retain and hold as his own all the said property, and the plaintiff did not after the giving of said notice take any steps to secure the possession of said property or make any claim therefor until the commencement of this action."

Judgment was rendered accordingly and the plaintiff appeals therefrom. The contention is that the findings are not supported by the evidence. Preliminarily to the statement of the facts of the transaction involved herein, as shown by the evidence, it should be stated that, as the court found, the Randolph Fruit Company, by an instrument in writing or a bill of sale, through W. O. Randolph, as president, and J. F. Eichar, as secretary, thereof, on the 1st day of March, 1916, transferred and sold to the plaintiff all its packing house equipments, which had been installed and which were then still maintained in 16 different packing houses situated in as many different localities in the southern part of the state. Among the equipments so purported to be transferred to the plaintiff was the one contained in the Rose street packing house, as we will hereafter refer to the packing house in controversy.

The defendant testified that he erected and completed the packing house in question a short time before the month of September, 1914; that he owned another packing house on his premises, some distance from where the Rose street packing house was erected; that there was not enough fruit raised in the immediate neighborhood of the Rose street packing house to justify its equipment with the machinery necessary for operating it. The agreement between Randolph, acting for the plaintiff or its predecessor, and the defendant, was entirely verbal, no written lease or contract having been executed between the parties; but it appears that at some time prior to the month of September, 1914, and prior to the time at which the equipment was installed, the defendant met W. O. Randolph, the president of the plaintiff, and a conversation ensued between the two regarding the operation of the packing house by the predecessor of plaintiff. The defendant testified that he stated to Randolph that he was willing that his company should take possession of the packing house; and install the necessary machinery therein and operate the same in consideration of annual rent equal to 6 per cent. on the cost of the packing house, plus the taxes and insurance, which, the defendant stated, would amount, approximately, to the sum of \$330 per year; that he proposed to Randolph that he would accept either cash or any machinery which might be installed in the plant for the purpose of operating it as in payment of rent; that this was, in effect, agreed to by Randolph; at any rate, the plaintiff's predecessor, after said proposition was made by

the defendant to Randolph, installed the equipment in the packing house; that thereupon the predecessor of plaintiff entered into the occupation of the building and operated the plant until the purported transfer by it of the equipment to the plaintiff, on the 1st day of March, 1916; that on or near the last-mentioned date the plaintiff entered into the possession of the packing house and operated the plant until the month of September, 1917, when it ceased further operation of and abandoned the packing house, leaving in the packing house, however, the equipment which its predecessor had installed therein, and not paying nor offering to pay the defendant money or cash as in payment of the rent for the use and occupation of the building. From that time until the time of the commencement of this action, to wit, December 19, 1919, the defendant himself operated the packing house.

The evidence, without conflict, shows that the machinery constituting the packing outfit, with the exception of a few movables, was attached to the building by means of bolts and nails. This machinery consisted of brushes, shafting, pulleys, elevator, sprocket wheels, the motive power, etc. As to the trucks and other movables connected with the operation of the plant, the defendant's witness, Webb, who was the foreman or overseer of the Rose street plant while operated by plaintiff and its predecessor, testified that, after the plaintiff had ceased operating the packing house, he had a conversation with the defendant in which the latter stated that, while he intended to retain the machinery attached to the building as in payment of rent for the use of the house, he claimed no interest in the "packing boxes and the trucks and other movable materials, including the shook, and would like to have it removed as quickly as possible," etc.; that he (Webb) thereupon "loaded up all that stuff, including the shook, paper, nails, trucks, stoves, and took the Marketing Company sign down," shipping all said articles to Naranjo, where the plaintiff was interested in a packing house.

[1] It should be added that there is no evidence of a specific agreement as to the term during which the lease should run, but from the testimony of the defendant that he proposed to the plaintiff's predecessor through its president, Randolph, that the rental would be upon the basis of \$330 per year, and that the plaintiff entered into the occupation of the building upon that proposition, although not expressly assenting to it, the conclusion or a finding would be justifiable that the term was for one year. Indeed, in the absence of any express agreement as to a determinate period during which the lease was to exist, the presumption would be that the hiring of the property was to be for one year from its commencement; there being no evidence that in the particular locality in

which the Rose street packing house is situated there prevails or has prevailed any usage on that subject. Civ. Code, § 1943. The lease, being verbal, could not be for a longer period than one year. Civ. Code, § 1624, subd. 5.

[2] As is to be understood from what has already been said, there was no agreement that the Randolph Fruit Company should or might remove the property affixed to the building, except upon payment to the defendant of the rental in money. The transaction, therefore, is governed by section 1019 of the Civil Code. *Merritt v. Judd*, 14 Cal. 60; *Pomerooy v. Bell*, 118 Cal. 635, 50 Pac. 683; *Conde v. Sweeney*, 16 Cal. App. 157, 116 Pac. 319. Said section 1019 reads as follows:

"A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

The situation, as it is presented by this record, is this: That the Randolph Fruit Company abandoned the premises and its right to the further possession thereof during the term of its lease, leaving the property in dispute still attached to the building, without paying or offering to pay the defendant the rental due in money. Under the terms of the agreement, therefore, the equipment, or so much thereof as was attached to the building by means of bolts, screws, and nails, thereupon became fixtures, and consequently the property of the defendant. Indeed, since the lease was from year to year, the tenancy of the Randolph Fruit Company was terminated on the expiration of the first year of its lease and by a renewal thereof at that time. With the termination of the lease at the end of the first year, the plaintiff not having paid the defendant the first year's rental in money, the right to remove the fixtures also terminated. *Merritt v. Judd*, 14 Cal. 60, *supra*; *Marks v. Ryan*, 63 Cal. 107; *Carlin v. Ritter*, 68 Md. 488, 13 Atl. 370, 6 Am. St. Rep. 474; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 578, 26 Am. Rep. 699; *Sanitary District v. Cook*, 169 Ill. 191, 192, 48 N. E. 461, 39 L. R. A. 369, 61 Am. St. Rep. 164, 165.

In view of this conclusion, the attempted transfer of the equipment, or so much thereof as was attached to the building, by the Randolph Fruit Company to the plaintiff, was obviously without legal force. The former, under the circumstances, was wholly without authority to make a transfer of that part of the equipment affixed to the building to a third party. The taking of possession of the packing house by plaintiff through the mere authority of the Randolph Fruit Company, without attornment by defendant, would be beyond the rights of said company. There was no express consent by the defend-

ant that the plaintiff should take possession of the premises; but, it may be granted, consent may be implied by the silence of the defendant or his failure to object to the plaintiff taking possession, in which case the plaintiff's tenancy would be by mere sufferance or at will. But in any event the mere taking of possession of the packing house by the plaintiff, whether with the consent of the defendant or not, could not have the effect of divesting the defendant of his ownership of the fixtures; they having become such before such possession was taken. In fact, the plaintiff appears to have recognized the right of the defendant to retain the equipment as fixtures, for, as seen, the latter himself operated the packing house with the equipment in question for over two years from the time that the plaintiff ceased to operate the packing house and abandoned the possession and its right to the possession thereof. Indeed, as the findings show, the defendant, in the month of April, 1917, gave notice to the agent of the plaintiff that he would thereafter retain and hold, as his own, the property in question, and the plaintiff thereafter took no steps to secure possession of the same, nor did it make any claim of ownership of said property until the commencement of this action.

[3] The foregoing is decisive of the case against the appellant. The findings and the judgment, however, are erroneous, in that there are thereby awarded to the defendant, in addition to those articles belonging to the equipment which were attached to the building, a number of movable articles used in connection with the operation of the plant, to wit, several trucks and a number of tables. These articles were shown by the evidence not to be attached to the building, and, of course, they could not become fixtures within the meaning of the law.

The judgment, in so far as it adjudges that part of the equipment which is attached to the building by means of nails and bolts to be fixtures, and therefore the property of the defendant, is affirmed, and that part of the judgment which awards the defendant the movables mentioned is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 781

WELCH v. ALCOTT et al. (Civ. 4010.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1923.)

1. Stipulations ⚭8—Proposed agreement signed only by part of litigants held binding on none.

A proposed agreement, signed by some of the parties to litigation, when refused by others, constitutes a mere offer to stipulate, and is of no binding effect on any party.

2. Appeal and error ⚭714(5)—Discussion of matters not within record may not be considered by court.

Discussion in briefs of matters upon which the record furnishes no light cannot be considered by the court.

3. Partnership ⚭344—Judgment of dissolution held unsupported by findings.

Conclusions of law and judgment in an action for dissolution of a partnership held unsupported by findings of fact to the extent of the valuation placed upon certain office furniture.

4. Partnership ⚭344—In action for dissolution, order for execution against fund in trustee's hands held improper.

In an action for the dissolution of a partnership, where it was conceded and appeared in the findings that a certain fund had been created and existed in the hands of a trustee, and that the issue was merely as to its division between the parties, no order in the judgment for execution against the property is warranted or proper.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Edmund Welch against Edward H. Alcott and others. From a judgment for plaintiff, certain defendants appeal. Judgment modified.

C. Elvon Musick, of Los Angeles, H. C. Allen, Jr., of Pasadena, and I. H. Prince, of Los Angeles, for appellant Title Insurance & Trust Co.

Clyde R. Burr, of Los Angeles, for appellant Alcott.

Prescott & Prescott, Frank C. Prescott, and Frank G. Fallon, all of Los Angeles, for respondent Welch.

Flint & MacKay, Wm. A. Bowen, Luther G. Brown, and James P. Clark, all of Los Angeles, for other respondents.

CRAIG, J. Appeal by defendants Edward H. Alcott and Title Insurance & Trust Company, a corporation, from judgment after a second trial between the parties, following a reversal by the Supreme Court and order remanding "for a new trial upon the issues as to the Hendricks deal only." Welch v. Alcott, 185 Cal. 731, 762, 198 Pac. 626, 639.

The plaintiff, and defendant Alcott were copartners until May 23, 1914, when an action for dissolution and accounting was instituted, and were engaged in establishing a townsite and selling real estate embracing what is known as Niland, in Imperial county, and described as the southeast quarter of section 4, township 11 south, range 14 east, San Bernardino meridian. The findings made at the former trial, as affirmed, recite that:

"The defendant Edward H. Alcott on the 13th day of March, 1914, granted and conveyed in trust to the defendant Title Insurance & Trust Company, a corporation, the said townsite here-

inbefore described, the said defendant Title Insurance & Trust Company being therein named as trustee to carry out the provisions of a certain declaration of trust of the same date, and being described as trust No. 3152, and that the said defendant, Title Insurance & Trust Company, a corporation, did, on the 13th day of March, 1914, execute a declaration of trust described as said trust 3152, whereby the said defendant Title Insurance & Trust Company undertook and agreed that the said townsite hereinbefore described should be improved, the cost of improvements paid out of a certain improvement fund therein provided for, and should hold the said townsite to sell the lots thereof at prices not less than those indicated in the schedule of selling prices attached to said declaration, and to receive amounts collected by the First National Bank of Brawley, and to disburse all moneys coming into the hands of said trustee in the manner provided in said declaration."

It was further found that of the personal property belonging to said partnership there was in the hands of said trustee, to the credit of the defendant Alcott, the sum of \$5,158.19 in cash.

One of the questions before this court arises from a state of facts related in the opinion of the Supreme Court, as follows:

"Appellant attacks the finding in the Hendricks deal, which is to the effect that a sale was attempted in the business of but no commission was made for the partnership. The complaint alleged the deal was made in the business of the partnership, and a commission of \$200 was earned 'and the same accounted for in the partnership.' The answer denies the deal was for the partnership, and alleges it was 'made by the plaintiff alone for his own account'; that appellant had nothing to do with it, nor did he claim or receive any part of the commission received by respondent. The commission does not appear in the accounting. Respondent testified the deal was made by him and Carroll Owen, and that he, respondent, got all the commission, and 'it was accounted for in the partnership.' Appellant's testimony follows the answer. The finding is that the partnership did not earn the commission. All the evidence, however, shows respondent actually received the commission and retained it. The finding is therefore contrary to the complaint and the evidence. It was developed in the direct examination of respondent that an action brought by Hendricks against him alone for the recovery of the commission on the ground of fraud was pending. It is not made to appear, however, whether this action is responsible for the finding. A new trial of this issue is necessary."

The trial court in due time accordingly proceeded to a hearing, at which time the previous findings and judgment, in conjunction with the opinion of the Supreme Court, were reviewed by the court and respective counsel, but no additional evidence was adduced. The court there announced:

"As I take it, this court at this time is bound by the decision of the Supreme Court that there was a copartnership. Whatever is tried now

is tried upon the law as established there. It is a copartnership. I take it the only two questions I can possibly see would be whether he did receive the \$200, and that is admitted; second, whether or not he paid it back."

It appears that the plaintiff, though claiming to have repaid the amount, offered to renounce credit therefor, and tendered the full sum of \$200, whereupon the court ordered that findings be prepared and served. The findings of fact as they appear in the record brought here include the following assets of the partnership:

"Dishes and tents; rug; office furniture; Owens notes, with First National Bank, \$3,000; cash belonging to said partnership, with trustee, Title Insurance & Trust Company, to credit of E. H. Alcott, now on hand, \$5,158.19."

Notwithstanding the remarks of the court and its findings, the conclusions of law recite that the office furniture is of the value of \$3,000, which amount is added to the assets found belonging to the partnership, and the judgment accords with the conclusions of law in this respect. Cash in the sum of \$3,725, which includes the Owens notes, is found to be in the hands of the First National Bank, thus making the total value of the personal property of the copartnership \$11,883.19. Liabilities in the sum of \$2,569.71 are deducted, leaving a balance of \$9,313.48, one-half of which, or \$4,656.74, is adjudged to be due each copartner. Certain credits due the defendant Alcott are then debited against the amount thus allowed the plaintiff, and it is finally adjudged and decreed that the share of the plaintiff is \$3,164.58.

Said judgment directs that the defendant Title Insurance & Trust Company render and account to the plaintiff for an equal one-half of all rights heretofore vested in defendant Alcott, since the latter was shown to be the trustor of the trust property held by said company. The judgment concludes:

"That execution issue hereon against defendants Edward H. Alcott, Title Insurance & Trust Company, a corporation, First National Bank, a corporation, in the sum of \$3,164.58, together with costs of retrial, amounting to \$5."

The trust company appeals from the judgment upon the ground that the previous judgment, as affirmed by the Supreme Court, did not authorize the trial court in holding it liable to the plaintiff to account as a trustee for any amount outside of the partnership assets, there being no finding that it was guilty of a breach of trust; that all it can be required to do is to execute the provisions of the trust, and pay the plaintiff his share when entitled thereto.

Defendant Alcott appeals from the judgment, and complains that the findings of fact and conclusions of law are materially different; that neither in the evidence nor in the findings is the furniture shown to be of any value, though this sum is in the conclusions

and judgment added to the true valuation of the assets, and plaintiff Welch allotted one-half of this greater amount, thus diminishing by \$1,500 the share of defendant Alcott. This defendant also complains of the judgment directing execution against him personally for the full amount of the share of the plaintiff. It was subsequently stipulated between all the parties, except the defendant Title Insurance & Trust Company, that no judgment be taken or execution issued against the First National Bank.

[1] The only response of the plaintiff and respondent upon this appeal is that the defendant Title Insurance & Trust Company entered into a like stipulation with him; but the Title Company replies that the same was not filed, because some of the parties to the cause declined to sign it. At all events, no such stipulation is before the court, and we cannot consider it, except, perhaps, as having a bearing upon the contention of plaintiff that because of this stipulation the defendant title company, if successful here, should not be allowed its costs herein as against him. Upon that point it is clear that a proposed agreement signed by some of the parties to the action constituted no more than a mere offer to stipulate, and when refused by the others it acquired no binding force upon any party.

[2, 3] The briefs of counsel contain much discussion concerning matters upon which the record fails to furnish any light, such as the service upon appellants by respondent of conclusions of law claimed to have been at variance from those which the court signed; also an alleged stipulation which it is admitted was never fully executed or filed. It is obvious that these matters cannot be considered upon this appeal. As the record exists we have a simple case of conclusions of law and a judgment unsupported by the findings, in that an item of \$3,000 appears in the former which is not to be found in the latter.

[4] The only additional question necessary for us to determine is with respect to that part of the judgment which directs that execution issue against the three defendants. It is a fact conceded in the record, not contested in any way, and appearing in the findings, that a certain fund had been created and exists in the hands of the title company, and that the dispute is merely as to its division between the plaintiff and the defendant Alcott. Under such circumstances the entire matter is within the jurisdiction of the court as one of equity to direct the trustee as to the distribution of the fund in its hands, and no order for execution against the property is warranted.

In accordance with these views it is therefore ordered that the superior court modify its judgment by eliminating therefrom the item of \$3,000, and also the provision direct-

ing execution against the defendants; and that appellants recover their costs on this appeal.

We concur: FINLAYSON, P. J.; WORKS, J.

64 Cal. App. 757

CLARK v. BOARD OF EDUCATION OF EU-REKA SCHOOL DIST. et al. (Civ. 2645.)

(District Court of Appeal, Third District, California. Dec. 17, 1923.)

1. Appeal and error ⇐856(2)—Dismissal after general order sustaining demurrer affirmed, if any ground of demurrer good.

If any ground of demurrer sustained by general order is good, a judgment of dismissal after failure to plead further should be affirmed.

2. Schools and school districts ⇐133—Amended statute as to employment and discharge of teachers held applicable to teachers theretofore elected.

Pol. Code, § 1609, as amended by Act June 3, 1921 (St. 1921, p. 1664), relating to the powers of school trustees in respect to employment and discharge of teachers, applies to teachers elected before, as well as after, the amendment became effective, in the absence of contract.

3. Mandamus ⇐154(5) — Teacher's petition for reinstatement must show possession of required certificate.

A petition for writ of mandate to compel reinstatement of a discharged school teacher must set forth the qualifications and legal requirements necessary to show the school trustees' authority to reinstate petitioner at the time of his demand therefor, including his possession of the teaching certificate required by Pol. Code, § 1609, par. 5, subd. (a), as amended in 1921 (St. 1921, p. 1664).

4. Mandamus ⇐154(5)—Petition to compel reinstatement of teacher held defective as not showing nature of employment.

A petition for writ of mandate to compel reinstatement of a school teacher, discharged in alleged violation of Pol. Code, § 1609, as amended by Act June 3, 1921 (St. 1921, p. 1664), *held* bad on demurrer, as not showing whether petitioner was employed as a substitute, probationary, or permanent teacher, or as a principal or principal teacher.

5. Mandamus ⇐154(5)—Petition to compel reinstatement as permanent teacher must show employment for two years in district employing at least eight teachers.

A petition for writ of mandate to compel reinstatement of a teacher, discharged in alleged violation of Pol. Code, § 1609, as amended by Act June 3, 1921 (St. 1921, p. 1664), *held* defective as not alleging his employment for two consecutive school years, in a district employing at least eight teachers, which is made a prerequisite to employment of permanent teachers by par. 5, subd. (e), an allegation that eight teachers were employed being referable to the date of filing the petition.

6. Mandamus $\Rightarrow$ 154(5)—Petition to compel reinstatement of teacher must show how long petitioner was employed or whether employment was unlimited as to time.

A petition for writ of mandate to compel reinstatement of a teacher discharged in alleged violation of Pol. Code, § 1609, as amended in 1921 (St. 1921, p. 1664), must show when and for how long petitioner was employed, or whether such employment was with or without limitation as to time.

7. Schools and school districts $\Rightarrow$ 141(6)—Discharged teacher's demand for reinstatement must correspond with position to which elected.

A discharged teacher's demand for reinstatement must correspond with the position to which it is claimed he was elected.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Mandamus by G. Fred Clark against the Board of Education of Eureka School District, and the members thereof. From a judgment of dismissal, plaintiff appeals. Affirmed.

Metzler & Mitchell, of Eureka, for appellant.

E. W. Wilson and James W. Henderson, both of Eureka, for respondents.

PLUMMER, J. Plaintiff appeals from a judgment of dismissal entered after sustaining the defendants' demurrer to the plaintiff's second amended complaint.

The action is for a writ of mandate, requiring the defendants as the board of directors of the Eureka school district to reinstate the plaintiff as a teacher in the schools of said district.

After certain formal matters being set forth, the complaint of the petitioner alleges as follows, in paragraph 3 thereof:

"That petitioner has been successfully employed as a teacher by the Eureka school district for more than two consecutive school years, to wit, for four consecutive years, and was and is a permanent teacher, and employed in one of the public schools in the Eureka school district, viz. in the Winship school, in which said school are employed at least eight teachers under a principal, who has and does devote at least two hours per day to supervision in said Winship school, a school under his control. That petitioner has been such teacher during all that period, and has not resigned from said position, nor made any request that his resignation be accepted. That petitioner was employed prior to the commencement of the school year of 1918-19, and assumed his duties as a teacher in said Winship school in the capacity of principal, and performed such services as such principal teacher of said Winship school continuously during each school year thereafter, up to and until the 23d day of June, 1922."

It further appears from the complaint that on or about the 19th day of May, 1922, the

petitioner made a request in writing for leave of absence. To this request the board of directors replied as follows:

"My Dear Mr. Clark: At an adjourned meeting of the board of education held May 19, 1922, your communication was read. No action was taken upon your communication for the reason that the board of education reached the conclusion that the principal of the high school should also be the principal of the Winship school, and it might be inferred in granting the leave of absence that you would be entitled to reinstatement at the end of your leave of absence. Your communication was therefore placed on file.

"Mr. Geo. C. Jensen was appointed principal of the Winship school.

"Respectfully yours,

"Geo. B. Albee,

"Clerk Board of Education."

In paragraph 6 of the complaint the plaintiff's demand for reinstatement is alleged as follows:

"That thereafter, to wit, on or about the 7th day of August, 1922, petitioner made a demand for reinstatement, and did on the 28th day of August, 1922, present himself at said Winship school, prepared to go on with his work as such permanent teacher, and was thereupon by order of the defendants, ejected therefrom, and informed that he could not assume such position. That defendants failed and refused and do now fail and refuse to reinstate petitioner or permit him to assume the duties as such permanent teacher, or otherwise."

In paragraph 7 of plaintiff's complaint it is next alleged that the plaintiff was dismissed without cause, etc. Paragraph 7 is in the following words:

"That your petitioner was dismissed and discharged by said defendants from said position in said Winship school without just cause or any sufficient or legal reason, and without any hearing of any kind, or trial as in such cases provided, and is now refused such position by defendants illegally and contrary to law. That petitioner has all the qualifications of such teacher, and the certificates required by law, and has actually been acting as such teacher for the period of four consecutive school years last past, continuously, and at all times while school was in session. That defendants acted without any just cause or sufficient reason, and contrary to law and procedure."

Paragraph 9 alleges the amount of salary formerly received by the petitioner, to wit, \$2,400 per year, payable in ten monthly installments. To this complaint the defendants interposed both a general and a special demurrer. The language of the general demurrer is as follows:

"That said second amended petition does not state facts sufficient to authorize or justify the issuance of an alternative, or any writ of mandate therein."

The special demurrer contains eight different specifications, three of which only we

deem it necessary to consider, to wit, the fifth, sixth, and seventh specifications, which are as follows:

"(5) That it cannot be ascertained therefrom whether the petitioner was employed as a substitute, a probationary, or a permanent teacher.

"(6) That it cannot be ascertained therefrom when or for how long a time the petitioner was employed or whether or not such employment was with or without limitation as to time.

"(7) That it cannot be ascertained therefrom whether the said petitioner was employed as principal, as a principal teacher, or as a permanent teacher."

[1] Just what grounds of demurrer were sustained by the court does not appear from the transcript. The order is general and allowed the plaintiff ten days within which to file a third amended petition. This he declined to do, and judgment was thereupon entered. If any ground of demurrer alleged is good, then the judgment of the trial court should be affirmed.

[2] On the part of the petitioner, it is contended that section 1609 of the Political Code, as amended by an act approved June 3, 1921 (St. 1921, p. 1664), governs this case. On the part of the respondent it is strongly insisted that the section of the Political Code referred to prior to its amendment is the law which must be applied in determining the questions here presented. In the case of *Kennedy v. Board of Education of the City and County of San Francisco*, 82 Cal. 483, 22 Pac. 1042, it was held that an amendment to section 1793 of the Political Code, forbidding the removal of teachers except for cause, applied to all teachers elected by boards of education, whether they were elected before or after the enactment of the amendment.

If teachers are elected without any contract having been entered into between the teachers and the board of trustees, we see no reason why the decision in the *Kennedy* Case would not be applicable to the amended section 1609, approved in 1921, and hence its provisions would apply to teachers elected both before and after the date of that amendment becoming effective.

With this view of the law we will examine the plaintiff's petition, and judge it according to the provisions of the amended section.

[3-5] The general ground of demurrer is that the plaintiff's second amended petition does not authorize the issuance of an alternative writ of mandate. Subdivision (a) of paragraph 5 of section 1609 of the Political Code, as amended in 1921, provided that boards of trustees shall have power to employ as teachers only persons who hold legal certificates for teaching, in full force and effect, and on file at the time of such appointment in the office of the county school superintendent, etc. The plaintiff's petition alleges in paragraph 3 that the petitioner was employed prior to the commencement of the school year of 1918-19 and assumed his duties as teacher in said Winship school in the

capacity of principal and performed services, etc., until the 23d day of June, 1922. And in paragraph 6 that thereafter, to wit, on or about the 7th day of August, 1922, petitioner made a demand for reinstatement and did on the 28th day of August, 1922, present himself at said Winship school, prepared to go on with his work as such permanent teacher, etc. Then in paragraph 8, as hereinbefore stated, it is alleged that petitioner has all the qualifications of such teacher, and the certificates required by law, etc. The petition was filed on the 20th day of November, 1922. It thus appears that the petition does not show that the petitioner had any of the necessary qualifications or that he had the certificate required by law, either at the time of his alleged employment as teacher, or at the date of his demand for reinstatement as a teacher in the schools of the Eureka school district. It is a necessary prerequisite in a petition for a writ of mandate that the petitioner set forth all the qualifications and legal requirements necessary to show that at the time of the demand for reinstatement in the schools the board of school trustees would have the legal right and authority to make such reinstatement, and if he fails to do so his petition is necessarily defective, and a demurrer thereto would consequently be properly sustained. The fifth ground of special demurrer is that it cannot be ascertained from the petition whether the petitioner was employed as a substitute, a probationary, or a permanent teacher. By an examination of paragraph 3 of plaintiff's complaint it will be seen that this specification is also well taken. It does not allege in what capacity the plaintiff was employed. In this particular attention may also be called to subdivision (e) of the fifth paragraph of section 1609 of the Political Code as to the qualifications of permanent teachers. It is there specified:

The board shall have power "to classify as permanent teachers all persons who shall have been successfully employed as teachers by the district for two consecutive school years at the time of classification; provided, also, that the two years of successful service shall have been performed in a district employing at least eight teachers under a principal who shall devote at least two hours per day to supervision in the school or schools under his control.
* * *

The language of the petition in paragraph 3, attempting to comply with the provisions of the subdivision of the Code just referred to, is as follows:

"And employed in one of the public schools in the Eureka school district, namely, in the Winship school, in which said school are employed at least eight teachers, under a principal who has and does devote at least two hours per day to supervision," etc.

It will thus be seen that the petition is entirely silent as to whether the district had

employed the requisite number of teachers during the two years' period. The mere allegation that there are employed eight teachers is referable in point of time to the date of the filing of the plaintiff's petition, to wit, November, 20, 1922. In other words, the petition uses words of present application and does not comply with the Code. It is required that such number of teachers must have been employed under the supervision of a principal for the past period of at least two years.

[6] The sixth ground of special demurrer is that it cannot be ascertained from the petition when or for how long a time the petitioner was employed or whether or not such employment was with or without limitation as to time. That this must appear in the petition is readily seen by an examination of the cases of *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Marion v. Board of Education*, 97 Cal. 606, 32 Pac. 643, 20 L. R. A. 197, having to do with the same questions with which we are now dealing. In the *Kennedy* Case the election was without reference as to limitation, and, therefore, by the court held to come under the terms of section 1793 of the Political Code, as amended in 1881 (St. & Amdts. 1881, p. 46) prohibiting the removal of teachers without cause, etc. In the *Marion* Case the election was for one year or for a definite period, and the court held that, even if such an election was void, nevertheless the statute did not apply, and the power of removal on the part of the school trustees was not taken away. In the *Marion* Case the decision in the *Kennedy* Case is taken up and considered, and the distinction to which we are here referring pointed out, and the application which should be made set forth, just as we are making it here. The *Kennedy* Case also sets forth the necessary allegations as to qualifications in holding certificates to which we have heretofore referred.

[7] The seventh ground of special demurrer is that it cannot be ascertained from the petition whether petitioner was employed as principal, as a principal teacher, or as a permanent teacher. This ground also appears to be well taken, as will appear by a rereading of paragraph 3 of plaintiff's second amended petition with this subject in mind. This defect becomes more apparent with the petitioner's demand for reinstatement, as his demand for reinstatement must correspond with the position to which it is claimed the petitioner had theretofore been elected.

From the foregoing the conclusion necessarily follows that the defendants' demurrer to the petitioner's second amended complaint was properly sustained. The petitioner was given ample time within which to amend, but declined to do so, and, under such circumstances, we see no reason for disturbing the judgment of the trial court.

It is therefore ordered that the judgment be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; HART, J

64 Cal. App. 722

SMITH, Superintendent of Streets, v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY. (Civ. 4614.)

(District Court of Appeal, Second District, Division 1, California. Dec. 12, 1923.)

1. Courts $\S$ 117—Recital in minutes as to stipulation by attorneys held not conclusive as to such fact.

On application for writ of prohibition to prevent further proceedings upon a temporary restraining order, on the ground that the order was ex parte and was made without notice to petitioner and without a return day, for showing cause why the order should not continue pending the action, in violation of Code Civ. Proc. $\S$ 527, recital in minutes that the order was made pursuant to a stipulation in which petitioner's counsel had joined, held not conclusive as to such fact.

2. Courts $\S$ 117—Affidavits held to prove that attorney did not stipulate to granting of temporary restraining order, notwithstanding recital in minutes.

On application for writ of prohibition to prevent further proceedings upon a temporary restraining order, on the ground that the order was ex parte and without notice to petitioner and without a return day for showing cause why the order should not continue pending the action, in violation of Code Civ. Proc. $\S$ 527, affidavits in support of petition held to prove that petitioner's attorney did not stipulate to the granting of restraining order, notwithstanding recital in minutes that attorney did so stipulate.

3. Prohibition $\S$ 10(2)—Granting of temporary restraining order ex parte, without notice and without making matter returnable within 10 days from date of order, held in excess of court's jurisdiction.

Under Code Civ. Proc. $\S$ 527, providing that in case a temporary restraining order shall be granted ex parte, without notice, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on a day not later than 10 days from the date of such order, a court in granting a temporary restraining order, ex parte, without notice and without making the matter returnable on a day within 10 days from the date of the order, exceeded its jurisdiction and will be prevented by writ of prohibition from taking further proceedings upon the temporary restraining order.

Application for writ of prohibition by Frank C. Smith, as Superintendent of Streets of the City of East San Diego, Cal., against the Superior Court of the State of California in and for the County of San Diego. Writ granted.

Crouch & Sanders, Sloane & Sloane, and F. G. Blood, all of San Diego, for petitioner.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for respondent.

CONREY, P. J. Petition for writ of prohibition. There is now pending in the superior court of the county of San Diego an action entitled *People of the State of California, on relation of Charles H. Harris, Plaintiff v. City of San Diego, a Municipal Corporation, and the City of East San Diego, a Municipal Corporation.* Said action is in the nature of quo warranto, wherein the plaintiff seeks to establish the invalidity of certain proceedings for the consolidation of the city of East San Diego with the city of San Diego.

The petitioner herein alleges that on the 1st day of November, 1923, by virtue of proceedings duly instituted and perfected for the improvement of certain streets in the city of East San Diego, it had become the duty of petitioner, as superintendent of streets of that city, to enter into a contract for said street improvement work under an accepted bid therefor; that on the 1st day of November, in the quo warranto action, the superior court issued a temporary restraining order whereby petitioner is restrained and commanded to desist and refrain from entering into any contract for or on behalf of said city of East San Diego or of the officers thereof or of the taxpayers, citizens, or electors thereof, and to refrain from instituting, carrying on, perfecting, or completing any proceeding for the improvement of any street or other public place in said city of East San Diego, "save and except in proceedings in which a contract has actually been signed on behalf of said city by the superintendent of streets, and a vested right has accrued, during the pendency of the above-entitled action, and until a final determination thereof." Petitioner alleges that the said temporary restraining order was made on the ex parte application of the city of San Diego, and was not based upon a verified complaint or upon affidavits showing the existence of any grounds therefor, nor had any complaint or affidavit showing any grounds for the issuance of said injunction been filed in the said action or served upon the petitioner; that no notice of any application for the said temporary restraining order was made upon petitioner nor any one in his behalf, and petitioner had no notice of said application; that said temporary restraining order was made without a return day upon which petitioner might appear to show cause why the same should not continue for the pendency of the action, and that the said restraining order was made in violation of the provisions of section 527 of the Code of Civil Procedure, wherein it is provided that no temporary restraining order made ex parte and without notice shall be granted,

unless the matter shall be made returnable not later than 10 days from the date of such order; that petitioner has made application to the superior court for the dissolution of said injunction, and that said court has refused to hear or determine the said matter or modify or amend the said restraining order; that said restraining order is made in excess of the jurisdiction of the superior court, and it is the legal duty of petitioner to sign a contract with the California Construction Company for the said street, and that, unless the said superior court be directed to refrain from further proceedings in connection with said temporary restraining order, said court will attempt to punish petitioner for performance of his legal duty as a violation of said unlawful order. The petition is duly verified.

A return to the alternative writ issued herein has been filed, duly verified by S. M. Marsh, one of the judges of said superior court. In its return, respondent denies that said temporary restraining order was made ex parte or without notice or stipulation or appearance by petitioner's attorney, or the said city of East San Diego; alleges that said order was made pursuant to a stipulation made in open court by the attorneys for the petitioner and by Arthur T. French, city attorney of the city of East San Diego and attorney for said petitioner, and by the city attorney and assistant city attorney of the city of San Diego, which stipulation was duly entered on the minutes of the superior court for November 1, 1923. A copy of the minute order, annexed to the return, is entitled in two actions; one being said quo warranto action and another being an action entitled *Arthur Tocque, Plaintiff, v. City of San Diego et al., Defendants.* It recites the appearance of Sloane & Sloane, Crouch & Sanders, and F. G. Blood for the plaintiffs, and the appearance of S. J. Higgins, city attorney for the city of San Diego, and Arthur T. French, city attorney for the city of East San Diego, as attorneys for the defendants. The minute order further states:

"By stipulation of Sloane & Sloane and F. G. Blood, Crouch & Sanders objecting, and S. J. Higgins, city attorney for city of San Diego, it is by the court ordered that an injunction pendente lite, in the case of *Harris v. City of San Diego et al.* be made, as more fully appears in the signed order filed herein. * * * On motion of counsel for defendants herein, it is by the court ordered that the motion of the city of San Diego for a modification of the temporary restraining order in the case of *Tocque v. City of San Diego et al.* be denied, and that by stipulation of respective counsel a temporary restraining order be granted in the case of *Harris v. City of San Diego et al.*, as more fully appears in the signed order filed herein."

Respondent herein denies that said court has refused to hear or determine the application for dissolution of said injunction, and al-

leges the fact to be that said application is now pending in said quo warranto action, and that said motion of petitioner to modify and amend said restraining order will be heard and determined at such time as the matter may be presented for determination by the attorneys for the parties to said quo warranto action; that further proceedings in said action, including the motion to modify and amend said restraining order, have been continued upon the request and with the consent of the respective parties therein.

In said return, respondent further alleges that there is now pending in said superior court the said quo warranto action; that the petitioners in said action are represented therein by Crouch & Sanders, Sloane & Sloane, and F. G. Blood (attorneys for petitioner and his attorneys), and that defendants are represented therein by S. J. Higgins, city attorney of the city of San Diego, and Arthur F. H. Wright, deputy city attorney of that city, as attorneys for the city of San Diego, and by Arthur T. French, city attorney of the city of East San Diego, as attorney for the said city of East San Diego; that on the 1st day of November, 1923, before Hon. S. M. Marsh, judge of said superior court, personally appeared Hugh A. Sanders, of the firm of Crouch & Sanders, Harrison G. Sloane, of the firm of Sloane & Sloane, and F. G. Blood, on behalf of said petitioner, and S. J. Higgins, Arthur F. H. Wright, and M. R. Thorp, attorneys for the city of San Diego, and Arthur T. French, city attorney and attorney for the city of East San Diego, and in open court agreed and expressly stated to the court, in the hearing and presence of each other, that a restraining order should issue out of the superior court restraining the defendant, the city of East San Diego, and its officers from certain acts specified in the restraining order set forth in the petition for the writ of prohibition herein; that pursuant to said stipulation so made in open court and entered on the minutes of the court, the judge of said court, the said S. M. Marsh, ordered the preparation of such restraining order; that thereafter Hugh A. Sanders, one of the attorneys for said petitioner, and Stanley T. Howe, deputy city attorney, on behalf of S. J. Higgins, city attorney of the city of San Diego, appeared before Judge Marsh and presented to him for his signature a restraining order; that said restraining order so presented was then and there modified in certain particulars, and with the consent and in the presence of said attorneys said restraining order so modified was signed by the said judge, same being the same restraining order attached to the petition for writ of prohibition herein; that said restraining order was signed pursuant to said stipulation and with the consent and at the request of the attorneys of record in said quo warranto action, and that by reason of said facts pe-

tioner and his attorneys are estopped at this time to dispute the legality or validity of said restraining order or the jurisdiction or authority of respondent court to make and issue the same.

At the hearing on the return to the writ herein, petitioner presented counter affidavits, made respectively by petitioner Frank C. Smith, by A. Ray Sauer, Jr. (who is president of the board of trustees of the city of East San Diego), by Arthur T. French, by F. G. Blood, by Harrison G. Sloane, and by Hugh A. Sanders. It was agreed that the evidence upon the issues raised by said return should consist of the said verified return and the said affidavits.

The affidavit of Frank C. Smith states that neither Crouch & Sanders, Sloane & Sloane, nor F. G. Blood had authority to represent him in any capacity prior to the 9th day of November, 1923, at which time he employed said attorneys to present his petition for writ of prohibition herein; that affiant had no knowledge of any stipulation or application relating to said restraining order in the quo warranto case until after said order had been made; that neither affiant nor any other officer, agent, or employee of the city of East San Diego, or any attorney for said persons, consented to the making of said restraining order.

The affidavit of A. Ray Sauer, Jr., states that neither of said attorneys last above named were attorneys representing or authorized to represent the said city of East San Diego nor any officer or agent thereof in connection with said quo warranto action, but that in fact said attorneys and all of them were and are attorneys for the plaintiff in said action, in which the city of East San Diego is a defendant; that Arthur T. French is the city attorney for the city of East San Diego and for all of its officers, agents, and employees; that neither of said attorneys other than French had any authority to represent the city of East San Diego nor any officer thereof in said actions in the superior court on the 1st day of November, 1923, or to make any stipulation in such actions on their behalf; that the said temporary restraining order was not made pursuant to any stipulation or agreement by any authorized attorney for the city of East San Diego or any officer thereof.

The affidavit of Arthur T. French states that he is, and at all times mentioned herein was city attorney of the city of East San Diego and the only attorney at law authorized to represent the said city of East San Diego and all of its officers, agents, and employees in connection with said quo warranto action; that affiant was present on the 1st day of November, 1923, before the said Judge Marsh, when the quo warranto action and another action entitled *Tocque v. City of San Diego* were heard; that Judge Marsh refused to recognize Hugh A. Sanders

as attorney for the plaintiff in said quo warranto action and only recognized the firm of Sloane & Sloane as attorneys in said action; that a stipulation was presented in said case by Harrison G. Sloane, and agreed to by the city attorney of the city of San Diego; that thereafter the court took up the said case of *Tocque v. City of San Diego*, in which said Sanders made an application for a continuance until the 5th day of November, and offered to stipulate that as far as the said Tocque was concerned, if the city of San Diego would consent to said continuance, an order might be made restraining the city of East San Diego and its officers from signing any new contracts until the said 5th day of November, and no longer, but that the city attorney of the city of San Diego refused to agree thereto and opposed said continuance; that after argument thereon the court granted said application for a continuance and ordered that a restraining order be made restraining the officers and employees of the city of East San Diego from signing or entering into any new contracts until Monday, the 5th day of November, and no longer, when the matter could be heard; that affiant did not consent to the making of said order, nor have any part or connection therewith, and was not an attorney in said suit, but was merely in the courtroom as a spectator; that thereafter, on the same day, the said Judge Marsh signed a temporary restraining order in another action, to wit, the said quo warranto action, and made the said temporary restraining order run during the pendency of said action, the same being the restraining order attached to the petition for writ of prohibition herein; that neither affiant nor any officer, agent, or employee of the city of East San Diego or any attorney for them had any knowledge of the making of said order, but that the said order was signed and made upon the ex parte application of the city attorney of the city of San Diego and without notice to affiant or to any of the said officers, agents, or employees of the city of East San Diego, and was not made in the case of *Arthur Tocque*; that thereafter, on the 5th day of November, upon the further hearing of the *Tocque* Case, the matter was heard before Hon. W. P. Carey, judge of said superior court, and that the judge of said court, before going into said matter, requested Judge Marsh to come to his courtroom and state the status of the said temporary restraining order made on the 1st day of November; that thereupon Judge Marsh stated in the presence of Judge Carey, Sanders, Sloane & Sloane, and Blood, that he understood that Mr. Sanders had agreed that a restraining order might be made in the *Tocque* Case, restraining the city of East San Diego from entering into any contract until Monday, the 5th day of November, when the matter would be finally heard; that later Sanders and a deputy city attorney for San

Diego presented themselves in his chambers, at which time the said deputy city attorney requested that the restraining order be made in the case of the People of the State of California instead of the *Tocque* Case, and made for the pendency of the action, and that Mr. Sanders objected thereto and stated his objection over the telephone to the city attorney, but that, notwithstanding such objection, he, the said judge, had signed the said order.

The affidavits of Blood, of Harrison G. Sloane, and of Sanders are substantially like that of French, so far as the principal transactions which occurred on the 1st day of November are concerned.

[1] The most sharply disputed question of fact is that relating to the consent of Mr. French to the making of the restraining order in the quo warranto case. As he was present in the courtroom when that case and the *Tocque* Case were taken up for consideration on the 1st day of November, the court seems to have assumed that he took part in the stipulation, and made its recitals accordingly in its minutes. But we think that the recitals in the minutes are not conclusive of the matter in this proceeding, where the jurisdiction of the court to make the order depends upon actual consent having been given by French as attorney for the city of East San Diego and its officers, of whom the petitioner here was one.

[2] We find that in fact the primary and principal discussion before the court related to the granting of a restraining order to continue until November 5th in the *Tocque* Case. Mr. French was not an attorney in that case, and remained silent, as a mere bystander. It was determined by the court at that time that a restraining order should issue in the *Tocque* Case, to remain in force until November 5th, when there would be a further hearing of that matter. Later in the day Mr. Sanders and Mr. Howe, a deputy city attorney of the city of San Diego, alone appearing before the judge in chambers, and the city of East San Diego not being represented, the restraining order, which is the subject of the present proceeding, was made in the quo warranto case instead of the *Tocque* Case, and was made to continue in force "pending the determination of said action." The order signed by Judge Marsh is entitled in the quo warranto case alone and does not recite the appearances by counsel or any stipulation by them. The minute order which preceded the signed order, and which is entitled in both cases, does recite the appearance of French as city attorney for the city of East San Diego, and does state "that by stipulation of respective counsel" the temporary restraining order is granted in the quo warranto case. But by reason of the facts to which we have referred concerning Mr. French's relation to the transaction, we think that the recital of his appearance as set forth

in the minute order should be construed as referring only to the quo warranto case. Nevertheless, we find that in fact French did not stipulate to the granting of any temporary restraining order in that case, or at all.

[3] Since the injunction order in the quo warranto case was granted without notice to petitioner or to the city of East San Diego and without their consent and without consent of their attorney, it necessarily follows that the power of the court to restrain the act sought to be enjoined was restricted to the period of 10 days specified in the statute, and was further restricted by the requirement that the matter be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court would admit of, but not later than ten days from the date of such order. Section 527, Code Civ. Proc. The situation presented by the facts of this case is similar to that considered by this court in *Kelsey v. Superior Court*, 40 Cal. App. 229, 236, 180 Pac. 662, 665, where this court said:

"The provisions of section 527 provide a complete scheme in a proper case for the obtaining of a writ of injunction, and such scheme must be deemed the measure of the power to be exercised by trial courts in the matter of provisional injunctions. *United Railroads v. Superior Court*, 170 Cal. 755, Ann. Cas. 1916E 199, 151 Pac. 129. The effect of the order made was to nullify the terms of the statute, which are so plain and unambiguous that no room exists for interpretation. *German Sav., etc., Society v. Aldrich*, 5 Cal. App. 215, 89 Pac. 1063."

In view of the facts and the law as hereinabove stated, we are of the opinion that in making and issuing its said restraining order in the quo warranto case the superior court exceeded its jurisdiction.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 15

YOUNG v. ROCHA et al. (Civ. 2615.)

(District Court of Appeal, Third District, California. Dec. 20, 1923.)

1. Sales $\S$ 170—Where purchaser furnished date of shipment as required by order, seller could not modify it and offer performance at later date.

In an action for breach of contract based on defendant's refusal to accept a shipment of cocoanut meal, the original order providing for the giving of shipping dates later, where it appeared that when defendant furnished a shipping date plaintiff did not deliver on such date, *held*, that the date given became a part of the order as though originally inserted therein, so that plaintiff by responding that he would ship "about" such date could not modify the date of

shipment, and, time being of the essence of the contract, delay in performance was not within Civ. Code, $\S$ 1492, providing for offer of performance after date fixed.

2. Sales $\S$ 175—Refusal to accept shipment of goods after time ordered not a cancellation of contract of sale.

By refusing to accept a shipment of goods after the time fixed by order, the buyers did not cancel or rescind the contract, but stood thereon and based their rights on its terms.

3. Sales $\S$ 176(3)—Purchasers held not to waive right to object to time of delivery by giving other reasons for refusing to accept goods purchased.

Where purchasers of meal refused to accept shipment thereof after the time specified by contract, they did not waive their right to object to the delay in performance merely because they gave other reasons for refusal to accept, in view of Code Civ. Proc. $\S$ 2076, and of Civ. Code, $\S$ 1501.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by R. Young against Manuel Rocha and others for damages for breach of contract. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred L. Dreher, of San Francisco, and Puter & Quinn, of Eureka, for appellant.

Metzler & Mitchell, of Eureka, and O. A. Wuolle, of San Francisco, for respondents.

FINCH, P. J. The jury returned a verdict in favor of defendants, and judgment was entered accordingly. Plaintiff moved for a new trial, which was denied. This appeal is from the judgment. Plaintiff is the assignee of Lewis Simas Jones Company. For convenience, the company will be hereinafter referred to as plaintiff. The action is for damages alleged to have resulted from defendants' breach of the following contract:

"Order No. 225. Date, June 15, 1920.

"Ship to Farmers' Store at Arcata, Cal., * * * 2 cars copra meal per ton 47 f. o. b. S. F. Shipping dates to be given later. To be taken before Dec. 30th, 1920.

"Farmers' Store, by Manual Rocha, Mng."

By mutual consent of the parties, the words "Eldorado meal" were later substituted in the order for the words "copra meal." September 6, 1920, Rocha wrote plaintiff:

"I * * * ask you to send me a car on the first of October and the other car on the first of December."

September 8th plaintiff wrote in reply:

"We have your letter of September 6, and in accordance with your instructions will ship you a 30-ton car of Eldorado Cocoanut Meal about the 1st of October, and a 30-ton car about the 1st of December."

In anticipation of receipt of the car of meal at the time ordered, the Farmers' Store sold a car of Eldorado meal to one of its customers to be delivered October 1st. October 4th this customer canceled the order because the meal was not delivered to him at the time ordered. Rocha thereupon, on October 4th, wrote plaintiff:

"This is to advise you, if you have not already sent the car of cocoanut, not to send it for the reason that I cannot sell it because the price has gone down so much that I have not been able to sell any that I have had on hand and from what I see the price is going down lower and lower. Therefore I ask you to please cancel my order and let me know what you decide to do."

The plaintiff received this letter October 6th, at which time it had not yet made the shipment, nor did it at any time make any shipment to the defendants. The plaintiff made no reply to the letter, but placed the matter in the hands of its attorneys, who wrote Rocha, according to the latter's testimony, "and says there is a carload to ship, and if I don't accept I have to stand the damages." October 18th Rocha again wrote plaintiff, saying:

"Once more I write you asking you what can be done so that I do not lose so much on the cocoanut which I ordered, because I asked you to cancel not so much on account of the price but because I could not sell it on account of Nilsen selling cheaper than I could buy it. * * * See what you can do, so that you do not lose and I do not lose because I do not want a lawsuit with anybody."

The parties not having succeeded in reaching an adjustment of the controversy, the present action was commenced March 16, 1921. The complaint alleges that "defendants refused to accept said Eldorado meal, and canceled the whole contract." The answer alleges that when plaintiff "failed and refused to carry out said contract * * * and failed to ship said Eldorado Cocoanut Meal on October 1, 1920, * * * defendant could not use or sell said Eldorado Cocoanut Meal, and refused to accept the same at a date later than said contract called for."

[1] Appellant contends that plaintiff was not under obligation to ship the meal on the 1st of October because in its letter of September 8th it stated that it would ship it "about the 1st of October," and that the "words on or about do not mean exactly." Plaintiff's letter of September 8th, however, is no part of the contract between the parties. The original order provided for "shipping dates to be given later." This provision gave the defendants the option to fix the dates of shipment at any time before the end of the year. When defendants thereafter fixed the date for the first shipment at October 1st, that date became a part of the order as much as if it had been originally

inserted therein. Plaintiff's letter of September 8th could not have the effect of modifying the date of shipment so fixed by defendants any more than it could have changed any other term of the order. Of course, defendants were required to give reasonable notice of the time selected for shipment, but it cannot be successfully contended that a notice of 24 days was not reasonable.

Time was of the essence of the contract, though not expressly so declared therein. Section 1492 of the Civil Code provides:

"Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other persons, in the meantime."

In this case the delay in performance was not "capable of exact and entire compensation," nor was any offer of such compensation made. In a case not unlike this in some respects it is said:

"In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons." *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

For numerous other cases in point, see 13 *Rose's U. S. Notes*, Rev. Ed. 36, and *L. R. A.* 1916E, 940.

[2] At the time defendants refused to accept the meal they did not state that their refusal was based on plaintiff's failure to deliver the same at the time directed. Appellant argues that—

"Where a contract is attempted to be canceled and the person attempting said cancellation bases his right thereto on certain objections, all other objections which might have been pleaded at the time or stated are thereby waived."

By refusing to accept the shipment after the time ordered the defendants did not cancel or rescind the contract, but stood upon it, and based their rights upon its terms. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 14, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[3] Plaintiff's position can be no more strongly stated in its favor than by assuming that on the 6th day of October it expressly offered to deliver the car of meal to defendants. Section 2076 of the Code of Civil Procedure provides:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it."

Section 1501 of the Civil Code provides:

"All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

In *Allen v. Chatfield*, 172 Cal. 60, 69, 156 Pac. 47, 51, it is said that—

Section 1501 "provides in effect that the failure to object does not waive a defect which the person making the offer could not then obviate if objections were then made thereto. Section 2076 of the Code of Civil Procedure is not in direct conflict with this provision. The provisions of the different Codes, with relation to each other, must be construed as parts of the same statute. Pol. Code, § 4480. This provision of section 1501 is, therefore, to be construed as a qualification of section 2076."

It is obvious that on the 6th of October the plaintiff could not have obviated the defect of failure to deliver on the 1st of the same month.

In the bill of exceptions, certain rulings of the court admitting testimony are assigned as errors. The evidence was properly admitted under the pleadings as they stood at the time of such admission. Plaintiff was thereafter permitted to amend the complaint in such manner as to eliminate the issues to which such testimony was directed. Plaintiff's remedy was a motion to strike out the testimony or to request an instruction to disregard it. In any event, the plaintiff suffered no prejudice from the admission of the testimony because, viewing the whole evidence in the light most favorable to plaintiff and disregarding the testimony to which objection was made, the court would have been warranted in instructing the jury to find for defendants.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

64 Cal. App. 773

BAKER v. BAKER. (Civ. 4459.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1923.)

1. Appeal and error ⇨1071(1)—Judgment not reversed for defective finding or want of finding, if evidence supports judgment.

A judgment will not be reversed because of a defective finding or even for a want of a finding, if the evidence is such that the trial court must have made one of such a character as to support the judgment.

2. Divorce ⇨203—Wife's allegations held to present issue as to her ability to defend action without financial assistance from husband.

In a divorce action, in which the wife sought attorneys' fees under Civ. Code, § 137, her al-

legations that she "had no occupation, and no means of support, and is at present relying upon her relatives for support, and has no money or funds with which to pay counsel or costs of this action," held to present the issue of whether the wife was without financial assistance and would be unable from her own property to defend the action.

3. Divorce ⇨226 — Evidence held to show wife's inability to defend action without financial assistance from husband.

In a divorce action, in which the wife sought attorneys' fees under Civ. Code, § 137, evidence held to show that the wife was unable to defend the action without financial assistance from husband.

4. Divorce ⇨228—Order allowing wife counsel fees not reversed for failure of court to make finding as to wife's dependence on husband in view of evidence.

In a divorce action, in which the wife sought attorneys' fees under Civ. Code, § 137, an order allowing the wife attorneys' fees will not be reversed because of court's failure to make a finding that the wife was unable from her own property to defend the action and needed the financial assistance of the husband, where the evidence was such that the court could not have found otherwise.

5. Divorce ⇨222—That hearing on wife's motion for attorneys' fees did not take place prior to trial did not deprive court of jurisdiction.

Where wife's motion for attorneys' fees under Civ. Code, § 137, in divorce action was made in due time to have been heard before the trial of the case on its merits, the fact that the hearing and decision did not take place prior to the trial did not deprive court of jurisdiction to direct the husband to pay attorneys' fees.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for divorce by Arthur G. Baker against Helen Baker, in which the defendant filed a cross-complaint. From an order directing the plaintiff to pay defendant counsel fees on denial of divorce to both parties, plaintiff appeals. Affirmed.

Amend & Amend, of Los Angeles, for appellant.

George P. Adams and A. J. Sherer, both of Los Angeles, for respondent.

CRAIG, J. This action is one for divorce. The defendant filed a cross-complaint, and the court denied each party a decree. In the judgment it was ordered that the plaintiff pay the defendant \$200 as counsel fees in the action, and the appeal is from this order.

Prior to trial the defendant moved the court for an order under section 137 of the Civil Code that she be allowed her counsel fees. It was then stipulated by the parties that decision upon such motion be made at the time of the trial. In the judgment no

finding appears as to the property of either party. The finding and order of the trial court upon this issue is as follows:

"Wherefore it is ordered, adjudged, and decreed that plaintiff pay to the defendant the sum of \$200 as and for counsel fees in said action; said sum to be paid in five monthly payments, the first payment to be made during the month of April, 1921."

Appellant insists that section 137, Civil Code, does not authorize the allowance of counsel fees to the wife unless it be established and found that without financial assistance from her husband she would be unable from her own property to defend the action.

[1-4] It is a familiar rule that a judgment will not be reversed because of a defective finding, or even for want of a finding, if the evidence is such that the trial court must have made one of such a character as to support the judgment. *Hulen v. Stuart* (Cal. Sup.) 217 Pac. 750; *Krasky v. Wolpert*, 134 Cal. 338, 342, 66 Pac. 309. In the instant case the issue as to the wife's financial ability to defend was properly presented by the pleadings. The cross-complaint alleges:

"That the cross-complainant and cross-defendant had no occupation and no means of support, and is at present relying upon her relatives for support, and has no money or funds with which to pay counsel or costs of this action."

A similar allegation is contained in the answer. The only evidence upon the question of the defendant's financial worth was her own testimony. She testified as follows:

"I have a little cash on hand; I had to borrow to live. I owe about \$200 which I borrowed from George P. Adams and gave my note to him for it. I have no business or occupation. I have never worked for a living. I have no employment now. I have not fitted myself for a position. I am living with my brother, Dr. and Mrs. Sherer."

It is true that in addition to this Mrs. Baker stated that she was the devisee of an interest in an estate which, however, was undistributed, and that she had no information as to when her share would be received by her. This, of course, did not constitute an available fund with which to defend or prosecute the action. Had the trial court made any finding it is difficult to see how it would have been possible for it to have found otherwise than that without financial assistance in providing counsel fees the respondent would have been unable to defend against appellant's charges of cruelty, subsequently determined to have been entirely unfounded, from her own property.

[5] It is suggested by appellant that as the respondent was actually able to conduct her case without the payment of counsel fees ul-

timately ordered, this in itself establishes the fact that such an order was unnecessary. The motion for the allowance was made in due time to have been heard before the trial of the case on its merits. The fact that the hearing and decision upon the motion did not take place prior to the trial does not remove it from the court's jurisdiction as provided in section 137, Civil Code. *Farrar v. Farrar*, 41 Cal. App. 452, 182 Pac. 989.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

64 Cal. App. 770

**PEOPLE v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY
et al. (Civ. 4567.)**

(District Court of Appeal, Second District, Division 1, California. Dec. 17, 1923. Hearing Denied by Supreme Court Feb. 14, 1924.)

1. Statutes $\S$ 158, 159—Repeal by implication not favored; showing necessary to establish repeal by labor act stated.

Repeals by implication are not favored, and to establish same it must appear from the later act that it was intended to take the place of or repeal the former, or that the two are so inconsistent that force and effect cannot be given to both.

2. Criminal law $\S$ 260(4)—Right of appeal by state from justice's court not lost by failure to take in open court.

Under Pen. Code, $\S$ 1466, 1467, providing that appeals from justice's court may be taken as provided in title 9, pt. 2 (sections 1235-1265), "except that such appeal must be taken within fifteen days after judgment is rendered," the state does not lose its right of appeal from an order dismissing a prosecution in a justice's court by failure to announce the taking of same in open court, notwithstanding section 1240, which is included in title 9, part 2, and provides that an appeal may be taken by the people by announcement in open court when the order is made.

Application by the People of the State of California for a writ of mandate to be directed to the superior court in and for the county of Los Angeles and Sidney N. Reeve, Judge thereof. Writ granted.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Edward T. Bishop, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondents.

Haas & Dunnigan and J. J. Wilson, all of Los Angeles, amici curiæ.

HOUSER, J. This is an application for a writ of mandate for the purpose of directing the superior court in and for the county

of Los Angeles and Sidney N. Reeve, as a judge thereof, to hear and determine certain appeals from the justice's court of Los Angeles township.

The essential facts surrounding the matter appear to be that in two several actions pending before the justice's court of Los Angeles township, in which certain defendants were charged with a violation of the provisions of section 626f of the Penal Code in that they unlawfully had deer and deer meat in their possession, a justice of the peace (in all respects regularly, but in the absence of the district attorney or any deputy district attorney representing the people) had sustained demurrers in each of said cases, and, in addition thereto, had ordered each of the actions dismissed. Later, on the same day, a deputy district attorney appeared before the justice of the peace in his chambers and gave oral notice of appeal from each of the said judgments of dismissal, and still later, and on the same day, filed in the justice's court a written notice of appeal in each of said actions; following which the defendants therein served upon the district attorney their several notices of motion to dismiss each of said appeals on the ground that the court had no jurisdiction, and that the appeals were not taken as provided by law, which said motions were and each of them was granted by the judge of the superior court.

In view of the fact that it is conceded that mandamus is the proper remedy herein the only question which this court need determine is the one suggested by counsel for petitioner: Were the appeals in these cases taken at the proper time?

The right of appeal in such cases is provided for by section 1466 of the Penal Code, and section 1467 of the Penal Code contains the provision with reference to the time within which the appeal may be taken, as follows:

"The appeal may be taken, heard and determined as provided in title nine, part two of this Code, except that such appeal must be taken within fifteen days after the judgment is rendered or within ten days after the order is made from which the appeal is taken."

It will be noted that the effect of said section is to make the right of appeal from the justice's court of the superior court identical with the right of appeal from the superior court to the Supreme Court, except that in appeals from the justice's court to the superior court the appeal "must be taken within fifteen days after the judgment is rendered." It is contended by respondents that because under section 1240 of the Penal Code (which is included within title 9, part 2, of the Penal Code, to which section 1467 regulating the appeals from the justice's court to the superior court relates) it is provided that in appeals from the superior court to

the Supreme Court "an appeal may be taken by the people by announcing in open court at the time the order is made that the people appeal from the same"; and because of the further fact that said section 1240 was enacted at a later date than was said section 1467—an implied repeal as to section 1467 resulted. The argument of respondents is based upon the history of the legislation in the matter. Section 1466 of the Penal Code, which provides for appeals from justices' courts, has remained unaltered since its amendment in 1880; and until 1907, when the exception that such appeals "must be taken within fifteen days after the judgment is rendered," etc., was added to section 1467, said section 1467 merely provided that such appeals might be taken as provided in title 9, part 2, of the Penal Code. Up to 1907 section 1239 of title 9, of part 2 of the Penal Code required that appeals from a judgment in a superior court to the Supreme Court must be taken within one year after its rendition, and, by section 1240 of the Penal Code, the appellant was required to file with the clerk of the court a notice of such appeal and to serve a copy of such notice on the adverse party. In 1907 section 1239 was amended so that thereafter appeals by the defendant from a judgment of the superior court to the Supreme Court had to be taken within 90 days from the rendition of the judgment, and it was at the same legislative session that section 1467 of the Penal Code was amended as heretofore stated. Section 1240 was not amended in its present form until 1909.

It is urged that the amendment of 1907 to section 1467 of the Penal Code was a limitation applicable to appeals to superior courts upon the time which was otherwise prescribed by section 1239 and which would apply in the absence of the limitation.

The fact that section 1466 of the Penal Code provides that appeals from the justice's court to the superior court may be taken in like cases and for like causes as appeals may be taken to the Supreme Court, and that section 1467 of the Penal Code provides that such appeals may be taken as provided in effect in sections 1239 and 1240 of the Penal Code, might be conclusive were it not for the special exception in section 1467 that justice's court appeals from the judgment must be taken within 15 days after the judgment is rendered. In 1907, when such exception was enacted, section 1239 was also amended so that appeals from a judgment in a superior court might be taken within 90 days after the rendition of the judgment. The conclusion is irresistible that the Legislature intended that the time for taking appeals from the justice's court should be differentiated from the time for taking appeals from superior courts. Having thus expressly separated the time for taking such respective appeals, it

should now require strong and explicit language to reunite them in that regard.

[1] That repeals by implication are not favored is a well-known principle of law. The intention to do so must be unmistakable, or there must be a direct statutory enactment to accomplish that result. In substance, it has been decided by our Supreme Court many times that, in order for a subsequent act to repeal a former, it should appear from the last act that it was intended to take the place of or to repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both. In the *Matter of Yick Wo*, 68 Cal. 304, 9 Pac. 139, 58 Am. Rep. 12, and cases there cited; *Christy v. Board of Supervisors*, 39 Cal. 10; *Capron v. Hitchcock*, 98 Cal. 432, 33 Pac. 431. The principle applicable herein is covered in the cause of *Bateman v. Colgan*, 111 Cal. 586, 44 Pac. 238, where the court says:

"It is an established rule * * * that the law does not favor a repeal by implication, but that, where there are two provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. And, where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions."

In the case entitled *Matter of Petition of Johnson*, 167 Cal. 142, 138 Pac. 740, it is held (syllabus) that—

"Repeals of statutes by implication are not favored. A later act, containing no repealing clause, does not repeal a prior act except so far as the two are clearly inconsistent, or unless it is manifest that the latter act was intended as a substitute for the former in all respects and to cover the entire subject-matter to which both relate. In other words, the language of repeal, to be effective, must be of unmistakable meaning."

See, also, *Fox v. Townsend*, 2 Cal. App. 193, 83 Pac. 272; *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 18; *People v. Pacific Improvement Co.*, 130 Cal. 442, 62 Pac. 739; *People v. Sands*, 102 Cal. 12, 36 Pac. 404; *Thompson v. Board of Supervisors*, 111 Cal. 553, 44 Pac. 230; *Banks v. Yolo County*, 104 Cal. 258, 37 Pac. 900.

[2] We have here two statutes relating to the same subject-matter; one of them by its exception applies strictly to appeals from the justice's court, and the other, as originally enacted and without reference thereto by any other statute, applies solely to appeals from the superior court. They are not irreconcilably inconsistent one with the other. There is no express repeal of the statute first enacted, and it may stand without do-

ing violence to the later statute. In such circumstances it must be held that the right of the people to appeal herein was not lost until after the expiration of 15 days after the judgment was rendered.

It is also contended that under the provisions of section 1387 of the Penal Code the effect of the dismissal of the actions by the justice of the peace was to produce a bar to any other prosecution for the same offense. But the appeal being effective, neither the question of the legality nor the effect of such dismissal is one for determination by this court in this proceeding. If the superior court should conclude that the dismissal of the actions by the justice's court was illegal, necessarily any question of bar by reason of the provisions of section 1387 of the Penal Code would be eliminated, as would also any question of "once in jeopardy," which is also suggested by counsel as being proper for this court to determine at this time.

It is ordered that the writ issue as prayed.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 764

BASSI et al. v. WALDEN. (Civ. 2640.)

(District Court of Appeal, Third District, California. Dec. 17, 1923.)

1. Sales §168(2)—Purchaser's right of inspection should be exercised at time and place of delivery.

Ordinarily, a purchaser's right of inspection should be exercised at or before the time, and at the place, of delivery.

2. Evidence §450(8)—Contract held not so definite as to preclude parol proof of intention as to time and place of inspection.

A seller's agreement to load stakes sold for shipment by the buyer, and "to stand all shortages and culls," held not so definite and certain as to preclude parol proof of intention as to the time and place of inspection, though the natural inference, in the light of the situation and the surrounding circumstances, was that the culls were to be rejected while the stakes were being transferred from piles to the cars.

3. Sales §359(1)—Buyer's right to credit for culls rejected at point of destination of shipments by him held not established as matter of law.

In an action for the price of stakes delivered to and shipped by defendant, whose answer was only a general denial, evidence as to shipment of culls, which defendant contended were to be rejected at the points of destination, held insufficient to show, as a matter of law, contrary to the court's finding, that defendant was entitled to any credit therefor, irrespective of the place of inspection intended.

4. Continuance —44—Motion held properly denied as not supported by affidavit or other proof.

Where defendant presented no affidavit or other proof in support of his motion for a continuance to take depositions, the record did not disclose the names of the desired deponents or the facts to which they would testify, and there was no showing as to why their depositions were not taken before trial, the motion was properly denied under Code Civ. Proc. § 595.

5. Evidence —171—Parol evidence held admissible to prove shipment of carload of stakes by buyer.

In an action for the price of stakes delivered to defendant on board cars for shipment to purchasers from the latter, parol testimony as to shipment of a carload by defendant held admissible as against his objection that the bill of lading, a contract to which plaintiff was not a party, was the best evidence; Code Civ. Proc. §§ 1937, 1938, relating to proof of the contents of writings, being inapplicable.

Appeal from Superior Court, Humboldt County; H. L. Preston, Judge.

Action by A. Bassi and others, copartners, doing business as A. Bassi & Co., against E. D. Walden. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. H. G. Weaver and Metzler & Mitchell, all of Eureka, for appellant.

Mahan & Mahan, of Eureka, for respondents.

FINCH, P. J. The plaintiffs were given judgment, and the defendant appeals.

February 17, 1921, plaintiffs entered into a contract with the defendant reading as follows:

"The parties of the first part do hereby agree to deliver 200 M A #1 6-ft stakes at the Shively switch. Delivery to be made as soon as possible. Price to be paid—\$52 per M delivery at switch, or \$53.30 delivery on cars. One-half to be paid on delivery at switch, balance to be paid 10th month following shipment."

Under this contract either four or five carloads of stakes were delivered to and shipped by defendant during the early part of 1921, the evidence being conflicting as to the number of cars. In addition to the stakes shipped, the plaintiffs, up to January 20, 1922, had piled 165,000 stakes south of the depot at Shively. On the latter date the parties entered into the following agreement:

"Agreement entered into between Bassi & Co. of the first part and E. D. Walden, party of the second part. The party of the first part agrees to load 165,000 stakes, price to be paid fifty-one dollars (\$51.00) f. o. b. car, and agrees to stand all shortage and culls, load promptly, and load light stakes 165,000 stakes now piled south of depot. Party of the second part agrees to make payments 10th of month, following shipment, full payment or settlement

March 15th, 1922. This is new agreement to cover former contract made in February or March. Amount 200,000."

It is admitted that 161,200 stakes were shipped under the second contract. It appears that the stakes were shipped by defendant to various persons in the San Joaquin valley, where they were used as grape stakes.

[1] Appellant contends that it was the understanding of the parties that the culls were to be rejected and deducted at the points of destination in the San Joaquin valley and that plaintiffs were to stand the loss of the stakes so rejected. Ordinarily a purchaser's right of inspection should be exercised at or before the time of delivery and at the place of delivery. *J. K. Armsby Co. v. Blum*, 137 Cal. 553, 70 Pac. 669; *Whitaker v. Dunlap-Morgan Co.*, 44 Cal. App. 140, 186 Pac. 181; *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, and note, p. 804. There are, of course, well-recognized exceptions to the rule, as pointed out in some of the authorities cited.

[2] Defendant's place of business was in Humboldt county. The stakes were delivered to him at Shively, and title undoubtedly passed to him at that place. The stakes were on the ground at the time the second contract was executed. Interpreting the contract in the light of the situation of the parties and the surrounding circumstances, the natural inference from the stipulation that plaintiffs were "to stand all shortage and culls" is that the culls were to be rejected during the transfer of the stakes from the piles to the cars. The term, however, is not so definite and certain as to preclude parol proof of the intention of the parties as to the time and place of inspection.

[3] The evidence shows, without substantial conflict, that there is a custom among the buyers of Humboldt county to pay for stakes purchased upon the basis of the count made at the places to which the buyers ship the stakes, after deducting the culls rejected at such places. The defendant testified that the second contract was executed with the express understanding that the plaintiffs were to "be responsible for the shortage and culls at the other end of the line." There is no direct contradiction of this testimony. Witnesses for the plaintiffs testified that either the defendant or his brother, W. M. Walden, acting for defendant, inspected the stakes as they were loaded on the cars; that when asked if they were graded "good enough" they would say "they were fine"; that, when asked "if we were culling them good enough," W. M. Walden "said they were fine"; that W. M. Walden went over each car as it was loaded every day; that he was there every day and went into each car and looked at the stakes. The whole contract price was \$10,378.73, and,

while the defendant paid the plaintiffs a total of \$8,550.50 prior to the completion of the shipments, he made no claim that culls had been shipped until after the last shipment. Whatever the place of inspection intended by the parties, the evidence shows that the culls were thrown out before shipment, and there is no evidence that any culls were shipped, except as hereinafter stated.

The men who loaded the stakes on the cars were experienced loaders. They "load nearly all the stakes loaded from Shively * * * for all the people around there." In loading plaintiffs' stakes they culled out from 5,000 to 6,000 of them. They threw out the culls in loading from the piles to the wagon and again in transferring from the wagon to the cars. They inspected the stakes "pretty close," would see "just about" every stake. The defendant testified that he was at the point of destination when a car, No. 88373 containing 8,000 stakes, was received, and that 1,800 of them were rejected as culls. The evidence does not show that any of plaintiffs' stakes were shipped in a car of that number, but that 8,000 of their stakes were shipped in car No. 88673 on March 7, 1922, and that five different cars contained 8,000 stakes each. A Mr. Carter seems to have had charge of the loading and shipment from Shively of stakes belonging to defendant and not involved in this action. Relative to the 8,000 stakes contained in car No. 88373, the defendant testified:

"This car came in to me. * * * I saw the car was billed out by Carter, and I wired back to my brother to tell Carter not to load any more culls in the car. At the time I thought Carter billed it out and at the time I thought that it was my car, * * * but come to find out it belonged to Gianoni and Bassi & Co. and I sold it to another party at a loss of \$10 a thousand. * * * Q. Were the culls sold? A. I got two cents apiece for them. * * * Q. You never reported to Gianoni or Bassi & Co.? A. We never even deducted that; I have reported. Q. You did not deduct it? A. No, sir; I thought we would agree on that after I got back here. * * * We never deducted on our report. Q. Then you are making no claim for those now? A. There is 1,800. * * * Q. And you made no deduction for this? A. No."

From the foregoing testimony it is uncertain whether defendant at the trial claimed credit for the 1,800 culls. The answer consisted of a general denial which, of course, was sufficient, but it did not particularly point out the defense relied on. In view of the nature of the answer and the uncertainty of the testimony, the defendant should have clearly made known to the trial court whether he claimed credit for the 1,800 culls. From the discrepancy between the number of the car containing the culls and that of any car loaded by plaintiffs, together with defendant's testimony that he "saw the car was billed out by Carter," may have caused the court to con-

clude that the stakes therein were not loaded by plaintiffs. It further appears from the foregoing evidence of defendant that he assumed ownership of the culls and sold them and made no deduction by reason thereof. The evidence in this regard is not so clear and certain as to establish, as a matter of law, contrary to the finding of the trial court, that defendant was entitled to any credit on account of the 1,800 culls. There is no other evidence tending to show that culls were included in any of the shipments.

[4] The defendant attempted to show the number of culls rejected at the points of destination by the returns received by him from his purchasers at such points. The record does not show what these returns disclosed. The court sustained plaintiffs' objection to the admission of the evidence. Counsel for defendant thereupon asked for a continuance to enable him to take the depositions of the persons to whom shipments had been made for the purpose of showing the number of stakes which had been rejected as culls. At the close of the evidence he renewed the motion for a continuance. The motion was denied, and appellant contends that the court abused its discretion in denying the motion. The defendant did not present any affidavit or other proof in support of his motion. The record does not disclose the names of the persons whose depositions were desired or the facts to which they would testify. Neither was there any showing as to why the depositions of such persons had not been taken prior to the trial.

"A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." Code Civ. Proc. § 595.

[5] Plaintiffs produced bills of lading showing the shipments of four cars of stakes under the first contract. A witness for plaintiff was then asked:

"After these stakes had been shipped was there another carload shipped by Mr. Walden from your stakes?"

Counsel for defendant objected as follows:

"We object to it on the ground it is not the best evidence; the best evidence is the record of the railroad company for shipping those."

The objection was overruled, and several witnesses testified that the carload of stakes in question was shipped. No contention is made, nor could any be made successfully, that the evidence produced, if admissible, is not sufficient to show that the carload of stakes was shipped. The contention is that the court erred in admitting parol testimony to prove the shipment. The question in issue was whether the stakes had been delivered to defendant on the car and the number

thereof, not the contents of the bill of lading. The best and secondary evidence rules are not applicable to the admissibility of evidence on that issue. The bill of lading was a contract between the defendant as shipper and the railroad company as carrier, and the plaintiffs were not parties to that contract. If the controversy were between the shipper and the carrier, the rule contended for might be applicable. Appellant relies upon the provisions of sections 1937 and 1938 of the Code of Civil Procedure, relating to proof of the contents of writings. As stated, there was no attempt to prove the contents of the bill of lading but the number of stakes shipped, and the sections relied on have no application to the question.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

65 Cal. App. 9

Ex parte SOUZA. (Cr. 746.)

(District Court of Appeal, Third District, California. Dec. 20, 1923.)

1. Criminal law §238—Evidence held to show probable cause for believing defendant guilty.

Evidence that defendant had been issued a license to conduct a soft drink parlor, and that a person acting as bartender therein sold intoxicating liquor to customers on request, showed probable cause for believing defendant guilty of a violation of the prohibition law, within Pen. Code, § 1487, subd. 7, so as to authorize the magistrate in holding him.

2. Intoxicating liquors §168—When principal liable for acts of agent in selling liquor.

The mere selling of intoxicating liquor by an agent is not sufficient to warrant a conviction of the principal; but, if the circumstances are such that it may be inferred that the sale was made with the consent or knowledge of the principal, then he is equally guilty with the agent, and may be held criminally liable.

3. Criminal law §560—"Probable cause" defined.

Probable cause means having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

Application by Jack Souza for a writ of habeas corpus against the Superior Court of Sacramento County. Writ discharged.

Neil McAllister and Clifford A. Russell, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and J. J. Henderson, Dist. Atty., and Wm. V. Cowan, Asst. Dist. Atty., both of Sacramento, for respondent.

PLUMMER, J. On the 5th day of October, 1923, the petitioner was bound over to the superior court of the county of Sacramento by the police judge of the city of Sacramento to answer the charge of selling liquor in violation of what is generally known and called the Wright Act (St. 1921, p. 79). The petitioner seeks his discharge herein on the ground that he was held to answer for such alleged offense without probable cause, basing his petition upon subdivision 7 of section 1487 of the Penal Code.

The testimony, as set out in the transcript, shows the following state of facts: During the month of July, 1923, the defendant applied to the proper officers of the city of Sacramento for and obtained a license for conducting a soft drink establishment at 218 L street, in the city of Sacramento; that this license was in full force and effect at the time of the alleged offense for which petitioner was arrested; that on or about the 3d day of September, 1923, at about 7:30 p. m., two officers visited the establishment just referred to, and found in the place a bar behind which was a man engaged in dispensing soft drinks. The two officers referred to requested that they be served with something stronger than soft drinks, and, in response to such request, each of said officers was served with a drink of liquor known as and called jackass brandy. A portion of the drink so served was retained by the officers, and upon being analyzed was found to contain 26.26 per cent. of alcohol by volume, which is considerably more than the quantity allowed by law.

At the time the officers visited the place of business referred to the defendant was not present, and the charge against him is founded upon the theory that the principal, under such circumstances, is chargeable for the act of his agent, and that the circumstances tend to show that the agent was acting within the scope and authority of his employment, and therefore with the consent of the principal.

[1, 2] The question before the court is not whether the evidence in this case is sufficient to warrant a conviction, but simply whether there is sufficient testimony to justify the committing magistrate in coming to the conclusion that probable cause existed for believing the defendant guilty. That the crime was committed by the bartender is without question, and the only fact remaining, Is there sufficient evidence to indicate that he was acting in the capacity of the defendant's agent, and not simply on his own responsibility? The law seems to be well settled that in such cases the mere sale of intoxicating liquor by an agent is not sufficient, in and of itself, to warrant a conviction of the principal; but, if the attendant circumstances are such that the court or

jury may reasonably infer that the sale was made with the consent or knowledge of the principal, then, and in that case, he is equally guilty with the agent and may be held criminally liable.

In the first place, as we have seen, the testimony shows that the petitioner applied for and had issued to him and was in the possession of a license to conduct a soft drink establishment at 218 L street, in the city of Sacramento, county of Sacramento, at the date of the alleged offense. Evidence that defendant had previously applied for or obtained a license to sell liquor at the place in question is admissible as tending to show him to be the keeper or proprietor of the place. *Commonwealth v. Sullivan*, 156 Mass. 229, 30 N. E. 1023; *Commonwealth v. Andrews*, 143 Mass. 23, 8 N. E. 643; *Commonwealth v. Brown*, 124 Mass. 318. Whether such testimony is sufficient to establish the fact of proprietorship beyond a reasonable doubt is wholly immaterial upon this inquiry, or upon the inquiry conducted by the committing magistrate; it is, however, testimony tending to show the fact of proprietorship, and therefore measures up to the requirement of the statute specifying probable cause.

Now, let us reason a little on the question of probabilities. According to the usual course of business, the proprietor of an establishment is the owner, who places others in charge thereof. It is possible that the man denominated by the witnesses as a bartender, as the one who dispensed drinks, was an interloper; but that conclusion is not probable. It is also possible that the bartender in charge of the establishment, for which we have seen another held a license to conduct the same, and therefore may be held to be the proprietor, was doing business upon his own responsibility, and not upon the responsibility of the proprietor. But this again is not probable. It is possible that the bartender brought the jackass brandy to the place of business, which the testimony tends to show was conducted by another, and kept the brandy there for sale for his own personal benefit; but this again is not probable. The usual and ordinary course of business is for the agent, clerk, or bartender, or by whatever name the person may be known, to sell those articles at the place of business that have been supplied by the proprietor thereof. Unless there is something appearing to the contrary, we think it reasonable to conclude that the usual and ordinary course of business has been followed, and that, under such circumstances, the requirement of the Penal Code has been met.

In *Knight v. Commonwealth*, 194 Ky. 563, 240 S. W. 40, in considering a somewhat similar case, the Supreme Court of Kentucky used the following language:

"It cannot be questioned that a principal can be subjected to penal prosecution and punish-

ment for an offense against the penal or criminal law of the state committed by his agent acting by his authority or approval, or within the scope of his employment. Nor is it necessary to prove express consent of the principal to the agent's illegal act. The assent of the former may be shown by any competent evidence to that effect; and proof of the fact that the illegal act was committed by the agent in the principal's place of business and in the conduct of his business has been held sufficient, in most circumstances, to make out a prima facie case of implied authority."

The facts in that case are strikingly similar to those in the case at bar, to wit:

"It appears from the testimony of the two witnesses named that the appellant owns and conducts a store in the village of Knightsburg, Muhlenburg county, in which are kept and sold such articles of general merchandise as are usually handled in a village store. Schmidt and Blythe in July or August, 1921, went together to the store, and, upon entering the former, in an open manner and in an ordinary tone of voice, made known to a young man in charge of the store, and then standing behind one of its counters, that he wished to purchase a quart of whisky, whereupon the man thus addressed produced from behind the counter a glass fruit jar containing a quart of 'moonshine' whisky, which in the presence of Blythe he sold and delivered to Schmidt at the agreed price of \$5, which sum the latter did not at that time pay, but then agreed to pay later. Following his purchase of the whisky Schmidt carried it away from the store accompanied by Blythe, but he failed to state, nor was he asked, whether he afterwards paid for it, or, if so, to whom the payment was made. Though Schmidt and Blythe positively testified that the man from whom the former purchased the whisky was in charge of the appellant's store, both professed to be unacquainted with him, and claimed that his name was unknown to them. Both also testified that they and the vendor of the whisky were the only persons in the store when the sale of the whisky took place."

[3] This case was decided in April, 1922, and was before the court upon a judgment of conviction, and, while the judgment was reversed on account of an error in the instructions given by the court, the Supreme Court of Kentucky, nevertheless, held that the trial court was correct in refusing to instruct the jury to bring in a verdict of not guilty on the testimony just referred to. It will be seen that the sale of the whisky in the Knight Case was made at an ordinary country store, where articles of merchandise were kept, as is common in establishments of that kind.

In *Elliott v. State*, 19 Ariz. 1, 164 Pac. 1179, the proprietor of a soft drink establishment was held liable for the sale of liquor by his agent, or the one in charge of the establishment. In that case it was held that the principal would not be liable unless the sale was made by his direction or knowingly assented to, or acquiesced in by him, but that such knowledge, direction or acquiescence might

be shown by the circumstances. It appears in that case that the real testimony upon which the defendant was held was the fact of sales made by the agent or the person called the bartender, both before and after the sale of the offense charged in the information. This is for the purpose of showing the course or conduct of business. In Ann. Cas. 1912A, 1109, are collected a large number of cases on the subject of the liability of a principal for the illegal sale of intoxicating liquor by his servant, one line of authorities holding that, in the absence of an express statutory provision to the contrary, a person licensed by the state to sell intoxicating liquors is not criminally liable for illegal sales made by a servant without authority and against his positive instructions; and also another line of authorities holding that a licensee is absolutely liable for illegal sales of liquor made by his servant, and that his instructions to the servant not to make such sales are immaterial on the question of his liability. These cases are all arising after judgment of conviction in the trial court, and necessarily differ in principle from the question with which we are now dealing. In the cases which we have cited, the liability of the principal for the act of the agent depended upon whether there was testimony sufficient to show the principal guilty beyond a reasonable doubt. With this we are not concerned. It is only, Does the testimony which we have referred to raise a probability of the defendant's guilt? The fact that the courts are so evenly divided upon whether such testimony does or does not show the defendant's guilt beyond a reasonable doubt is certainly sufficient to justify the holding that such testimony does raise a reasonable probability of the principal's guilt. The Kentucky case is but a trifle stronger, if any, than the evidence introduced against the petitioner herein, and in that case the Supreme Court held that the trial court was not in error in refusing to direct an acquittal. If such testimony is sufficient to go to the jury and support a verdict it is surely sufficient to justify a committing magistrate in holding that probable cause has been shown. Probable cause has been defined as "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." Following the usual and ordinary course of business there was sufficient testimony to induce in the mind of the committing magistrate the belief that the man who held a license for the establishment conducted at 218 L street, in the city of Sacramento, county of Sacramento, was a proprietor; that the person found in charge thereof and acting as bartender was placed there by him; that the goods being sold were articles of merchandise placed there for that purpose by the pro-

prietor; and that whatever was done by the person so placed in charge was at the instance, knowledge, and acquiescence of the owner thereof. We therefore conclude, even though we are satisfied that the prosecuting officers might by the introduction of a little more evidence have obviated this proceeding, that probable cause has been shown, and that the petitioner's application for discharge herein should be denied; and it is so ordered.

Writ discharged.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 709

ROBINSON v. McABEE. (Civ. 2634.)

(District Court of Appeal, Third District, California. Dec. 12, 1923.)

1. Elections $\S$ 285(1)—From the affidavit and statement of grounds of election contest held that it sufficiently appears two precincts named were within township.

In an election contest for justice of the peace, where in affidavit and statement of grounds of contest which stated the parties were opposing candidates in a certain township and that illegal votes were cast in two specified precincts, the affidavit was sufficient as against general demurrer to show that such precincts were within the township.

2. Elections $\S$ 287—Question whether precincts included within township not raised in contest by general demurrer.

In election contest wherein the affidavit and statement of grounds alleged that illegal votes were cast in A. and C. precincts in a township, and the prayer of the complaint was for a recount in these precincts, a general demurrer did not raise the question whether the two precincts were embraced within the township.

3. Elections $\S$ 293(3), 295(1)—Record of minutes of board of supervisors of election held admissible and prima facie evidence as to facts therein stated in election contest for justice of the peace.

In an election contest for the office of township justice of the peace, the minutes of the board of supervisors containing statement of votes received by all candidates was admissible and its contents prima facie correct as to facts therein set forth, including the number and names of the precincts of the township.

4. Elections $\S$ 293(3)—Requiring voter not legally qualified to disclose name of person voted for not error.

In an election contest requiring a voter, not legally qualified, to disclose the name of the person for whom she voted for the office, was not error.

5. Elections $\S$ 72—Registered voter held not legally qualified when she had not been a resident of county for 90 days at time of election.

Though a voter was registered as such before a general election, she was not legally

qualified when, prior to and at the time of the election, she had not been a resident of the county for 90 days as required by Const. art. 2, § 1.

6. Witnesses ⇨306—Right to decline to give testimony on ground that it would incriminate is personal.

The right of a witness to decline to give testimony because it may tend to establish crime against witness is wholly personal.

7. Witnesses ⇨306—Compelling witness to testify over her objection because incriminating not prejudicial to rights of contestee in election contest, and not to be availed of by him.

In an election contest the court's action in compelling a witness, not qualified to vote and not a party of the contest, to state for whom she voted as against her objection that her testimony would tend to incriminate her, was not prejudicial to contestee's rights, and could not be availed of by him.

8. Elections ⇨293(3)—Rule as to right of voter to preserve the secrecy of his ballot applies to qualified voters only.

The rule as to the right of a voter to preserve the secrecy of his ballot is restricted to electors who have legally qualified to vote, and does not apply to voters not qualified at the time of casting their ballots.

9. Elections ⇨295(1)—Trial court's conclusion that disqualified voter's ballot was for contestee held justified by her testimony.

Testimony of disqualified voter held to justify trial court's conclusion that she cast her ballot for contestee.

10. Elections ⇨293(3)—Circumstantial evidence resorted to, if necessary, to prove disqualified voter voted for particular candidate.

Circumstantial evidence may be resorted to, if necessary, to prove that a disqualified voter has cast his ballot or voted for a particular candidate at a particular election.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Election contest by O. H. Robinson against S. T. McAbee. Judgment for contestant, and contestee appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.
M. H. Iversen, of Ukiah, for respondent.

HART, J. The contestant and the contestee were rival candidates for the office of the justice of peace of Anderson township, in Mendocino county, at the general election held throughout the state on November 7, 1922. On the face of the returns, as indicated by the canvass of the vote for said office by the board of supervisors of said county, McAbee, the contestee, received a total of 165 votes, and his opponent, Robinson, received 164 votes. Said board officially declared that McAbee received the highest number of votes cast for said office at said election and direct-

ed a certificate of election to be issued to him, and the same was so issued.

On November 21, 1922, Robinson instituted a proceeding contesting the election of McAbee, and in his petition or verified statement of the grounds of contest alleged, among other matters, that certain illegal votes were cast at said election in Counts and Anderson precincts of Anderson township for said McAbee, and that "the greater number of legal votes and ballots were cast at said general election for the contestant herein than for the contestee, and that at said election contestant received a plurality of the total of votes cast for the candidates for said office." Upon the filing of said affidavit or petition, a citation, addressed to the contestee, was issued, and, together with a "notice of illegal votes" (section 1116, Code Civ. Proc.), was served on him on the 21st day of November, 1922. After a general demurrer to the contestant's affidavit or petition interposed by him was overruled by the court, the contestee filed an answer to the affidavit or statement of contest denying the allegations thereof.

At the trial of the contest the ballots cast at the election in the several precincts of Anderson township were recounted by the court. Upon said recount the court found that one ballot was cast in Counts precinct which bore no expression of choice for the office of justice of the peace of said township, but which was erroneously counted by the election officers for McAbee. The throwing out of this vote left the contestee and contestant with 164 votes each. The court further found that in Anderson precinct of said township one Leila Waggoner cast a vote for McAbee and which was counted for him, and that said Leila Waggoner was an illegal voter. This vote was deducted from McAbee's total, with the result, obviously, that his total vote was reduced to 163, the vote then standing: Robinson 164, and McAbee 163. Upon these findings the court rendered judgment declaring Robinson to have been elected, canceling the certificate issued to McAbee, and directing a certificate of election to be issued to Robinson.

The contestee appeals from said judgment and supports the appeal by a bill of exceptions.

The correctness of the ruling rejecting the ballot which contained no stamp opposite the name of either of the candidates for justice of the peace of said township is not challenged. In fact, it is conceded by contestee that the court's ruling was proper with respect to said ballot. The contention is, however, that the judgment should be reversed for several different reasons, to wit: (1) That there was no evidence showing that Anderson and Counts precincts are included within the boundaries of Anderson township; (2) that the court committed prejudicial er-

ror in requiring the witness Waggoner to state for whom she voted, she having through her counsel, especially employed to represent her at said hearing, declined to testify on the ground that her testimony would tend to incriminate her, and the further ground that to compel her to state for whom she voted would require her, against her consent, to surrender her right to preserve the secrecy of her ballot; (3) that the testimony of said witness did not warrant the court in finding that her ballot was cast for McAbee.

[1-3] 1. We think it sufficiently appears in the affidavit and statement of the grounds of contest that Anderson and Counts precincts are situated within Anderson township. It is not so specifically stated, but the affidavit does declare that the contestant and contestee were opposing candidates for justice of the peace of Anderson township and in connection therewith alleges that illegal votes were cast at said election in Anderson and Counts precincts and that the greater number of legal votes and ballots were cast at said election in said township for the contestant herein. The prayer of the complaint asks for a recount of the ballots cast in the two precincts named. As stated, the demurrer was general, and the question whether the two precincts mentioned were embraced within Anderson township was not thus raised. In that particular we think the affidavit was sufficient to countervail the claims of a general demurrer. The answer does not deny that the two precincts named constitute a part of Anderson township. At the trial the contestant introduced in evidence the minutes of the board of supervisors containing a statement of the votes received by all candidates at the general election held in the county of Mendocino on November 7, 1922, including the votes canvassed by the board of supervisors for the office of justice of the peace in Anderson township by precincts, and also the results of said canvass. The several precincts constituting Anderson township were therein named, and opposite each was given the number of votes received therein by McAbee and Robinson, respectively. Among the precincts so named were Anderson and Counts precincts. This record was admissible in evidence under the state of the pleadings, as indicated above, and its contents are prima facie correct as to the facts therein set forth, including the number and names of the several precincts of Anderson township. *Calaveras County v. Brockway*, 30 Cal. 325, 326; *People v. Davidson*, 2 Cal. App. 100, 83 Pac. 161; *Starkweather v. Dawson*, 14 Cal. App. 666, 112 Pac. 736; *Merkley v. Trainor*, 142 Cal. 265, 75 Pac. 656.

[4, 5] 2. The court did not err in requiring the witness Miss Waggoner, an alleged illegal voter, to give testimony disclosing the name of the person for whom she voted for the office of justice of the peace. It is first

to be remarked that the evidence, independently of any testimony given by Miss Waggoner, conclusively shows that, prior to and at the time of the general election held in California in November, 1922, and at which election she is alleged to have voted, she had not been a resident of Mendocino county for a period of 90 days. Indeed, this proposition is not disputed by the contestee. The witness, therefore, was not legally a qualified voter at the time of the holding of said election, although it is conclusively shown and, in fact, not disputed, that she registered as a voter of Anderson township in the month of October, 1922. Const. art. 2, § 1.

[6, 7] As to the complaint that the court erred in requiring Miss Waggoner to testify over her objection that her testimony would tend to incriminate her, it is first to be remarked that the right of a witness to decline to give testimony for the reason that it may tend to establish a crime against him is wholly personal to the witness. It is a personal privilege which the witness may himself either claim or waive. Miss Waggoner was not a party to the present contest, and the fact that her testimony might show, or have a tendency to show, that she committed a public offense, can in no measure affect the rights of the contestee. Whether the court's action in compelling her to testify involved a violation of her right to refuse to testify on the ground stated is a matter which can in no manner concern the contestee or which could have operated prejudicially against his rights in the trial of the contest. Nor is it of any concern to the contestee whether the testimony so given may or might be used against the witness in a prosecution for illegally voting at said election. Indeed, the learned attorney for the contestee appears to have well recognized these propositions, since the objection to the witness' testimony on said ground was not interposed by him but by the witness herself, through an attorney, not connected with the trial of the contest, but who, as he himself stated, appeared before the court for no other purpose than to represent and protect the rights of the witness. It follows from the foregoing considerations that the objection to the witness giving her testimony upon the ground that it would tend to incriminate her cannot be availed of by the contestee.

[8] The objection made by the contestee himself, through his attorney, that the court could not legally require the witness to state for whom she voted for the office of justice of the peace for the reason that such action by the court would involve a violation of the right of a voter to preserve the secrecy of his ballot, is untenable. It is well established in this country that the rule sought to be invoked by counsel for the contestee here is to be restricted in its application to those electors who have the legal qualifications which entitle them to vote. As applied to such vot-

ers the rule that the secrecy of the ballot shall be maintained is "justly regarded as an important and valuable safeguard for the protection of the voter and particularly the humble citizen, against the influence which wealth and situation may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot but is sacredly guarded by the law for all time unless the voter himself shall voluntarily divulge it." McCrary on Elections (4th Ed.) § 488. The rule, however, is not applicable to persons who vote at a particular election but who are not qualified voters at the time of casting their votes. As is said by the author just named (section 492):

"A person who votes without being qualified is a mere intruder and not entitled to the privileges which belong to legal voters."

Or, as was well said by the late Chief Justice Beatty, in the case of *Patterson v. Hanley*, 136 Cal. 265, 276, 68 Pac. 821, 825:

"The policy of the law is, it is true, to preserve secrecy of the ballot, but this policy does not extend to illegal votes. If the elector disregards the terms upon which he is allowed to vote, and thereby secures the counting of an illegal ballot, he forfeits the privilege of secrecy in favor of the superior right of a party injured by his act to have the truth disclosed."

See cases cited in the footnotes of the case of *People v. Pease*, 84 Am. Dec. 242, 268 et seq. See, also, 15 Cyc. p. 424; Ann. Cas. 1912A, 728; *People v. Turpin*, 49 Colo. 234, 112 Pac. 539, 33 L. R. A. (N. S.) 766, Ann. Cas. 1912A, 724; *Van Winkle v. Crabtree*, 34 Or. 462, 55 Pac. 831, 835, 56 Pac. 74; *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773, 778.

Of course, such a person will not be compelled to testify as to the person for whom he voted until it is clearly shown he voted illegally. And so long as the question as to the legality of his vote is in doubt, he cannot be compelled to make the disclosure. In this case, however, Miss Waggoner was shown to be without the qualifications of a voter before she was asked to state for whom she voted.

The counsel for the contestee cites the cases of *Lauer v. Estes*, 120 Cal. 652, 53 Pac. 262, and *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71, as supporting the position that a voter cannot be compelled to disclose the names of the persons for whom he voted at an election. Those cases do not support that position. They merely hold, among other things, that the extrajudicial declarations of a voter disclosing for whom he voted at an election involve hearsay testimony and are, therefore, inadmissible. This rule is stated and approved by nearly all the authorities to which our attention has been called and is undoubtedly sound.

[9] 3. The evidence discloses that the county clerk of Mendocino county had, prior to

the day of the election in question, delivered to the election officers of Anderson precinct, in Anderson judicial township, 250 ballots; that 101 of said ballots were returned unused to said county clerk; that six of said ballots had been spoiled and 143 had been voted; that, according to the poll list of said precinct, 143 persons had voted in said precinct at said election. The ballots, on the recount of the same under the order of and before the court, disclosed that in said precinct 76 ballots were cast or votes had been voted at said election for the contestee for justice of the peace of Anderson township, and 59 for the contestant. The first question asked Miss Waggoner by counsel for the contestant was whether, at the election in question, in Anderson precinct of Anderson township, she cast her vote or stamped her ballot "for one of the candidates or a candidate for justice of the peace of Anderson township," to which question she unequivocally replied that she did. The following questions were then propounded to the witness by counsel for the contestee and the answers following returned:

"Q. For whom did you cast your vote? A. Well, if I stamped it as I intended to, I stamped it for Mr. McAbee. I don't know whether I got the stamp in the right square, and I wondered afterwards whether I got it in the right one. Q. Will you say whether or not you stamped a cross after the name of S. T. McAbee? A. I don't know his initials. I said that is who I intended to stamp it after. Q. Mr. McAbee was a candidate for that office, wasn't he? A. That is who I intended to stamp it for."

On cross-examination the witness testified:

"Q. You say you intended to stamp your ballot for Mr. McAbee? A. When I went there I intended to stamp my ballot for him, but I couldn't swear I did. Q. But by your testimony you are not testifying that you did stamp your ballot for Mr. McAbee, is that right? A. Well, I suppose I did; but, as I say, I was in a hurry and wondered afterwards if I did mark the cross in the right place. I was quite in a hurry to get back to my work. Q. And you don't know whether you stamped your ballot for Mr. McAbee or not? A. No, sir; I couldn't swear to it. Q. Do you remember when you voted if or whether or not you stamped it in the voting square? A. I suppose I did, but couldn't swear I did stamp it in the right place."

The witness, proceeding on cross-examination, stated that she recalled that she intended to vote for a certain measure and for certain candidates for other offices, and that she was able to recall that she "put the stamps on the ballot, but just where I couldn't say." On redirect she testified:

"Q. You went to the polls for the express purpose of voting for Mr. McAbee for that office, didn't you? A. When I went to the polls, I had in mind another measure I was more particularly interested in than any of the local officers. Q. Did you see the name of Mr. Mc-

Abee on the ballot? A. I suppose so. I read the ballot over. Q. You read his name there and remember of seeing his name there? A. Well, I read the names over. Q. Will you state now whether or not you stamped your ballot on the squares after the names in voting? A. No I couldn't swear that I did. Q. You understood that it was necessary at the time you voted that you should stamp your ballot in the squares, didn't you? A. Yes. I made an attempt to do that. Q. And you stamped your ballot in the square after the name of Mr. McAbee, or that was your intention? A. That was my intention, but I couldn't say that I got it in the right place."

On further recross, and further redirect, the witness stated that she had no personal acquaintance with McAbee prior to the day of the election; that he never solicited her vote; that she had never spoken to him until some day subsequent to the day of the election, but that, prior to the election, she was familiar with his name and became so through having one of his children in her classes; that she learned, on the night preceding the day of the election, that he was a candidate for justice of the peace; and that at that time she made up her mind to vote for him for said office.

The foregoing is all the testimony given by Miss Waggoner, except her statement that, after preparing her ballot, she delivered it to one of the election officers.

[10] We cannot justly say that the trial court misinterpreted the testimony of Miss Waggoner or the effect thereof, or was not justified in concluding therefrom that she cast her ballot for the contestee for the office of justice of the peace. It will be noted that the witness, in reply to the first question put to her by counsel for the contestant, positively stated that she did cast her vote for one of the candidates for justice of the peace at said election. It is true that she subsequently stated that she would not "swear" that she marked her ballot "in the right place" for said office; but it is also true that she stated that she looked over the ballot before preparing it for the ballot box and saw thereon the names of those persons who were candidates for the several offices to be filled at said election. She did not at any time deny that she voted for McAbee, but declared that she went to the polls and into the voting booth with the intention of doing so and that she supposed that she did mark her ballot for the contestee. The only matter as to which she appeared to be uncertain was whether she stamped her ballot for justice of

the peace in the square opposite the name of the contestee, and she was no less uncertain in that particular as to candidates on the ballot for other offices and certain measures which were to be voted upon that she intended to vote for. The ballots were inspected by the court, and it may be assumed, since the record here is silent as to that consideration, that the ballots, save and except the one which, as seen, bore no expression of choice for justice of the peace, were properly stamped. If they had not been, undoubtedly that fact would have been made to appear in the record. The witness did not claim that she might have mistakenly or inadvertently voted for any other candidate for justice of the peace than the contestee. Indeed, she declared, as seen, that she went to the polls and into the voting booth intending to vote for McAbee, that she "looked over the ballot" before starting to mark it, and that she supposed she voted for the contestee. Her statement that she "supposed" that she so voted is tantamount to saying that she "thought" or "believed" she voted for McAbee. At all events, it was for the trial court to determine from all the circumstances and the manner in which the witness gave her testimony whether she did or did not vote for McAbee. Further discussion of the evidence is not necessary. As stated above, the case, so far as the evidence is concerned, is one in which the conclusion of the trial court cannot justly be interfered with. It will not be disputed that, no less than as to any other issue of fact, circumstantial evidence may be resorted to, if necessary, to prove that a disqualified voter has cast his ballot or voted for a particular candidate at a particular election (see *McCrary on Elections* [4th Ed.] § 493; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242), and it is certainly true that if from such evidence a finding has been deduced that the vote so cast was for a candidate whose election is challenged by reason of such illegal vote, and that said vote is accordingly deducted from his total vote, no court of review will disturb such finding unless it clearly appears from the circumstances themselves as they stand in the printed record that they are inherently too weak or upon their face insufficient in probative force to justify the conclusion arrived at by the trial court.

We think the result reached herein by the court below should be approved. Accordingly, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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court of Visalia township, county of Tulare, state of California, adjudging him guilty upon three counts of a complaint charging him with a violation of the Wright Act (St. 1921, p. 79). The first count charged him with the possession of intoxicating liquor, the second with transporting the same, and third with having in his possession a still and other implements in use for the manufacture of said intoxicating liquor. He alleges that a fine of \$500 was imposed upon each count, and that in default of payment he was committed to the county jail to be imprisoned therein at the rate of \$1 per day for each dollar of the fines so imposed. The fines were imposed October 17, 1923, and petitioner has not therefore served full time for the payment of any one of the several fines imposed upon him.

The sole question presented by the petitioner as the ground for his release is that the Wright Act in adopting the provisions of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, 10138¼ et seq.), made no provision for imprisonment for nonpayment of fine, for the reason that the Volstead Act made no such provision. The question of the right of a justice's court to provide for imprisonment for nonpayment of a fine imposed under the Wright Act, where no term of imprisonment was fixed by the Volstead Act, was recently before us in *Ex parte Kennerly* (Cal. Sup.) 214 Pac. 857. We there determined that imprisonment for a fine was not a distinct punishment, but merely a method of enforcing the payment of a fine. *People v. Markham*, 7 Cal. 208; *Ex parte Kelly*, 28 Cal. 414; *Ex parte Crittenden*, 62 Cal. 534; *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113; *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334. That principle thus relied upon in *Ex parte Kennerly*, supra, disposes of the question presented by the petitioner, although it is true that the main point presented and considered in *Ex parte Kennerly*, supra, was whether or not the provisions of section 1205 of the Penal Code, which prohibited imprisonment for nonpayment of fine for a longer period than was permitted for the punishment of the offense, prevented such imprisonment. The argument there was that, inasmuch as the Wright Act provided no term of imprisonment, therefore section 1205 of the Penal Code prohibited such imprisonment for nonpayment of fine. We held that, the judgment being imposed by a justice's court, section 1446 of the Penal Code controlled. While the question here involved was not directly presented in that case, it was involved therein, and the reasoning by which the conclusion was reached that imprisonment for nonpayment of fine was proper applies equally to the petition herein.

The application is denied.

193 Cal. 37

Ex parte GARRISON. (Cr. 2652.)

(Supreme Court of California. Jan. 21, 1924.)

Fines ☞ 11—Justice's court can imprison for nonpayment of fine, though statute does not provide therefor.

Though the Wright Act does not provide for imprisonment for nonpayment of fine imposed under it, a justice's court can provide for such imprisonment; this not being a distinct punishment, but merely a method of enforcing the payment of a fine.

In Bank.

Original habeas corpus proceeding by W. A. Garrison. Application denied.

D. M. Edwards and J. C. Thomas, both of Visalia, for petitioner.

PER CURIAM. Petitioner seeks a writ of habeas corpus upon the ground that he is detained under a judgment of a justice's

193 Cal. 39

PEOPLE v. MENDEZ et al. (Cr. 2580.)

(Supreme Court of California. Jan. 21, 1924.)

Criminal law — 739(2)—**Circumstance of proof of alibi held to present only substantial conflict in evidence which was for the jury.**

In a murder case, the circumstance that each of the defendants presented, by several witnesses, an alibi which was substantially perfect on its face, suffices merely to present a substantial conflict in the evidence, to be resolved by the jury, where witnesses at the place of the crime testified to defendants' presence there.

2. Criminal law — 1167(1)—**Defect in authentication of indictment mere irregularity and not prejudicial.**

That deputy county clerk, who filed an indictment, instead of placing in a space provided therefor the name of the clerk together with his own signature as deputy, stamped therein with a rubber filing stamp the date and clerk's name, underneath which he placed his signature, if a defect, did not operate to prejudice any right of the defendants.

3. Criminal law — 655(1)—**Proper for judge to advise district attorney to offer photographs in evidence.**

It was not misconduct for the judge, when the district attorney was about to hand to the jurors for their inspection certain photographs which had been fully identified, but had not been formally offered in evidence, to interrupt and advise the district attorney to first offer them in evidence.

4. Witnesses — 246(1)—**No misconduct for court to intervene and question witness to show location on photograph pointed out by witness.**

Where a witness had indicated a location upon a photograph or upon a plat by merely pointing thereto in such manner that the written transcript of his testimony would be unintelligible, it was not misconduct for the trial court to intervene and by questions elicit answers such as would make the record truly reveal what the witness was actually testifying.

5. Witnesses — 246(1)—**Proper for trial judge to intervene and clarify testimony.**

When it appeared that boy witness was confused, it was proper for the trial judge to intervene and by questions of his own help to straighten out the witness and clarify his testimony.

6. Criminal law — 655(1)—**Court properly intervened and required readings of portions of testimony at coroner's inquest.**

Where counsel read isolated portions of testimony at coroner's inquest which apparently conflicted with the testimony at the trial, it was not error for the trial judge to intervene of his own motion and compel the reading of other portions of the context which revealed that the apparent conflict was not a real conflict; the circumstance that in so doing he may have incidentally aided the prosecution being of no consequence.

7. Criminal law — 633(1)—**Duty of trial judge to supervise and regulate course of trial.**

It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed in so far as it may be within the established rules of evidence.

8. Criminal law — 656(8)—**Judge should not convey personal opinion to jury.**

The trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence.

9. Criminal law — 1170½(5½)—**Questions of judge held not prejudicial.**

Though the court in questioning witnesses should not have referred to "the place where the murder was committed," "the scene of the crime," "the time the murder was committed," defendants were not prejudiced thereby, where the defense consisted of an alibi and the claim that the crime was committed by some other person or persons.

10. Criminal law — 1035(3)—**Defendant must object to act or statement of trial judge.**

A defendant who deems himself injured by an act or statement of the trial judge during the trial is not permitted to keep silent in order to speculate upon the verdict and claim redress only after the verdict is adverse.

11. Witnesses — 40(1)—**Nine year old boy competent.**

There was no error in ruling that a boy nine years old was a competent witness under Code Civ. Proc. §§ 1879, 1880.

12. Homicide — 234(1)—**Evidence sufficiently identified defendants.**

In prosecution for murder in the first degree, evidence held sufficient to warrant a finding that defendants were the persons who did the killing.

13. Witnesses — 41—**Personal injuries affecting mentality of witnesses to homicide held to go only to weight of evidence.**

Testimony that witnesses testifying to killing did not fully recover mentally, by reason of being beaten into insensibility, until some time after the crime, only went to the weight of the testimony of the witnesses and not to its admissibility or legal sufficiency.

14. Criminal law — 404(1) — **Admission of butcher knife in evidence held not error, and refusal to exclude proper.**

In a murder case, court did not err in admitting in evidence, and refusing to exclude therefrom, a butcher knife found upon the person of one defendant at the time of his arrest; defendant stating at the time that there was no objection to it being introduced.

15. Criminal law — 424(1)—**Statements of defendant held admissible.**

In murder case there was no error in admitting testimony as to damaging statements made by one defendant which were in no sense confessions, where one of the witnesses was not a peace officer at the time the statements were made and the other, who was an officer, inform-

ed the defendant of his legal rights, and the statements were freely and voluntarily made without any threats or promises.

16. Witnesses —240(2)—Leading questions discretionary.

The extent to which leading questions shall be permitted rests in the sound discretion of the trial judge.

17. Homicide —178(1)—Always proper to show some other person committed crime.

In a prosecution for murder it is always proper to show that some other person, and not the defendant, committed the crime.

18. Homicide —234(1)—Defendant need not establish guilt of third person with degree of certainty requisite to sustain conviction.

A defendant in a murder case, in order to exculpate himself by showing guilt of another, should not be required to establish the guilt of the third person with that degree of certainty requisite to sustain a conviction of the latter.

19. Homicide —178(1)—Evidence simply affording possible ground of suspicion against another inadmissible.

In prosecution for murder, evidence which simply affords a possible ground of possible suspicion against a third person is inadmissible.

20. Homicide —178(2, 3)—Mere motive and threats by third party inadmissible.

Mere evidence of motive in another person or of motive coupled with threats of such other person is inadmissible, unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged.

21. Criminal law —368(1), 419, 420(1)—Confessions, threats, and flight by third parties hearsay and inadmissible if not *res gestæ*.

Confessions, threats, and circumstances of flight on the part of third parties are all in the nature of declarations or admissions of such third persons, and are therefore inadmissible as hearsay unless they come within the *res gestæ* exception, and they cannot be regarded as a part of the *res gestæ* unless and until evidence is produced which has an inherent tendency to connect such persons with the actual commission of the crime.

22. Homicide —178(1)—Evidence as to flight of third parties held properly excluded.

In prosecution for murder where from the evidence it appeared that four persons took part in the crime, *held*, that the court did not err in excluding evidence that four Mexican laborers, not including defendants, quit work upon the morning following the homicide and could not be found some weeks later.

23. Homicide —285—Duty of trial judge to state clearly separate elements essential to crime.

It is, generally speaking, the duty of the trial judge to state clearly to the jury the separate elements essential to constitute the crime charged; but, where murder was substantially conceded and the only real issue was whether the crime had been committed by the defendants or by some one else, defendants cannot com-

plain of the failure of the court to instruct as to the separate elements constituting the crime.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Alvino Mendez and another were convicted of murder in the first degree, and appeal. Affirmed.

Wilbur W. Randall and Miller K. Hinds, both of El Centro, for appellants.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Ernest R. Utley and J. E. Simpson, both of El Centro, for the People.

MYERS, J. Each of the defendants appeals separately herein from a judgment of conviction upon a verdict of guilty against each of them of murder in the first degree, and from an order denying his motion for a new trial. The evidence produced in behalf of the prosecution was ample, if credited by the jurors, to sustain each of the verdicts. There is no contention herein to the contrary except in one respect, which will be hereinafter mentioned. Assuming, as we must, that the evidence in behalf of the prosecution was given full credit by the jurors, the following is a brief statement of the facts established thereby. Mike Farnesaro was operating a ranch in the Imperial valley, a few miles from the Mexican boundary line, and was residing thereon with his wife and three children, Joe, aged nine, Paul, aged seven, and a little girl still younger. On the evening of January 2, 1923, at about dusk, Farnesaro with his two boys was at a haystack about 60 feet from his house pitching hay to his cattle in the corral. Three Mexicans, identified by Joe as these two defendants, and a man named Rubo (or Rubio), came in from the highway, apparently from the south, and asked Farnesaro for work, to which he replied he had none for them. One of the three men had a gun in his hand, and each of the other two had a knife in his hip pocket with the blade projecting upward. They then sought to purchase some bread from Farnesaro, tendering some Mexican coins, which he refused to accept. They then asked where they might find work, to which Farnesaro replied, in effect, that they might find it at the Sample ranch, which lay to the northward. The two little boys then went to the house for supper, leaving their father with the three Mexicans at the haystack. A short time afterward the three Mexicans came into the house, shouting in Spanish: "Money! We want Money!" One of them, Cazares, seized the two little boys, threw them upon the bed where the little girl was sleeping, and bound their hands and feet with portions of the bedding. At the same time the other two

men seized Mrs. Farnesaro and forced her, struggling, into the adjoining room. Then Cazares with a stick or metal rod beat the three children into a state of insensibility, while the other two men did likewise with Mrs. Farnesaro in the adjoining room. A fourth Mexican, identified by Joe only as a man named Mike, entered the house while this was going on. Some hours later the four men returned to the house and unbound the hands and feet of the two boys upon the bed, and finding Joe returned to consciousness again beat him into a state of insensibility. The crime was not discovered until the morning of the second day following, some 36 hours later, when the body of Farnesaro was found upon the ground near the haystack. He had been beaten to death with some blunt instrument. The three children were at that time up and out of the house, but they were in a pitiable condition physically and were mentally irrational. Mrs. Farnesaro was found lying upon the floor of the room into which she had been dragged at the time of the assault, and she was totally unconscious and so remained for several days thereafter. Each of the four had sustained skull fractures and other serious injuries. It does not clearly appear from the record whether or not anything had been actually stolen from the house, but the entire house had been ransacked. The trunk and the dresser drawers had all been opened and their contents strewed about. Mrs. Farnesaro had had \$85 in gold coin wrapped in a rag, which she had seized at the entry of the men and kept concealed in her hand during the assault, and which was found underneath her body after the discovery of the crime. Mrs. Farnesaro at the trial identified the defendant Cazares, whom she had previously known, with the utmost positiveness, notwithstanding the fact that he had a handkerchief over the lower portion of his face at the time of the assault. Her identification of Mendez, whom she had not known previously, was much less positive and less convincing; but she did point him out at the trial as one of the two men who had assaulted her. The boy Joe positively identified both defendants, both of whom he had known previously, and his testimony in this respect was not substantially shaken by a severe cross-examination. It is true that he did state at one time that he had never known Mendez until after the latter's arrest, but in response to questions from the court it was made apparent that what he meant thereby was that he had not known Mendez' name until after the arrest; that he had previously been acquainted with the man Mendez, but had been ignorant of his name.

[1] The circumstances that each of the defendants presented, by several witnesses, an alibi which was substantially perfect upon

its face, suffices merely to present the familiar situation of a substantial conflict in the evidence, which could be resolved only by the jurors, who saw and heard the several witnesses and observed their demeanor and manner of testifying. It may be mentioned that the identification of these two defendants was afforded substantial corroboration by evidence of numerous facts and circumstances subsequent to the crime which tended legitimately to indicate a guilty conscience upon the part of each of the defendants.

[2] There is no merit in the contention that the indictment herein was fatally defective, in that it is not shown to have been presented in compliance with section 944 of the Penal Code. The indictment as filed bears upon its back the indorsement: "A true bill. P. N. Bucklin, Foreman Grand Jury." Immediately underneath the same is a printed form of blank indorsement reading as follows:

"Presented by the foreman of the grand jury in the presence of the grand jury in open superior court of the county of Imperial, state of California, and filed as a record of said court this ——— day of February, A. D. 1923."

Immediately underneath the same was a blank space for the signature of the county clerk. The deputy county clerk who filed the same, instead of placing in this space the name of the clerk, together with his own signature as deputy, stamped therein with a rubber filing stamp the words, "Filed; February 15, 1923. C. G. Mousseau," underneath which he placed his signature, "H. L. Foster, Deputy." There is no contention that the indictment was not in fact presented by the foreman of the grand jury in their presence to the court on February 15, 1923, and filed on that date with the clerk of the court. Under these circumstances, the defect in the authentication thereof by the clerk, if it be conceded to be a defect, was nothing worse than a mere irregularity of procedure which did not operate to prejudice any right of either defendant.

[3-10] Both defendants complain that the trial judge throughout the trial exhibited a bias in favor of the prosecution and prejudice against the defendants to their great injury. It is charged by counsel that—

"Throughout the prosecution's case in chief the court has aided the district attorney in presenting his evidence and getting his evidence in; has aided and assisted in the correction of testimony of the prosecution's witnesses; has sought to defeat the effect of the cross-examinations of the defendant by immediately breaking in upon it, to lead and assist the witnesses in correcting the effect of damaging cross-examinations, and in numerous other ways caused the jury to be influenced in arriving at their verdict."

We are cited to many instances appearing in the record as supporting these charges. We have examined all of them. In many of the cited instances which give some color of support to these charges, it is clearly apparent that the trial judge acted with entire propriety. For example, when the district attorney was about to hand to the jurors for their inspection certain photographs which had been fully identified, but had not been formally offered in evidence, the trial judge interrupted and advised the district attorney to first offer them in evidence, which was done, and they were properly received. In various instances wherein a witness had indicated a location upon a photograph or upon a plat by merely pointing thereto in such manner that the written transcript of his testimony would be unintelligible, the trial court intervened and by questions elicited answers such as would make the record truly reveal what the witness was actually testifying. Other instances occurred while counsel for defendants were endeavoring to impeach the witness Joe Farnesaro by showing conflicts between his testimony at the trial and his testimony at the coroner's inquest, and calling upon him to explain them. This procedure is frequently confusing to a lay witness of mature years and intelligence. In the case of a boy of nine years, who apparently was accustomed to use three languages and had but an imperfect knowledge of either, it was obviously difficult to apply this method without doing an injustice to the witness. When it appeared that the boy was confused in this manner, the trial judge would intervene and by questions of his own would help to "straighten out" the witness and clarify his testimony. Upon one or two occasions when counsel read isolated portions of the testimony at the coroner's inquest which apparently conflicted with the testimony at the trial, the trial judge intervened of his own motion, compelling them to read other portions of the context which revealed that the apparent conflict was not a real conflict. In all of these things the trial judge was but doing his duty. The circumstance that in so doing he may have incidentally aided the prosecution is of no consequence. The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered. It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed in so far as it may be, within the established rules of evidence. Other instances are cited wherein the trial judge (inadvertently without doubt) apparently overstepped the narrow bounds of strict propriety which the policy of the law prescribes for the conduct of a trial judge. In questions to witnesses he referred to "the place where the murder was committed,"

"the scene of the crime," "the time the murder was committed," and in discussions with counsel during the trial as to the admissibility of evidence, he used some expressions which might be considered as invading to some slight extent the province of the jury. Of course this should not be done, but it is frequently difficult to discuss questions of the admissibility of evidence without using some such expressions.

"Under our system the trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. The determination of questions of fact must be made by the jury free from the influence that knowledge of the trial judge's views thereon might have." *People v. Soeder*, 150 Cal. 12, 18, 87 Pac. 1016, 1019.

Our Constitution expressly forbids judges to charge jurors upon matters of fact, and in obedience thereto a trial judge should be rigorously careful not to say or do anything in the course of a trial in the presence of the jurors which may be taken by the latter as an expression of his opinion upon any question of fact in issue. In some cases a reference by the trial judge to "the place of the murder" or "the scene of the crime" might be seriously prejudicial to the defendant charged therewith, but not so in the instant case. The defense of each defendant herein consisted of an alibi and the claim that the crime was committed by some other person or persons. No question was made at any point of the trial that Farnesaro had been murdered. The sole contention of defendants was that he had been murdered by persons other than themselves. If the trial judge was indiscreet in this respect counsel for the defendants were equally so. They each made repeated references during the trial to "the time the crime was committed," "the scene of the murder," "the place where Mike Farnesaro was murdered," etc. In none of the instances cited, with but three or four exceptions, did counsel for either defendant make any objection at the trial to the statement made or question asked by the trial judge, which is the subject of the present complaint. In the three or four instances wherein objection was made it was not well founded and was properly overruled. In all of the other instances no objection was made or in any way called to the attention of the trial judge. If objection had been made the trial judge could, and doubtless would, have promptly repudiated the intention to indicate any opinion upon the facts and thus would have effaced from the minds of the jurors any false impression which they might have gained. A defendant who deems himself injured by an act or statement of the trial judge during the trial is not permitted to keep silent in order to speculate upon the verdict and claim redress

only after the latter has gone adversely to him.

[11-13] There was no error in ruling that Joe Farnesaro, nine years old, was a competent witness. Section 1879, Code of Civil Procedure, provides that—

"All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. * * *"

Section 1880 provides:

"The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination. (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. * * *"

There is no contention that Joe Farnesaro was of unsound mind at the time of the trial, and it is apparent from his testimony upon the voir dire, as well as upon direct and cross-examination, that he was not incapable of receiving just impressions of the facts or of relating them truly. The real basis of the complaint of the defendant Cazares in this respect, as well as of the contention of the defendant Mendez, that the evidence is insufficient to support the verdict, rests upon the contention that the facts as testified to by Joe were not facts which he actually remembered, but were things which had been told to him by others and which he thought he remembered; in other words, that his testimony was the product of suggestions which had been made to him by peace officers and others engaged in investigating the crime and preparing the case for trial. There is some apparent basis for this contention in the record. There were material contradictions in his testimony, and it was shown that he had made various statements shortly after the crime which were completely at variance with his testimony at the trial. The same thing is true to some extent with respect to the testimony of Mrs. Farnesaro. By way of explanation thereof it was shown by the testimony of the attending physician that Joe, by reason of the injuries he had received, did not fully recover mentally until two weeks after the crime, and that Mrs. Farnesaro did not return to complete mental normalcy until about six weeks after the crime. But in any event these objections go only to the weight of the testimony of these witnesses, not to its admissibility or to its legal sufficiency, and the question of the weight and credibility of this testimony was solely for the jurors. The trial court accorded the widest latitude to the defendants in their efforts to discredit the testimony of these witnesses by showing that it was the product of suggestion, and the conclusion of the jurors thereon cannot be disturbed by this court.

[14] The court did not err in admitting in evidence and refusing to exclude therefrom the butcher knife found upon the person of defendant Cazares at the time of his arrest. It may be conceded that this was not properly admissible if it had been objected to. However, counsel, for this defendant not only failed to object to its introduction, but when it was offered in evidence stated to the court, "there is no objection to it being introduced." Having thus received it with the express acquiescence of counsel, the court committed no error in denying the motion to strike it out, which was made some days later.

[15] There was no error in admitting the testimony of Gillett and Spencer as to damaging statements made by defendant Cazares. These statements were in no sense confessions. Spencer was not a peace officer at the time. Gillett, who was sheriff, first informed the defendant of his legal rights, and the foundation was laid by showing that his statements were freely and voluntarily made, without any threats or promises, and by a showing, at least prima facie, that this defendant knew enough English to understand what was said to him and to express himself intelligently.

[16] The extent to which leading questions shall be permitted rests in the sound discretion of the trial judge, and we find nothing herein indicating an abuse of that discretion. We find no evidence in the record to support the claim of "misconduct of newspapers."

We come now to what is, perhaps, the most serious contention raised upon this appeal. It is that the court erred in excluding testimony which, in the language of counsel, "would have proved that the deceased had been, just prior to his death, involved in difficulties with (1) Mike Amarillas, an employee, who threatened to kill deceased two weeks before the homicide; (2) with Giorgio Brokerage Company, whom deceased had sued for \$3,000; (3) with Vasquez et al. over the tomato crop and purchase of a heifer which deceased by force took from the possession of Vasquez et al. after part of purchase was paid; (4) with four Mexicans who lived on deceased's ranch one-fourth of mile from the house of the homicide, at the time of killing, with whom deceased had serious trouble a few days before his death; * * * that on New Years day at noon hour the deceased came to the shack occupied by the four Mexicans on the Farnesaro ranch just across the road from the Sample ranch-house and demanded pay from one of the Mexicans for damages done by a horse breaking into barley, and failing to collect the money deceased confiscated the horse, leading it home with him; that while at the shack deceased laid claim to two horse blankets, upon which two Mexicans slept; that upon leaving the said shack, deceased ordered all the

occupants to move from said house immediately; that four men quit work on the Sample ranch at 9 o'clock a. m. on the 3d day of January, 1923, demanded their pay, and went across into Mexico, and when later searched for could not be found; that the description of three of said men was identical as to person and clothing with the description of the three at the homicide," and that on January 2d the deceased turned the flow of irrigating water into the field in which the shack was situated, with the result that the Mexicans were flooded out of the shack some time during the night following. The trial court did in fact admit the evidence offered in support of the contentions numbered 1, 2, and 3, supra, and admitted some of the evidence offered in support of No. 4, but rejected much of the latter. Evidence was received showing that at the time of the homicide and for some time prior thereto sixteen Mexicans were occupying a shack upon the Farnesara ranch a quarter mile north of the place where decedent was living and were employed upon the Sample ranch, which was across the road therefrom; that on the morning of January 2d deceased turned the irrigating water into the field wherein this shack was located, with the result that some time during that evening and night the field became flooded to an extent which rendered the shack untenable. The court excluded the offered testimony relative to controversies over the horse and the horse blankets and testimony offered to show that at 9 a. m. on January 3d four Mexicans employed at the Sample ranch quit work, and that the descriptions of three of them corresponded with the descriptions previously given in evidence of the three Mexicans who committed the assault. The trial court expressed the view that evidence tending merely to show that persons other than the defendants may have had a motive for the commission of the crime was inadmissible unless coupled with other evidence having an inherent tendency to connect such other persons with the actual commission of the crime. He excluded the testimony as to the descriptions of the three men who quit work upon the following morning, upon the ground that the proffered descriptions were so general and indefinite that they would apply equally to hundreds of persons. Defendants' counsel conceded this to be the fact.

[17-20] We are inclined to agree with these conclusions of the trial judge. We do not find any California case directly in point upon the question whether evidence of motive upon the part of some one other than the defendant for the commission of the crime charged is admissible, in the absence of other evidence tending to connect such other persons with the commission thereof. "It is always proper to show that some other person, and not the defendant, committed

the crime with which he is charged." *People v. Mitchell*, 100 Cal. 328, 333, 34 Pac. 698, 700. The question herein is what kind and quality of evidence is essential to that end, and upon this question we have received no assistance from counsel. It seems clear that a defendant, in order to exculpate himself, should not be required to establish the guilt of a third person with that degree of certainty requisite to sustain a conviction of the latter. On the other hand, it seems equally clear that evidence which simply affords a possible ground of possible suspicion against another person should be inadmissible. The decisions in other states are not completely harmonious upon this question. But they are substantially unanimous in holding that mere evidence of motive in another person, or of motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged. See notes to 1 Wigmore on Ev. (2d Ed.) §§ 139-142. The learned author criticizes the rationale of these decisions somewhat severely, but concedes that they are substantially unanimous upon this point. It seems to us that there is a sound basis for this rule and that it rests fundamentally upon the same consideration which led to the early adoption of the elementary rules that evidence to be admissible must be both relevant and material. It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

[21] This brings us to the inquiry whether the claimed circumstances of flight above referred to would constitute such additional evidence as would render the evidence of motive admissible. We do not think so. Circumstances of flight are in the nature of confessions by such third persons and are, therefore, in the nature of hearsay evidence. Evidence, even of express confessions of third persons, is generally held inadmissible, in the absence of other evidence tending to connect such other persons with the crime. See cases in notes cited supra. Confessions, threats, and circumstances of flight on the part of third persons are all in the nature of declarations or admissions of such third per-

sons, and are therefore hearsay, unless they come within the *res gestæ* exception to the hearsay rule. It does not seem to us that they may be justly regarded as a part of the *res gestæ* unless and until evidence is produced which has an inherent tendency to connect such persons with the actual commission of the crime.

[22] In the instant case the trial judge expressed the opinion that the mere circumstance that four Mexican laborers quit work upon the morning following the homicide, and that some weeks later they could not be found, could not be considered as an indication of flight on their part. He stated, in substance, apparently as a matter of common knowledge, that there were at that time in Imperial valley thousands of itinerant Mexican laborers, who were continually seeking work, obtaining work, quitting and moving on, and who were constantly passing and repassing the Mexican boundary line, which was but a short distance away. The truth of this statement was not challenged by the defendants either in the court below or in this court. But whether or not those facts were of such common knowledge as to be judicially cognizable, we are of the opinion that the trial court committed no error in rejecting the proffered testimony.

There is no merit in the contention that the proffered evidence sufficiently connected the three Mexicans with the commission of the crime by showing that they were "in the vicinity thereof" at the time of its commission. No evidence was proffered showing that they were in such vicinity except the evidence that they had been occupying the shack a quarter mile away. If, for example, it had been shown that these men lived ten miles away and had been seen on the evening when the crime was committed within a quarter of a mile from the place of its commission, with nothing to explain their presence there, this might perhaps be regarded as tending sufficiently to connect them with the crime to render evidence of their animus admissible. But such is not the case here.

[23] We have examined the instructions given and find no substantial error therein. Nor do we think that the jurors could have been misled by anything said therein when all of the instructions are considered together in the light of the issues and the evidence. We do not think that the defendants could have been prejudiced by the rejection of the proffered instruction defining the different elements of the crime charged. It is, generally speaking, the duty of the trial judge to state clearly to the jury the separate elements essential to constitute the crime charged. But, as pointed out above, in the instant case the fact that Farnesaro had been murdered was substantially conceded, and the only real issue which the jury was called upon to resolve was whether the crime had

been committed by these defendants or by some one else. Under these circumstances, defendants cannot be held to have been prejudiced by the failure of the court to instruct as to the separate elements constituting the crime. The remaining instructions rejected were sufficiently covered by the instructions given.

We cannot conclude that there has been any miscarriage of justice herein, and the judgments and orders appealed from are hereby affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.

193 Cal. 183

**HADACHEK v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.**
(S. F. 10968.)

(Supreme Court of California. Feb. 6, 1924.)

Appeal and error  607(1)—**Notice to prepare record held given in proper time.**

Code Civ. Proc. § 953a, *held* to permit filing of notice to prepare a record at any time after notice of the entry of judgment, and before the expiration of 10 days after notice of decision on motion for a new trial, so that a notice given during that period was sufficient.

In Bank.

Original application for writ of mandate by Amos F. Hadacheck against the Superior Court of Los Angeles County and C. P. Vicini as Judge thereof. Writ granted.

James W. Bell, of Los Angeles, for petitioner.

Fred W. Morrison, of Los Angeles, for respondents.

PER CURIAM. This is a petition for a writ of mandate to compel the settlement of a transcript under section 953a, Code of Civil Procedure. The failure of respondent to certify the transcript in this case is based upon the proposition that the notice to prepare a record under the provisions of section 953a of the Code of Civil Procedure was given after judgment and before the decision of the trial court upon the motion for a new trial. The statute in that regard provides that—

The "said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for a new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof."

We think the proper interpretation of the section permits the filing of the notice at any time after notice of the entry of the judgment, and before the expiration of ten days "after notice of decision" on motion for a

new trial. The notice was given during that period, and was sufficient. The respondent should have certified to the transcript.

Let a peremptory writ issue.

65 Cal. App. 41

LANGDON et al. v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.
(Civ. 4309.)

(District Court of Appeal, Second District, Division 1, California. Dec. 21, 1923.)

1. Jury $\Leftarrow$ 34(3)—Direction of verdict held usurpation of functions of jury.

In an action for damages arising out of an automobile collision where it was stipulated that the jury should find for plaintiff in the amount of \$248.32 if at all, and where after some deliberation the jury returned a verdict for plaintiff in the sum of \$1, the court's action in directing the jury to go back and bring in the verdict for the amount stipulated, notwithstanding its protest that it could not agree to such amount and its request for permission to reconsider, *held* an unauthorized usurpation of the functions of the jury, rendering the verdict returned in accordance with such directions invalid.

2. Certiorari $\Leftarrow$ 29—Will lie to review proceedings wherein right to trial by jury has been improperly denied.

Though certiorari will not lie for the correction of a mere error, it is a proper remedy to review proceedings wherein defendants have been deprived of their constitutional right to jury trial by improper conduct of the court.

3. Trial $\Leftarrow$ 134—Judge may not substitute personal opinion for that of jury or compel action by it against its judgment.

Though a judge sitting with a jury has plenary rights with reference to the orderly conduct of the case and application of the law to the facts, he may not substitute his personal opinion for that of the jury or compel it to act against its judgment.

Application by A. Alice Langdon and another for a writ of certiorari to review a judgment of the Superior Court in and for the County of Riverside and William H. Ellis, Judge thereof. Judgment annulled.

Haas & Dunnigan, of Los Angeles, for petitioners.

Sarau & Thompson, of Riverside, for respondents.

HOUSER, J. Certiorari. The purpose of this proceeding is to review the action of the superior court in a case appealed therefrom to the justice's court. From a judgment rendered in a cause of action for damages arising out of a collision between two automobiles, the unsuccessful party to the action appealed to the superior court. In the course of the trial before a jury in the

superior court, it was stipulated that there was expended by the plaintiff for repairs upon its automobile the sum of \$248.32. No further stipulation with reference thereto was entered into between the respective parties either personally or by their counsel. The jury was instructed that if it found for the plaintiff, damages should not exceed \$248.32. After some deliberation, the jury returned a verdict for the plaintiff in the sum of \$1. By the direction of the court the clerk of the court entered the verdict. Thereupon counsel for plaintiff moved the court "to direct the jury that, having found for the plaintiff, their verdict must be in the sum of \$248.32, for the reason that that was the stipulation made between counsel during the trial of this case." Over the objection of defendants' counsel and against the protest of the jury, the court granted the motion and directed the jury to return a verdict in the sum of \$248.32. Judgment was entered on the verdict, and a motion for new trial was denied. The colloquy among the judge, the respective attorneys, and several members of the jury leading up to the rendition of the final verdict was somewhat extended and is too long to be here inserted; but it clearly appears therefrom that in no uncertain terms was the jury peremptorily ordered to so change the verdict that instead of the damages in favor of plaintiff being in the sum of \$1 they should be for the sum of \$248.32; that different members of the jury explained to the judge that the original verdict for plaintiff in the sum of \$1 "was rendered as a compromise measure"; that they "finally agreed upon a compromise verdict, but they were not willing to agree for the whole amount"; and that "several of the jurors agreed to vote for the plaintiff on condition that the sum be fixed according to the judgment of the jury, for \$1"; that the jury requested leave to recall the verdict in favor of plaintiff for \$1 in order that they might more fully consider the question of the alleged contributory negligence of plaintiff and, if so determined, render a verdict for defendants, or otherwise alter the verdict; but the judge refused to decide what their powers were in that regard.

The attitude of the court is illustrated by the following excerpts from the transcript of the court reporter's notes on the proceedings:

"The court will direct you to go back. The court is going out for his dinner, but I will wait for you here five minutes. * * *

"But the court just told them to do it (bring in a verdict for \$248.32). Now, if the court has no authority or power here, then of course we might as well shut up shop here. * * *

"The law tells the court what he may do when persons will not obey the order of the court. * * *

"The court has told them to go back and bring in a verdict for \$248.32. Why don't you do it?"

And as a final admonition:

"When I issue an order directing a verdict, you cannot get away from it, if you will observe your oath; that is all there is to it."

[1] It will thus be seen that by means of thinly veiled threats and by intimidation the jury was coerced into returning a verdict to which otherwise it would not have agreed. The functions of the jury in determining the facts of the case were usurped by the judge. The verdict purporting to be that of the jury was not at all of its volition, but represented only the express order of the court; the so-called verdict of the jury was in reality but a "verdict" by the judge.

[2, 3] While certiorari will not lie for the correction of mere error, the action of the court in the instant case amounted to a great deal more than that. It deprived the defendants of their constitutional right under the law to a jury trial; it took away from the jury every freedom of action and converted it into nothing more than a piece of legal machinery, useful only for the one purpose of fashioning its output under the hand and direction of the master mechanic. The one great power of the jury was absolutely destroyed; not a vestige of its power remained; there was a total obliteration of any authority which it lawfully possessed. The natural and only possible result was the destruction of defendants' fundamental rights by a process of law not countenanced by authority or legal precedent. Such an attempted encroachment by one arm of the judicial department upon the guaranteed prerogatives of another member thereof, if permitted as a precedent in the administration of justice, might lead to disastrous consequences. As well might the jury assume judicial powers to the exclusion of the judge therefrom, as for the judge to usurp the functions of the jury in its right to pass upon questions of fact. An innovation of that character would threaten the very foundations of our institutions and present a positive menace which in the exercise of diligent foresight ought to be quashed at its very inception. The judge sitting with a jury has plenary rights with reference to the orderly conduct of the case on trial, including the duty of declaring the law applicable to the facts and the legal effect thereof; but in no circumstances, in litigation of the character here in question, has the judge any warrant in the law for a substitution of his personal opinion for that of the jury, nor lawful authority to compel action by the jury as against its judgment. The operation by which the jury was compelled to abdicate the rightful exercise of its historic functions was an excess of power by the judge; the jurisdiction of the court was overreached; and a judgment was thereby rendered which was of no force or effect.

"Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inept lack of power." *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 580; *Tomsky v. Superior Court*, 131 Cal. 620, 63 Pac. 1020; *Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485.

See, also, *People v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776.

It is ordered that the judgment entered in said superior court on the verdict in favor of plaintiff in said action be and the same is annulled.

We concur: CONREY, P. J.; CURTIS, J.

(65 Cal. App. 29)

In re MOORE'S ESTATE. (Civ. 4774.)

(District Court of Appeal, First District, Division 2, California. Dec. 21, 1923. Hearing Denied by Supreme Court Feb. 18, 1924.)

1. Husband and wife $\S$ 274(1)—Provision for distribution of community property among descendants of deceased spouse on death of surviving spouse without issue inapplicable where inseparably mingled with survivor's other property.

If community property is so mingled with the surviving spouse's other property that it cannot be traced to its origin, Civ. Code, $\S$ 1386, subd. 8, providing for division of the community property among decedent's descendants, on the death of the surviving spouse without issue does not apply.

2. Husband and wife $\S$ 274(4)—Evidence held insufficient to justify finding as to right of descendants of testatrix's deceased husband to community property.

In a will contest by descendants of testatrix's husband, who predeceased her, evidence held insufficient to justify the inference that testatrix preserved in kind community property received from her husband's estate or invested or reinvested it in any particular security, so as to permit its being separated from her other property and traced to its origin as part of the community property.

3. Evidence $\S$ 595—Conflicting inferences equally justified present nothing for jury or court.

When conflicting inferences equally justified may be drawn from the proof, there is nothing for the jury or court sitting without a jury but mere guesses and conjectures, on which no verdict or decision can be founded.

4. Evidence $\S$ 75—Court may presume stronger evidence not offered would be unfavorable.

Where parties content themselves with introducing weaker and less satisfactory evidence than they might, the court may presume that the omitted evidence would be unfavorable.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceeding by Anna B. Moore, as executrix of the estate of George A. Moore, deceased, and others, contesting the will of Mary Ellen Moore, deceased, opposed by Harry W. Lobb, individually and as executor of testatrix's estate. From a judgment of dismissal, contestants appeal. Affirmed.

Robert L. McWilliams, of San Francisco, for appellants.

Hadsell, Sweet & Ingalls, of San Francisco, and Earle Warren, of Oakland, for respondent Lobb.

STURTEVANT, J. This is an appeal by the contestants in a contest of a will where the proceeding was commenced after the will had been admitted to probate. George A. Moore was married twice. By his first wife he had several children, George J., Herbert B., Harry T., Mary F., and Jane W. By his second wife, Mary Ellen, he had no children.

George A. Moore died testate in the year 1916, and by the terms of his will he left his property to his second wife, Mary Ellen. After due proceedings had, she received \$16,000, which the record shows was community property. His widow, Mary Ellen, continued to live on until the 14th day of August, 1920, when she died testate, leaving her surviving at least one sister, and one nephew residing in Humboldt county. After her death her will was admitted to probate, and the proponent and respondent, Harry W. Lobb, was, on September 2, 1920, appointed, in accordance with the provisions of her will, sole executor thereof. Thereafter this proceeding was commenced, and on March 13, 1922, the second amended petition was filed. Later the respondent interposed a demurrer, the demurrer was overruled, he filed an answer, and a trial was had. The trial of the issue, interest in the estate, was had by the trial court sitting without a jury. When that issue was on trial, both parties having submitted their evidence, the trial court decided the issue against the contestants, discharged the jury, and dismissed the proceeding.

The contestants are either the children of the husband of the decedent or the children of a deceased child of the husband. By their contest they claim that their stepmother, Mary Ellen Moore, inserted a residuary clause in her will which was invalid by reason of the undue influence practiced on the decedent by the respondent Harry W. Lobb; that under the alleged invalid clause upwards of \$80,000 was therefore left undisposed of by will; and that said sum remains to be administered upon as though the decedent had died intestate. In this connection the contestants claim that the decedent, had received from her husband's estate \$16,000, and that the whole thereof was community property, and that she retained the whole of

said sum intact until the date of her death, and that the said sum was included in and covered by the \$80,000, which was so left undisposed of by will, and to which the contestants were entitled to assert their claim. All of these facts the contestants conceded in the trial court and now concede that they were bound to prove as showing their interest in the estate. Civ. Code, § 1386, subd. 8. But, so conceding the burden resting on them, they claim that they made the proof in the trial court, and that the trial court erred in determining that they had not shown an interest. The respondents make several replies to the claim of the appellants, and, as we view this case, it becomes necessary to consider only one. That reply is that, if we give to the evidence received and the evidence not received its full legal effect, the proof was insufficient on the issue as to interest, on the part of the contestants, in the estate.

[1] The appellants proved that Mary Ellen Moore received from the estate of her deceased husband something over \$16,000, and that the whole was community property. As stated by the Supreme Court in the Estate of Brady, 171 Cal. 1, on page 5, 151 Pac. 275, on page 276:

"It may also be conceded that if such community property is by the husband (the surviving spouse) so mingled with his other property that it cannot be traced to its origin as a part of the community property, subdivision 8 could not be applied." (Parentheses ours.)

To meet that rule and to avoid the consequences of it, the appellants attempted to show that Mrs. Moore retained the said \$16,000, and the rents, issues, and profits thereof, and was possessed of the same at the time of her death. However, to prove the fact they did not attempt to introduce any direct evidence. They attempted to prove the fact by indirect evidence. Moreover, this evidence included two different theories:

(1) They attempted to show that from the date of her husband's death until the date of her own death that Mrs. Moore suffered no losses and lived within her income. In following along this line of proof they called to the stand her nephew, Frank A. Brown, and examined him as to his knowledge of Mrs. Moore's affairs. They showed that Mr. Brown was a favorite nephew of Mrs. Moore and down to 1910 was a member of her family household; but none of the matters with which we are concerned in this case occurred before the year 1910. After that year Mr. Brown occasionally visited his aunt and occasionally had conversations with her, and it suffices to state that he did not claim to know nor to testify regarding the many things that may have happened when he was not by the side of his aunt.

(2) Taking up another line of proof, the appellants produced the inventory filed in the estate of Mary Ellen Moore. That inventory is a long one, and includes over 40 items of

real and personal property. Some of the items, in turn, consisted of a bunch of bonds or a bunch of stock, and in each bunch there were from 10 to 40 or even more indentures of similar tenor. Thereupon the appellants undertook to introduce proof as to when each piece of property was acquired and with what moneys it was purchased. It is not necessary to repeat the testimony, but it will suffice to say that the appellants did not so account for investments that could have been made, in whole or in part, consuming the entire \$16,000, and, in fact, many times more than the \$16,000. Although every certificate of corporate stock was presumably dated when the same was issued to Mary Ellen Moore, the record does not disclose such dates nor any reason why the proof was not made. Although the corporate bonds were presumably purchased from some person, natural or artificial, no attempt was made to introduce evidence to prove the date of the purchase. Although several items were appraised at less than the face value, showing on the face thereof an apparent loss, no evidence was introduced showing the purchase price, and therefore, whether there was an actual loss, and, if so, how much, and whether the loss was incurred by the decedent after she received the moneys from her husband's estate, or before.

During the progress of their case the appellants produced and offered in evidence a book that is marked "Cash." The book purports to cover a period of time from September, 1912, to a part of the year 1918. The respondents objected to the offer, the objection was sustained, and the appellants assign the ruling as erroneous. The writing in the book is conceded to be almost wholly in the handwriting of the decedent. The left-hand page consists almost wholly of items concerning the arrival and departure of and short remarks concerning the servants; the right-hand page purports to state the household expenses and the personal expenses of the decedent. It is minutely itemized. The right-hand page, however, does not purport to state the investments made by the decedent, and the attention of the trial court was not called to a single entry in that behalf. The book does contain some disjointed entries regarding dividends received, but neither party claimed those entries were material in this case. Conceding without deciding that the book should have been received in evidence, it will suffice to remark that the contents of the book were evidence of no fact except to show that Mary Ellen Moore was most frugal in her habits, and of that fact there was no dispute.

The appellants produced and offered in evidence individual income tax returns for the years 1917 and 1918. The trial court sustained an objection, and the ruling is assigned as error. We think it may be conceded that similar papers might be admissible un-

der some circumstances on the trial of such an issue as was involved in the instant case; but the appellants do not point out to us any particular fact contained in any one of the papers that was particularly helpful to either party. The return for the year 1917 showed a total net income of \$6,389.53; it further showed that during that year the decedent contributed to charitable organizations \$15. The return for the year 1918 showed a net income of \$2,137.88; it showed no losses by fire or storm; it showed contributions in the sum of \$40.

[2-4] Assuming without deciding that the rejected evidence should have been received, and considering all of the evidence which the appellants offered, we think it is clear that the appellants did not offer evidence sufficient to justify the trial court in holding that they had proved an interest in the estate of the deceased. In the first place, if we view all of the evidence mentioned and give it all of the force which it is entitled to, it does not carry the inference that after Mary Ellen Moore received the \$16,000 from her husband's estate that she preserved the same in kind, or that she invested the same in any particular security, or reinvested the same in any particular security. It may equally be inferred that she so mingled those moneys with her other properties that they cannot now be traced to their origin as a part of the community property. When such conflicting inferences may be drawn from the proof, then there is nothing for the jury, or the trial court sitting without a jury, but mere guesses and conjectures, and upon these no verdict or decision can be founded. *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 366, 64 Pac. 480. Moreover, the appellants had before them the itemized inventory of the investments of which the decedent died possessed. They did not show whether a profit or a loss was made on any one. They did not show, if a loss, whether the loss was, in whole or in part, funds received from the estate of the husband. They did not show whether any one of the investments was made, in whole or in part, with the funds received from the estate of the deceased husband. But the appellants contented themselves with introducing weaker and less satisfactory evidence. Under those circumstances the trial court was entitled to presume that the omitted evidence would be unfavorable and, for that reason, was not offered. *Stedman v. Stedman*, 179 Cal. 288, 291, 176 Pac. 437.

The ruling of the trial court was, in effect, holding that the evidence produced by the appellants did not present to the trial court the inference which the appellants would have had the trial court draw. We cannot say that the trial court erred in so holding.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 50

MONDADA V. BORDENAVE. (Civ. 4607.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1923. Hearing Denied by Supreme Court Feb. 18, 1924.)

1. Trusts ☞107—Burden not on mother to show that son had independent advice in conveying property to her.

In an action by son against his mother, old and infirm, to have declared a trust on realty conveyed by him to her for valuable consideration, the burden was not on the mother to show that plaintiff had independent advice, notwithstanding the deed was drawn by her attorney.

2. Appeal and error ☞1011(1)—Judgment on conflicting evidence as to whether property was conveyed in trust affirmed.

A judgment against a son, suing to have a trust declared in realty conveyed by him to his mother, affirmed, as based merely on conflicting evidence as to whether the property was conveyed in trust, or free and clear of all equities for a valuable consideration.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Thomas Mondada against Marie Bordenave. Judgment for defendant, and plaintiff appeals. Affirmed.

A. M. More and E. B. Mering, both of San Francisco, for appellant.

Ralph Starke, of San Francisco, and E. B. Martinelli, of San Rafael (Jordan L. Martinelli, of San Rafael, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought to have a trust declared upon certain real property in Marin county, Cal. The legal title to said property was vested in the defendant, who is the mother of the plaintiff. Plaintiff alleged that prior to April 27, 1909, he was the owner of said real property, and that on that date he deeded the same to the defendant upon the oral agreement that the defendant would reside upon said property and keep the same as a home for both plaintiff and defendant, and that, if defendant should leave said home, she would reconvey the said property to the plaintiff. Defendant denied the making of any such oral agreement, and alleged that the property was conveyed to her absolutely and free from any trusts in payment of an indebtedness of approximately \$1,000, which amount was due to defendant from the plaintiff at the time of the said conveyance. Thus were presented the only questions, which are ones of fact, involved in the case.

The trial court found the allegations of the complaint regarding the oral agreement to be untrue, and found that the plaintiff conveyed the property in question to the de-

fendant "for and in consideration of the sum of \$1,000, in which amount plaintiff was indebted to defendant, said indebtedness being made up by and evidenced by a promissory note bearing date of October 14, 1907, for the sum of \$500 and the additional sum of \$500 which defendant had loaned to plaintiff."

At the time of the trial the defendant was 79 years of age. The plaintiff was evidently a man of mature years, who had been working and earning his living for many years prior to the time he acquired the real property in question in 1902. It is true the evidence in the record is conflicting, and that there is considerable evidence upon which the trial court might have based findings in favor of the plaintiff's contention. However, the defendant told a story which supports the findings in her favor, and the trial judge stated he was inclined to believe her testimony, and found accordingly.

[1] The contention upon the appeal is that, as the parties were mother and son, and occupied a confidential relation one to the other, the burden was upon the defendant to show that no trust attached to the property; that as the record shows that the deed to the property was drawn up by the attorney for the mother, and that the son had no attorney representing him, the transaction is presumably void, and the burden was upon the mother to show that the son had independent advice upon the question of deeding the property to her. Reliance is placed upon the case of *Nobles v. Hutton*, 7 Cal. App. 20, 93 Pac. 289. In that case the donor of the property was old and feeble in mind and body, and the court found her to have been mentally incompetent at the time of the execution of the deed to her son. It was there said:

"When, therefore, he [defendant] obtained from her [plaintiff], under the circumstances disclosed by the evidence, valuable property—in fact, practically her entire estate—admittedly without a valuable consideration, the burden rested upon him to show that the fructification of the transaction was not attained through fraud or undue influence."

The circumstances disclosed by the evidence in the present case are exactly the reverse of those disclosed in the case last cited. In the present case the grantee was the mother. She was old and feeble, according to the testimony. The grantor was the son, so far as the record shows, entirely competent mentally and active physically. And one of the distinguishing features of the case of *Nobles v. Hutton*, and one which is stated as a part of the rule announced therein, is that in that case there was no valuable consideration paid for the property, while in the present case the court has found upon sub-

stantial evidence that a valuable consideration was paid by the grantee.

Two other cases are relied upon by appellant. They are: *Mead v. Mead*, 41 Cal. App. 280, 182 Pac. 761, and *Brison v. Brison*, 90 Cal. 324, 27 Pac. 186. Both of these cases are distinguishable from the instant case in two important particulars. In the *Mead* Case the property was conveyed by a father to a son without any consideration. The grantor was a man of 83 years of age, quite deaf, stricken with paralysis, feeble in body and mind at the time of the trial, and the deed had been made by him 5 years earlier. In the case of *Brison v. Brison* the conveyance was from the husband to the wife without any consideration whatsoever, and the trial court found that the conveyance was made with the understanding that the property would be reconveyed later.

[2] There are no other matters requiring consideration upon this appeal. The record merely presents a case of conflicting evidence upon the vital question involved, i. e., was the property conveyed to the defendant upon a trust or was it transferred to her free and clear of all equities for a valuable consideration, and the trial court, after seeing the witnesses, accepted as true the statement of the mother, and found accordingly.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

65 Cal. App. 120

PEOPLE v. ABBOTT. (Cr. 1141.)

(District Court of Appeal, First District, Division 2, California. Jan. 2, 1924.)

1. Criminal law ☞351(3)—Evidence of forfeiture of bail and apprehension on bench warrant held admissible on issue of flight.

In a prosecution for having obtained money by false pretenses, evidence that defendant had failed to appear at the time first set for his trial, that he was arrested some six months later upon a bench warrant, and that his bail had been declared forfeited for the purpose of showing that he had attempted to evade the consequences of a trial by flight, *held* proper.

2. False pretenses ☞22—Defense that prosecuting witness not entitled to rely on false representations not sustained.

In a prosecution for obtaining money by "false pretenses," in that defendant had sold to the prosecuting witness a number of barrels containing colored water upon representations that they contained whisky, *held*, that defendant could not avoid liability on the theory that there was no longer any property rights in the whisky, and that the prosecuting witness must be presumed to have known such fact and was not entitled to rely on the false representations, since such representations were of fact and not of law, and the basis of the charge being a misrepresentation of a material

fact with knowledge thereof and intent to defraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Herbert Abbott was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was convicted upon an information charging him with the crime of obtaining money by false pretenses made with an intent to defraud. He appeals from the judgment of conviction and the order of the trial court refusing his motion for a new trial.

[1] The appellant assigns as error the admission of evidence showing that the bail bond of defendant had been declared forfeited by the court prior to the trial, and that a bench warrant had issued for his apprehension. It is admitted by the appellant that this evidence was offered for the purpose of showing that he had attempted to evade the consequences of a trial by flight, but he contends that the record evidence of the proceedings had by the court prior to the trial of the cause was not admissible for this purpose. Some authorities from other jurisdictions are cited to the point that this evidence was not admissible, as it covered an *ex parte* proceeding had in the absence of the defendant. But in the case before us evidence had previously been offered to show that the defendant had failed to appear at various times when his case was called before the trial court, and that six months after the date upon which his case was set for trial he was arrested in another county after considerable search. It was then shown that he was arrested upon a bench warrant, which was issued by the trial court a few weeks previous to the time when his bail was declared forfeited. The introduction of the evidence relating to the issuance of the bench warrant upon which the appellant was subsequently arrested in another county was clearly admissible as evidence of flight. The evidence relating to the forfeiture of his bail was merely a part of the general story and was not prejudicial to the trial of his case.

[2] The second point urged is that the evidence was insufficient to justify the verdict, because the false pretenses upon which the money was fraudulently obtained from the prosecuting witness consisted in representations that a number of barrels contained

whisky, whereas, as a matter of fact, said barrels contained colored water. It is then argued that, inasmuch as "there are no longer any property rights in whisky," the prosecuting witness must be presumed to have known the law to be such and could not therefore be deemed to have relied upon the false representations of the appellant.

Accepting for the time being appellant's general statement of the law as to property rights in whisky, we cannot accept his conclusion as to the legal effect of the representations made in this case, because those representations were of a matter of fact and not of law. The basis of the charge upon which appellant was tried was that he had made a misrepresentation of a material matter of fact, with knowledge of the true facts and with the intention to defraud, that the injured party, relying upon the false representations, was induced to part with his money, and that the appellant obtained this money as a result of the fraud. These were the necessary elements to be proved by the prosecution, and a review of the record satisfies us beyond any doubt that the evidence was sufficient to sustain the charge to the information.

Criticism is also made of the instructions relating to the evidence tending to show the flight of the defendant, but the argument here is practically the same as that advanced upon the first point considered.

We find no error in the record, and from our examination of it we are satisfied that the appellant was legally convicted on substantial evidence.

Judgment and order affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J

65 Cal. App. 98

RANDOLPH MARKETING CO. v. WOOD
et al. (Civ. 3718.)

(District Court of Appeal, Second District, Division 1, California. Dec. 28, 1923.)

1. Sales — Evidence held insufficient basis for finding as to value of mixed grapes delivered under contract for a particular variety.

In an action for damages for the delivery of four carloads of grapes of mixed varieties, under a contract for Zinfandel grapes, testimony that it would be impossible to say what a mixed car would be worth, that it would be worth "approximately \$30 a ton, maybe more," and that if it contained a large percentage of a certain variety witness would probably give full price for it, held insufficient to support a finding as to the value of the grapes delivered as a basis upon which to determine damages.

2. Sales — Evidence of price obtained on resale held properly excluded on issue of damages for failure to perform as to quality.

In an action by a purchaser for damages for delivery of mixed grapes under contract for a particular variety, proof of the amount for which the mixed grapes were sold as a basis for determining the damages sustained held properly excluded; such damages, under Civ. Code, § 3313, being determinable from their actual value, rather than the price for which they were sold.

3. Sales — Damages for delivery of goods other than those ordered held not recoverable because of failure to show value.

Under Civ. Code, § 3313, the measure of damages for delivery of mixed grapes under a contract for a particular variety is the excess, if any, of the value of the variety ordered over the actual value of those delivered; so that, in the absence of any showing as to the actual value of grapes delivered, the purchaser is not entitled to recover, although he establishes a contract for the resale at a profit of the goods ordered.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Randolph Marketing Company against H. L. Wood and another. From a judgment for defendants, plaintiff appeals. Affirmed.

John H. Miller, of San Francisco, for appellant.

A. J. Carlson, of Modesto, and D. H. Laubersheimer, of Los Angeles, for respondents.

CURTIS, J. Action to recover damages for breach of contract in the sale of four carloads of Zinfandel grapes. The grapes were purchased by the plaintiff from the defendant Wood through defendant Ely as a broker acting for Wood. The purchase price was \$45 per ton, which was paid at the time the cars were loaded by Wood at stations near Modesto, in Stanislaus county. Two cars were consigned to Walla Walla, Wash., one to Portland, Or., and one to El Paso, Tex. On the arrival of the grapes at their respective destinations the four cars were found not to contain Zinfandel grapes only, but each car contained a mixed variety of grapes, principally Tokay, Mission, and Zinfandel varieties. The consignees refused to accept the grapes, for the reason that they contained varieties other than Zinfandel. There was no evidence of the amount of each variety of grapes shipped in any one car, nor was there any evidence of the amount of each variety of grapes shipped as a whole in the four cars. The only evidence of the value of the grapes shipped was that given by the defendant Ely. He stated that Mission grapes were worth \$5 per ton more than Zinfandel, and that other varieties were worth from \$5 to \$15 per ton less than Zinfandels, but that it would be im-

possible to say what a mixed car, that is, a car containing a number of varieties of grapes, was worth, without knowing what percentage of the different varieties were in the car. In answer to a question as to what he would give for such a car of grapes, the witness testified:

"Probably \$30 a ton; maybe more. I would have sized it up. If I thought it contained 60 or 70 per cent. of Missions in there, I would have probably given the full price for it."

At the close of plaintiff's testimony, upon the motion of defendants, the court granted a nonsuit. This motion was granted on the ground that there was no evidence of any damage having been sustained on behalf of plaintiff, for the reason that the evidence failed to show the value of the grapes shipped, or that the grapes actually shipped were of any less value than the grapes ordered and paid for by plaintiff.

[1] We are not favored with any brief or points and authorities on behalf of respondents. Appellant contended that the evidence shows that the grapes as loaded in the cars at the points of shipment were worth only \$30 per ton, and that as it paid \$45 per ton for the grapes, its damage would be the difference between the amount paid and the value of the grapes delivered, or \$15 per ton. This would undoubtedly be true if there was any evidence that the value of the mixed cars was only \$30 per ton. It will be noted that the witness Ely in the first place stated that it would be impossible to state the value of a mixed car of grapes without knowing the percentage of the different varieties of grapes in the car. It is true he stated that he would probably give \$30 or more per ton for such a car of grapes, but what a person might give for an article is no evidence of its value. He might, for reasons good and sufficient to himself, be willing to pay a price far in excess of its actual value. On the other hand, he might have but little or no use for the article, and be unwilling to pay even a fraction of its real value. It would be an extremely unsafe rule that would permit the value of property to be so established. Furthermore, the testimony of the witness, even if competent to prove the value of the grapes, was so indefinite and uncertain as to render it worthless as evidence in the case. He testified that he probably would give \$30 per ton, and maybe more, for a mixed car of grapes without knowing the amount of each variety of grapes in the car. How much more he does not state. He does say, however, if he thought there was a large percentage of Mission grapes in the car he would give the full price for it. It is apparent that testimony of this character would

not support any finding which the court might make relative to the value of the grapes sold. As we have before noted, this was the only testimony before the court upon this issue of the case. The trial court, therefore, rightly granted defendant's motion for a nonsuit.

[2] Plaintiff offered to prove at the trial the actual amount received by it for the grapes at their respective destinations, under the claim that the measure of its damage was the difference between what it paid for the grapes and what, in the exercise of its best skill in reducing the damage as much as possible, it was enabled to realize from the sale of the grapes at their destinations. Defendants objected to such proof, and their objection was sustained by the court. There was no error in the court's ruling. The measure of damages in cases of this character is fixed by section 3313 of the Civil Code.

[3] There was evidence tending to show that the plaintiff had contracted to sell the grapes ordered from the defendants for \$50 per ton. Plaintiff contends that in view of this evidence it was entitled to recover in this action at least the difference between that price and the purchase price of said grapes, which would be \$5 per ton. In support of this last contention plaintiff has called our attention to a citation found in 24 Am. & Eng. Enc. of Law (2d Ed.) page 1156, and to a number of cases there referred to in support of the text. These authorities are all from jurisdictions other than our own. As before stated, in our opinion the measure of damages in this case is covered by the provisions of section 3313 of the Civil Code of this state. By this section plaintiff would be entitled to recover the excess, if any, of the value of Zinfandel grapes at the time of their purchase over the actual value of the grapes delivered. Plaintiff therefore would not be limited to the purchase price of \$45 per ton paid for the grapes, but, in fixing the amount of its damage, would be entitled to show the market value of the grapes agreed to be purchased. This market value might be \$50 per ton, or any other amount which the evidence might establish. In this case there is testimony tending to show that the value of Zinfandel grapes at the time these grapes were ordered was at least \$50 per ton, but plaintiff can recover only the excess of such value over the actual value of the grapes delivered. As we have already shown, we believe, plaintiff failed to establish the actual value of the grapes delivered, and as a result of such failure it has not shown that it sustained any damage whatever.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

65 Cal. App. 123

FARRAR et ux. v. WHIPPLE et al.
(Civ. 4506.)

(District Court of Appeal, First District, California, Division 2. Jan. 2, 1924.)

1. Highways — 175(1)—Duty of driver as relates to use of right-hand portion of highway stated.

Under Motor Vehicle Act, § 20, as amended by St. 1919, p. 215, § 12, subd. (a), requiring motor vehicles to "travel upon the right-hand side of such highway unless the road ahead on the left-hand side is clear and unobstructed for at least 100 yards ahead," and also requiring the operator of a motor vehicle to use the right-hand side of a highway "wherever practicable," it is the duty of the operator of an automobile to use the right-hand side of the highway if clear and passable, but if blocked or impassable he may use the left-hand side, giving way at all times to traffic from the opposite direction.

2. Highways — 184(2)—Negligence of one towing car of another held not shown in action for injuries caused by towed car.

In an action for personal injuries and for damages to an automobile from a collision by plaintiff's car with the car of one defendant, which was being towed by another defendant, which occurred as the two were passing each other at a point on the highway where it was partially blocked by cars parked at the edge of the road because of another accident, where there was no showing that defendant, whose car was towing the other, had violated the Motor Vehicle Act, § 20, as amended by St. 1919, p. 215, § 12, subd. (a), requiring use of the right-hand side of a highway whenever practical, *held* as to him there was no showing of negligence constituting a proximate cause of the injury.

3. Action — 50(1)—Action for damages to husband's property may be joined in action by husband and wife for injuries to wife.

Under Code Civ. Proc. § 427, subd. 8, a cause of action for damages to personal property of a husband may be joined in the same action with a cause of action on the part of the husband and wife for personal injuries suffered by the wife alone.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by J. C. Farrar and wife against A. S. Whipple and L. A. Gielow. Judgment for plaintiffs, and defendants appeal. Affirmed in part, and reversed in part.

Louis V. Crowley, of San Francisco, for appellants.

Thos. D. Johnston, of Martinez, for respondents.

NOURSE, J. This is an appeal by the defendants from a judgment entered against both of them for damages arising out of personal injuries to the plaintiff Josephine Farrar and for damages to the property of plaintiff J. C. Farrar, her husband.

The facts of the case are that the two

plaintiffs were riding in an automobile owned and operated by plaintiff J. C. Farrar upon one of the public highways in the county of Contra Costa. The defendant Gielow was operating his automobile on the same highway in an opposite direction, and at the time of the collision hereinafter referred to was towing an automobile owned and steered by the defendant Whipple. The car of the defendant Whipple had broken down a short time before, and the defendant Gielow, at the former's request and without compensation, was towing his car with an ordinary tow line of about 15 feet in length. A short time before the collision another accident had happened on the highway in question, and a number of cars were parked along the west side of the highway with their left-hand wheels standing about 1 foot within the paved portion of the highway. As the defendants approached these parked cars the defendant Gielow turned to the left, and continued his course along the highway at a rate of speed of about 10 or 12 miles an hour. At the same time the plaintiffs, approaching in another direction, passed Gielow's car as they proceeded upon their right-hand side of the paved portion of the highway as far to the right as it was possible for them to travel without getting off the highway. The defendant Whipple, while steering his car at this point, directed his attention to the scene of the former accident, and was looking at a man and woman who were lying upon the ground at the time. In doing this he failed to follow the line of the towing car but turned his wheel directly to the left and into the car of the plaintiffs, causing the injuries which are the basis of the action. The paved portion of the highway at that point was about 16 feet, while the dirt road beyond the paved portion of the highway extended about 8 feet. At the time of the collision the plaintiffs' automobile was almost entirely off the paved portion and running slowly upon the dirt side road. Judgment was rendered in favor of the plaintiffs, making an award for personal injuries suffered by the wife and also for the cost of repairing the automobile of the husband.

But two points raised on the appeal require consideration: First, whether there is any showing of negligence on the part of the appellant Gielow; and, second, whether the cause of action for damages to the personal property of the husband could be joined in the same action with the cause of action on the part of the husband and wife for personal injuries suffered by the wife alone.

[1, 2] Upon the first point respondents rely upon the provisions of section 20 of the Motor Vehicle Act as amended (Stats. 1919, p. 215, subd. [a]), which reads:

"On all occasions the driver or operator of any vehicle in or upon any public highway shall

travel upon the right half of such highway unless the road ahead on the left-hand side is clear and unobstructed for at least one hundred yards ahead and in all cases while crossing an intersecting highway."

The same subdivision, however, requires an operator to travel upon the right-hand side of a highway "wherever practicable." The clear meaning of the section is that, if the right-hand side of the highway is clear and passable, it is the duty of the operator of an automobile to use that portion of it, but, if the right-hand portion of it is blocked or impassable, the operator may use the left-hand portion of it, giving way at all times to the traffic which is approaching in the other direction. Here the uncontradicted evidence is that the paved portion of the highway was 16 feet wide; that beyond the paved portion was a dirt road 8 feet wide; that the right-hand portion of the highway was blocked by machines which were parked thereon, making it necessary for the appellants to turn slightly to their left. These parked machines occupied about 1 foot of the paved portion of the highway, leaving for traffic in both directions a space of 15 feet. It further appeared that these cars were all standard width, to wit, about 6 feet. There was, therefore, even upon the paved portion of the highway, ample room for the cars of both appellants and respondents to pass, and there was no attempt to show that Gielow was traveling to the left of the center of the paved portion of the highway. So far as this appellant was concerned, he was, therefore, proceeding strictly within the terms of the statute, and no act of his was the proximate cause of the resulting injury. It stands in the record without conflict that the injuries were caused solely by the careless and negligent manner in which the appellant Whipple steered his car, and that but for this negligence the accident would not have happened. There is, therefore, nothing in the record to show negligence on the part of the appellant Gielow, and for that reason the judgment as to him must be reversed.

[3] On the second point it is argued that an action for damages to personal property of the husband cannot be joined with an action for damages for personal injuries sustained by the wife alone. Subdivision 8 of section 427 of the Code of Civil Procedure is cited. This reads in part that in any action brought by the husband and wife all consequential damages suffered or sustained by the husband alone may be alleged and recovered without separately stating them, and "that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately." By the terms of the sec-

tion the husband may be joined with his wife in suing for consequential damages resulting from personal injuries sustained by the wife alone. His action then becomes an action for damages for personal injuries, and as such is within the terms of that portion of the section which has just been quoted and which authorizes the joinder of an action for injuries to person and property growing out of the same tort.

Criticism is also made as to the want of proof of the injuries to the automobile, but upon the whole record we believe that the trial court had sufficient competent evidence to sustain the finding as to the respondents' damage in that particular.

The judgment against the defendant Whipple is affirmed, and that against defendant Gielow is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

65 Cal. App. 107

KINNEBERG v. FIREMAN'S INS. CO.
(Civ. 2644.)

(District Court of Appeal, Third District, California. Dec. 29, 1923. Hearing Denied by Supreme Court Feb. 25, 1924.)

1. Insurance — 668(5) — Delivery of bill of sale of insured automobile held question of intent for trial court.

In an action on an automobile fire insurance policy, requiring that insured's interest be that of unconditional and sole ownership, delivery of an alleged bill of sale of the property to a creditor *held* a question of intent for the trial court.

2. Insurance — 665(3) — Findings as to unconditional and sole ownership held justified.

In an action on an automobile fire insurance policy containing an unconditional and sole ownership clause, evidence *held* sufficient to justify the trial court's findings that plaintiff never lost control of an alleged bill of sale of the car to a creditor, that the latter never accepted or received the bill, and that no lien on the car was created thereby.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by M. J. Kinneberg against the Fireman's Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

William V. Cowan and J. M. Inman, both of Sacramento, for respondent.

PLUMMER, J. This an action by plaintiff to recover the sum of \$1,600 on an automobile fire insurance policy. Plaintiff had judgment and the defendant appeals.

The only question presented for consideration upon this appeal is whether the plain-

tiff had an insurable interest in the automobile covered by the policy issued by the defendant at the time of its destruction by fire. It appears that some time prior to the fire, and after the issuance of the policy sued upon in this action, the plaintiff borrowed from one Thomas Byrne the sum of \$1,266 and gave his promissory note therefor. The policy in question contains the following provisions:

"If the interest of the assured in the property be other than unconditional and sole ownership, or if the subject of this insurance be or become incumbered by any lien or mortgage except as stated in warranty No. 3 or otherwise indorsed hereon."

Warranty No. 3 is as follows:

"The automobile described is fully paid for by the assured and is not mortgaged or otherwise incumbered."

A few days after the execution of the note above referred to, Thomas Byrne called at the place of business of the plaintiff, Kinneberg, not, however, in connection with the loan herein referred to, or for the purpose of obtaining any security therefor. However, at the time of said call, the plaintiff, Kinneberg, went into his office and wrote out the following document:

"Superior Motor Sales Co., 1910 M Street. Phone Main —. Sacramento, Cal., Aug. 1, 1921. Sold to T. Byrne, Sacramento, Calif., 1 Pan-American touring car No. 3176. 1,266.00. Received payment.

"[Signed] M. J. Kinneberg.

"The above car is given as security on a \$1,266 note, in favor of T. Byrne, and said car is to remain the property of said T. Byrne until said promissory note is paid, together with interest thereon as specified in said note.

"[Signed] M. J. Kinneberg.

"[Signed] Thos. Byrne."

This paper was made out in duplicate; plaintiff signed both copies and handed them to Byrne. Byrne at first declined to sign the paper, stating that he did not care for the instrument; but, upon further request by the plaintiff, Byrne signed both copies and handed them back to the plaintiff, stating that he did not want the same. The circumstances of what took place in this transaction are shown by the testimony set out in the transcript which is as follows:

"Q. Mr. Kinneberg, didn't you, at the time you borrowed the money from Mr. Byrne, execute a bill of sale in the form of a promissory note covering this, in—a promissory note in the form of a mortgage on this car? A. All I gave him was a note for the money. That is all he asked. Q. You never signed any bill of sale of any kind? A. I made out a bill of sale subsequently to that, and offered it to him; but it was never accepted, because he didn't want it. Q. Mr. Kinneberg, you signed a bill of sale, didn't you? A. Yes, sir. Q. And Mr. Byrne signed it? A. Yes, sir. Q. You signed two copies, didn't you? A. Yes, sir. Q. And you

kept one, and he kept the other? A. No, sir; he did not. Q. Who kept the original copy? A. I kept it, and it was destroyed, simply because he didn't want it. Q. Well, why did Mr. Byrne sign it? A. He signed it before he realized what he was signing. He came down to my place to tell me that he had two or three people that he thought he could sell that car to, and I merely offered this to him, and he signed it, and after we got through, he said, 'What is this?' And I said, 'Well, it is simply a bill of sale, and I feel that you are entitled to it as additional security;' and he said, 'I don't want it;' and he left it on my desk, and after he went away I destroyed it. Q. You didn't destroy this one, did you? A. No. It was simply left there and mixed up with the rest of my papers when I delivered them to Mr. Cowan. Q. He signed both of them, didn't he—Mr. Byrne? A. He did; yes, sir. * * * Q. This was a week after you loaned him the money you went down there to borrow a car? A. Yes, sir. Q. And did this question of a bill of sale come up? A. He asked me to sign it. Q. Did he have it prepared? A. No; he did not. Q. Who prepared it? A. He did. Q. While you were down there? A. Yes. Q. Now state what he said. A. Well, I don't know. The only thing is, he just told me to sign it, and it would make it solid for me, security for me, that is all. Q. Well, was this before he made it out? A. Before he made what out? Q. The bill of sale. A. No; it was afterwards. Q. After he made it out? A. Yes. Q. Well, when you got down there, the bill of sale wasn't made out? A. No. Q. Did he sit down and make it out in front of you? A. Yes. Q. What did he say when he was making it out? A. Didn't say anything until he got it made out. Q. You didn't know what he was doing? A. No. Q. After he got it made out, he turned to you and said: 'Sign this'? A. No; he told me to sign that, and it would make it more secure for me, and then I read it, and handed it back to him, and told him I didn't want it. Q. Why didn't you want that? A. Why, because it is no good. Q. Why do you say that, 'No good'? A. That is no bill of sale. Q. Well, you objected to signing it, because you didn't like the form of it; is that it? A. No; because I didn't want to take it, because I didn't believe it was any bill of sale. Q. Well, why did you sign it? A. I signed it because he asked me to. Q. Well, why didn't you take it? A. Well, because I didn't want it. Q. But you signed it? A. Yes, and left it there, because I didn't want it. * * * Q. He didn't say anything about it until he went to give it to you? A. No; he just told me to sign it; it would make the note more secure for me. Q. And you said, 'No'? A. Yes, sir. Q. Then what happened? A. That is all. I signed it, and told him to keep it; I didn't want it. Q. You told him to keep it, you didn't want it? A. Yes, sir. Q. And he kept it? A. Yes, sir. Q. The two copies? A. Yes; he kept them. Q. He offered you one copy, though, didn't he? A. He offered it to me, and I didn't want it. Q. You just said, 'You keep it'? A. Yes. Q. Is that all you said? A. That is all I told him. I says: 'I don't want it, you can keep it.' * * * A. No; I just signed it for him. He asked me to sign it. He told me it would make it safer for me. Q. Did you or did you not at that time ask Mr. Kinneberg to take

care of it as your agent? A. I told him he could keep it and take care of it."

The witness Byrne also stated that he did not consider the paper any good as a bill of sale and did not want it. The foregoing testimony was repeated several times, as appears by the transcript, but the substance and effect thereof remained unchanged by the repetitions. The trial court found that the interest of the insured in the automobile in question was unconditional and sole ownership at the time of its destruction by fire on the 21st day of November, 1921; that the policy was in full force and effect; and as a conclusion of law from the facts found that the plaintiff was entitled to judgment for the insurance and entered judgment accordingly.

The writing referred to as a bill of sale was excluded from the testimony and therefore from consideration by the trial court on the ground that it was never delivered, and that no title to the automobile ever passed from Kinneberg to Byrne, and that no lien upon the automobile was created by the transaction just referred to. The testimony shows that the plaintiff handed the paper to Byrne with the request that he sign the same and that after the two copies were signed they were handed back by Byrne to the plaintiff. No further or other attempted delivery was made by Kinneberg and the papers thereafter remained in his sole custody and control; that in the beginning of the transaction the plaintiff intended by the writing referred to, to give Byrne security for the money theretofore borrowed from him seems clear. It is also evident that Byrne did not want any security in addition to the promissory note then held by him evidencing the amount of the indebtedness owed by the plaintiff. The evidence shows that one copy of the paper in question was destroyed and the other remained in existence with the papers belonging to the plaintiff.

[1] Under the circumstances which we have set forth and the testimony which we have copied, the question of delivery in this case is a pure question of intent to be found by the trial court. While a number of cases might be cited, the following excerpt from *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726, covers the question fully:

"The act solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall so operate. The elements going to make up such a paper all constitute an act factum or deed, but not complete until the paper has been delivered with the intent above mentioned. The intent with which it is delivered is all important. This restricts or enlarges the effect of the instrument. It may be delivered to another person as a mere custodian, or to such person to be kept by him and delivered to a third person on a condition performed, or

the happening of a certain event, or it may be delivered that it may have full operation as the deed of the party delivering it. This may be done in various modes. It is impossible to state a priori in exact terms what shall or shall not constitute a delivery, that the paper may have its full operation as a deed. It is to a great extent a matter of fact depending upon intent, and under such circumstances the intent as evidencing what the maker of the instrument meant to do, must be found from the circumstances of the transaction, the *res gestæ*, and while some general rules may be and are laid down in regard to it to ascertain such intent, the intent must be found as a fact, and can not always be determined as matter of law. There are some cases in which the intent is so plainly indicated by the *res gestæ* that but one conclusion can be deduced. Take the case of the delivery of such an instrument to a third person as a mere custodian for the party giving it, its solution is plain that there is no delivery of the paper to make it operative as a deed. Take another case of such a paper handed by the grantor to the grantee, with the declaration this is my act and deed, a delivery would be so plainly intended that no other conclusion could be reached. A third case of the delivery of such an instrument by the maker to a third person with directions to keep it and hand it to a person named as grantee in it, on the payment by him of a sum of money, the payment of the sum of money, and the tradition of the paper as directed having been made, no other result could be reached than that the paper became by such delivery an operative conveyance. These cases are simple, but in other cases where the intent is to be inferred from circumstances in their very nature equivocal, the solution as to delivery or not becomes one of difficulty, and depends so much on the subjective state of the mind of person or persons trying the issue produced by the evidence of the attending circumstances, that the law can lay down no certain rule on the subject. It then becomes a question of fact, and if there is evidence tending to sustain the finding of the court a qua, this court will not disturb it. This is settled, that delivery is not complete until the person delivering [grantor] has so dealt with the instrument delivered as to lose all control over it. And whether he has so dealt with the instrument depends upon the intent to be deduced from all the surrounding circumstances, the *res gestæ*."

[2] As we read the testimony we conclude that the trial court was justified in finding that there was no time when the plaintiff had lost control of the writing called the bill of sale or when it was legally beyond his power to make any disposition thereof that he saw fit, and also that the trial court was justified in concluding that Thomas Byrne had never accepted or received the same or so acted in relation thereto, that title to the automobile destroyed by fire had passed to him, and also that no lien thereon had been created by the transactions referred to in this opinion.

We conclude that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; HART, J.

65 Cal. App. 127

BOEHM et al. v. SPRECKELS. (Civ. 4812.)

(District Court of Appeal, First District, Division 2, California. Jan. 2, 1924. Hearing Denied by Supreme Court Feb. 28, 1924.)

Principal and agent —36—Good-faith sale of subject of agency held equivalent to revocation of agency.

Where contract with publisher for a route for delivery of a newspaper created an agency, rather than relation of seller and buyer, publisher's sale of the subject of the agency, made in good faith, operated as a termination of the agency, and was equivalent to revocation thereof.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by M. Boehm and others against John D. Spreckels. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hearing denied by Supreme Court; LAW-LOR, Acting C. J., and WASTE, SEAWELL, MYERS, and RICHARDS, JJ., participating.

Wm. M. Abbott, Wm. M. Cannon, K. W. Cannon, Fabius T. Finch, Paul F. Fratessa, and Geo. B. Keane, all of San Francisco, for appellants.

Samuel M. Shortridge, of San Francisco (T. J. Sheridan, of San Francisco, of counsel), for respondent.

NOURSE, J. This is an appeal from a judgment against plaintiffs upon sustaining a demurrer to their third amended complaint. The action was commenced by the filing of the complaint on January 8, 1914, and after the demurrers to the complaint and to three amended complaints were sustained judgment was entered on the last demurrer September 30, 1915. The amended complaint contains fifty-four separate causes of action, all involving claims of individuals who held paper routes and agencies for the selling and delivering within the limits of such routes of the "San Francisco Call," a daily morning newspaper, which prior to the commencement of the action had been published by the defendant, Spreckels, in the city of San Francisco. During the pendency of the action the plaintiffs commenced a new action in the same court upon the same cause of action set forth in what is designated as the second cause of action in the complaint in the instant case. This new action was commenced on October 22, 1914, and, after demurrers were sustained to the complaint and amended complaints, judgment was entered in favor of the defendant and an appeal was taken therefrom on November 15, 1915, the same day on which the appeal here under consideration was taken. That appeal, which was numbered San Francisco No. 7692, was carried to the Supreme Court and de-

cided adversely to the appellants on June 22, 1920. The case is reported as *Boehm v. Spreckels*, 183 Cal. 239, 191 Pac. 5. At the same time *Otten v. Spreckels*, 183 Cal. 252, 191 Pac. 11, involving the same subject-matter, was heard and determined by the Supreme Court.

On this appeal it is frankly conceded by the appellants that in order to prevail the two opinions of the Supreme Court just referred to must be overruled. In fairness to appellants' counsel, we should point out that their briefs were filed while the record on appeal remained with the Supreme Court to which the appeal was properly taken.

In the *Boehm Case*, Justice Shaw, speaking for the majority of the court, held that the contract with the publisher for a route for the delivery of the newspaper created an agency and did not declare a sale of property. The court further held that the sale of the subject of the agency, made in good faith by the principal, operated as a termination of the agency, and was equivalent to a revocation thereof. The case, therefore, is completely determinative of the issues raised in the case before us, and upon the authority of that case the judgment must be affirmed.

Judgment affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

65 Cal. App. 102

JENNINGS v. CLEARWATER SCHOOL DIST. OF LOS ANGELES COUNTY et al. (Civ. 4255.)

(District Court of Appeal, Second District, Division 2, California. Dec. 28, 1923. Hearing Denied by Supreme Court Feb. 25, 1924.)

1. Schools and school districts —97(4)—Proposition submitted to electors for issuance of bonds for certain purposes held to control any prior understanding as to use of proceeds.

Where the trustees of a school district submit to the electors the question of the issuance of bonds to raise money for "purchasing school lots," etc., the site to be purchased not being more definitely designated, and the bonds are accordingly voted, a contention that the trustees cannot use the proceeds of the bonds to purchase a site not adjoining the old school building because of an understanding entered into prior to the election between the trustees and the electors is untenable; the proposition submitted to the electors, later evidenced by the bonds, constituting the only contract between the parties.

2. Schools and school districts —97(4)—Bond proposition submitted to electors held to sufficiently describe its purpose.

In an election to authorize issuance and sale of bonds for purchase of school property, a proposition submitted to the electors for "raising money for purchasing school lots" sufficient-

ly described its purpose without designating the actual lots to be purchased.

3. Schools and school districts ☞50—Trustee's notice to electors of consultation meeting held to sufficiently state purpose.

A notice by school trustees to electors called for a consultation meeting, specifying the subject, "instructing the board of trustees with respect to the purchase of a school site, and the erecting thereon of a schoolhouse," sufficiently designated the matter to be discussed, under Political Code, § 1611, and failure of the notice and resolution adopted at the consultation meeting to specify that the schoolhouse was to be financed from the proceeds of bonds voted at a prior election was immaterial; the bonds being the sole source of such funds.

4. Schools and school districts ☞70—Majority vote held sufficient to support resolution of electors as to purchase of school sites.

Where neither the proposition for the issuance of bonds to purchase "school lots," etc., voted on at an election, nor the resolution adopted by the electors at a later consultation meeting as to the use of proceeds of the bonds to purchase school sites, mentioned the disposition of any school property owned by the district, and there was nothing to show that purchase of a new site involved sale of the old site, a majority vote sufficiently supported the resolution.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Suit by Clarence Jennings against Clearwater School District of Los Angeles County and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and Jerry H. Powell, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIG, J. The board of school trustees of Clearwater school district caused notice to be given that an election would be held therein for the purpose of voting upon the question as to whether or not said district should issue and sell bonds to the amount of \$45,000, as a means of "raising money for purchasing school lots, for building one or more school buildings, for making alterations and additions to said school building or buildings, for insuring school buildings, for supplying school buildings with furniture and necessary apparatus, and for improvement of school grounds." The election was held on July 12, 1921, pursuant to such notice, and, two-thirds of the votes cast being in the affirmative, said bonds were issued and sold, and the proceeds thereof are in the hands of the county treasurer. Subsequently to the sale of said bonds the trustees gave notice that—

"In accordance with the provisions of section 1611 of the Political Code, notice is hereby given that a meeting of the qualified electors of Clearwater school district, county of Los Angeles, state of California, will be held on the 13th day of January, 1922, between the hours of 1 p. m. and —, at Literary Hall, in said school district, for the purpose of consultation on the following: Instructing the board of trustees with respect to the purchase of a school site and the erecting thereon of a schoolhouse."

A meeting was accordingly held, and by a vote of 391 to 145, the following resolution was adopted:

"Moved that board of trustees be authorized to purchase a school site of not less than 4 acres fronting 20 rods in width on Ocean avenue from the property of L. D. Glock or John Thompson in said school district, and the erection on said school site a school building containing not less than 5 classrooms."

No question is raised as to the legality of any of the steps taken prior to this meeting, but appellant instituted proceedings against the respondents, praying that said purchase be enjoined, and that the trustees be restrained from using any part of the funds for the purchase of a school site which does not adjoin the present school property. The principal ground for injunction alleged in appellant's amended complaint is that—

"It was understood by and between the district and the trustees of said district and the electors of said district that the proceeds of said bonds, if voted, should be used for the purpose of purchasing lots adjacent to and adjoining said district's school site and for building one or more school buildings upon the lots so purchased, and for making alterations and additions to said school building or buildings, and for insuring buildings, for supplying school buildings with furniture and necessary apparatus, and for improving the school grounds of said district situate as hereinbefore described, and for no other purpose; that said bonds would not have been voted by the electors of said district had they known it was the intention of said trustees to use the proceeds of the sale of said bonds to acquire lots that do not adjoin the district's present school site and to build a schoolhouse on such lots."

It is further alleged that upon two occasions previously to the meeting above mentioned the trustees called meetings for the purpose of obtaining instructions to purchase a site not adjoining the present school grounds, and that upon each such occasion the proposition was defeated. It is argued therefrom that this action of the electors is evidence of such previous understanding and agreement, and is conclusive, and that the third meeting and resulting resolution were void, because the board called a meeting for consultation upon the purchase of a school

site over a mile south of the present school site; that the trustees were bound by the understanding and agreement which they are alleged to have had with the electors preceding said election, and are therefore without legal authority to purchase a site or to construct school buildings which shall not adjoin the old school property.

Upon the trial objection was sustained to the introduction of any evidence upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action for injunction, and the case was ordered dismissed. This appeal is taken upon the judgment roll.

[1, 2] The contention which appellant urges most strongly is that prior to the election an understanding was entered into between the electors of the school district and the trustees that the proceeds of the bonds, if voted, would be used to purchase a site adjoining that of the school owned by the district. This proposition is not worthy of serious consideration. The law makes no provision for informal understandings of this character. On the contrary, the authorities cited by appellant expressly hold that the proposition submitted to the electors, and upon which bonds are voted, and which is later evidenced by the bonds themselves, constitutes a contract, and necessarily the only contract between the parties. In addition to this the electors may, if called together by the school board for the purpose of consultation, make recommendations as to the selection of the school site, which the board may not disregard. But there is no place in the entire procedure for understandings, except such as are expressed in the submission upon which the electors vote. None of the authorities cited by appellant upon this phase of the appeal sustain his position, but, as we have indicated, practically preclude the acceptance of this view. This is true of *Peery v. City of Los Angeles*, 187 Cal. 753, 203 Pac. 992, 19 A. L. R. 1044, and *Hollywood High School Dist. et al. v. Keyes*, 12 Cal. App. 172, 107 Pac. 129. In the instant case the amended complaint shows that the electors voted bonds for the purpose of "raising money for purchasing school lots," etc. It is nowhere alleged that the site to be purchased was more definitely designated, and this without doubt was a sufficient description to present the proposition to the voters.

[3] But the law expressly authorizes the school trustees to call a meeting of the electors of the district for purposes of consultation. This they did, specifying in the notice that the subject of the consultation should be "instructing the board of trustees with respect to the purchase of a school site and the erecting thereon of a schoolhouse." This notice sufficiently designated the matter to be considered and acted upon by the electors.

It informed everyone interested of the general subject to be discussed and determined. The meeting was held, and a resolution was adopted directing the board of trustees to purchase certain property, which action upon the part of the board the petitioner now seeks to enjoin. In addition to the argument based upon the claim that an understanding existed, to which we have adverted, it is further urged that neither the notice of the meeting held on January 13, 1922, nor the resolution adopted at that meeting specified that the school site to be purchased and the schoolhouse to be erected thereon were to be financed from the proceeds of the bonds which had been voted on July 12, 1921. We think this contention is devoid of merit. The record discloses that there was but one source supplying Clearwater school district with the funds needed for the purposes in question. The history of the entire proceedings as disclosed by appellant's amended complaint shows that all of the meetings which were held, of which the one held January 13th was the third, had to do with the disposition of the money derived from the sale of the bonds voted on July 12, 1921. In numerous cases cited by respondent language equally general in character embodied in notices for similar purposes was held sufficient. Among these are *Sherman v. Torrey*, 99 Mass. 472, 473; *Dix v. School Dist. No. 2*, 22 Vt. 309; *South School Dist. v. Blakeslee*, 13 Conn. 227.

[4] Appellant insists that the resolution adopted at the meeting of July 13, 1922, was void, because passed by only a majority of the electors present. It is claimed that to give the resolution validity as authority to bind the trustees it must have been passed by a two-thirds vote, because, it is asserted, the effect of the action taken would be to change the site of the school existing in the district. There is nothing in any fact alleged in the amended complaint which would justify the claim that the purchase of a new site and the erection of a new schoolhouse would result in the sale or abandonment of the one already maintained. Neither the proposition voted upon at the election nor the resolution adopted by the electors mentioned the disposition of any school property owned by the district.

It is further contended by appellant that the proposition authorized in the resolution just mentioned had been refused approval by the electors at two previous meetings called by the trustees. However, the amended complaint shows that both of the meetings which preceded that of January 13th were called for the purpose of considering the double question of the disposition of the present school site and the purchase of another, which joint proposition had been voted down; but the proposition for the meeting which was last held involved only the pur-

chase of the new site, without any reference to the sale of the old one.

The judgment is affirmed.

We concur: FINLAYSON, P. J;
WORKS, J.

65 Cal. App. 94

ATKINS v. BOUCHET et al. (Civ. 4634.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1923. Hearing Denied by Supreme Court Feb. 25, 1924.)

Municipal corporations — 705(10)—Pedestrian, injured by automobile, held guilty of contributory negligence.

One struck by an automobile, who, while crossing street, glanced neither to the right nor the left, and with an umbrella held down to her waist line had her view of traffic completely cut off, and did not see the automobile until after the collision, although the accident occurred in the middle of the day, *held* guilty of contributory negligence.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Anna D. Atkins against J. B. Bouchet, Charles White, and William Green, copartners doing business under the firm name of the Clean Cleaners, and Joseph H. Meiss. Judgment for plaintiff, and defendants appeal. Reversed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellants.

Ostrander & Carey, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for the sum of \$2,600, damages for personal injuries sustained by plaintiff, who was struck by an automobile owned by the defendant Bouchet and operated by defendant Joseph H. Meiss. The only issue upon the appeal is as to the contributory negligence of the plaintiff; appellants contending that, under the facts admitted by the plaintiff in her testimony, she was guilty of contributory negligence as a matter of law, and that the trial court erred in failing to grant defendants' motion for a nonsuit and in failing to direct a verdict in their favor.

We think the plaintiff in this case was guilty of contributory negligence as a matter of law, and we base our conclusion upon the case of Finkle v. Tait, 55 Cal. App. 425, 203 Pac. 1031, reconsidered and approved by our Supreme Court in a most learned and comprehensive review of cases of this character. *Burgesser v. Bullock's* (Cal. Sup.) 214 Pac. 649. The undisputed facts in the instant case show that the plaintiff, while crossing the street, glanced neither to the right nor the left, and with her umbrella held down

to her waist line had her view of traffic on her left completely cut off, and did not see the automobile at any time until after the collision, although the accident occurred in the middle of the day. This situation makes peculiarly applicable the language of *Finkle v. Tait*, wherein it was said:

"There was evidence that he was carrying a box of raisins 23 inches long, 13 inches wide, and 10 inches thick on his shoulder, in such a position that it may have obscured his vision. If that was the case, then it was negligence for him to attempt to cross the street with his vision obstructed in that manner."

In the case of *Burgesser v. Bullock's*, supra, relied upon by the respondent, our Supreme Court said, in commenting upon the case of *Finkle v. Tait*, supra:

"We sustained the conclusion of the District Court of Appeal solely for the reason that the pedestrian was crossing the street without looking and under such circumstances that he could not see in the direction from which traffic might be expected."

The foregoing statement is precisely applicable to the situation disclosed, without conflict, in the instant case. On December 9, 1920, at about 2 o'clock p. m., the defendant Meiss, as employee of the defendant Bouchet, was driving a Ford delivery car for Bouchet in a westerly direction on the north or right-hand side of East Fourteenth street in the city of Oakland, Cal. East Fourteenth street, at this point, runs in a general easterly and westerly direction, and at right angles intersects Eighth avenue, which runs in a general northerly and southerly direction. As Meiss was thus traveling westerly on East Fourteenth street, he was proceeding at a speed variously estimated by the witnesses as from 15 to 25 miles an hour. As he approached Eighth avenue he was traveling in the roadway between the northerly street car rail on East Fourteenth street and the curb.

Plaintiff, just prior to the accident, according to her own testimony, had been walking in an easterly direction on the northerly sidewalk on East Fourteenth street with an umbrella well down over her head, to protect herself from the rain which was being blown from the east, thereby obstructing completely her view of west-bound vehicular traffic. She testified that when she was 2 or 3 feet from the corner, and just before turning to the south, she lifted her umbrella slightly and peeked beneath it in an easterly direction. She was near-sighted, but stated she could see to the east for a distance of about a block. As she glanced under her umbrella she saw no vehicles approaching from the east. She then stood at the corner and turned and faced in a south-

erly direction, with her left side to the east and toward the approaching west-bound travel, and with her umbrella well down over her head and toward the east. She stood in this position while the east-bound street car traveling on East Fourteenth street came to a stop and its passengers alighted. She estimated the time at about one or two minutes, and while appellants make the most of this, we think that matter is neither conclusive nor material.

It is beyond question that plaintiff stood at the corner during the time the street car was discharging its passengers and until it was about to start again, and that during all of that time she was either watching the street car or looking to the south across the street, and that she did not glance toward the east after "peeping" under her umbrella a few feet before she reached the corner, because she did not think it necessary. When the street car started up, plaintiff stepped from the curb, still without a glance to the east, from whence traffic was to be expected, and with her umbrella well down to protect her from the rain from the east, and proceeded in a southerly direction. Before she reached the car track she was struck by the rear end of the automobile, which, according to the testimony, skidded when the driver attempted to turn sharply to his left to avoid a collision with the plaintiff. Plaintiff did not know of the presence of the automobile upon the street until it struck her.

Under these facts, we see no escape from the rule applied in the case of *Finkle v. Tait*, supra. The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

65 Cal. App. 53

RICIOLI v. LYNCH et al. (Civ. 2651.)

(District Court of Appeal, Third District, California. Dec. 24, 1923. Hearing Denied by Supreme Court Feb. 21, 1924.)

1. Appeal and error §909(2) — Payment of annual fees for other purpose than use of road assumed in support of findings of ownership of easement by prescription.

It must be assumed, in support of findings that plaintiff was the owner and entitled to possession of an easement in a road over defendant's land by prescription, that annual fees paid were not for the use thereof but for the maintenance of gates as contended by plaintiff.

2. Easements §36(3)—Open and unmolested use of road for over 40 years held shown.

Evidence held sufficient to establish open, visible, continuous, and unmolested use of a road over another's land for more than 40 years before commencement of an action to quiet title to an easement therein.

3. Easements §36(1)—Open and unmolested use for requisite period presumed adverse and under claim of right.

It will be presumed that an open, visible, continuous, and unmolested use of a road over another's land, for more than 40 years before commencement of an action to quiet title to an easement therein, was under a claim of right, and adverse, and the burden is on the landowner, claiming that such user was permissive, to rebut such presumption.

4. Appeal and error §1001(1)—Court's determination as to insufficiency of rebuttal testimony held conclusive on appeal.

The court's determination that a prima facie case made by proof of open, visible, continuous, and unmolested use of a road for more than 40 years before commencement of an action to quiet title to an easement therein was not overcome by a witness' testimony as to what was said in a conversation between the parties' predecessors in title 45 years before the trial, when the witness was only 15 years old, held conclusive on appeal.

5. Licenses §58(3)—License to travel road held irrevocable.

Where landowners accepted a proposition of the owner of land, through which a road leading from their lands ran, to "come over and help gravel the road and all travel it," and worked for 2 or 3 months thereon with men and teams, the license became irrevocable.

6. Easements §7(2)—Adverse use of road for 5 years after license becomes irrevocable sufficient to establish title.

Adverse use of a road over another's land for 5 years, after a license to travel it became irrevocable, is sufficient to establish title by prescription.

7. Easements §48(6)—Right to use road held not affected by change in course.

That a tenant of one suing to quiet title to an easement in a road over another's land by prescription, and a tenant of the landowner, with the latter's permission, had recently changed the course of the road for a short distance to avoid a steep hill, held not to have affected plaintiff's right to use the road, including the new section.

8. Evidence §129(3)—Evidence of terms on which landowner gave right of way to others held admissible in subsequent user's action to quiet title.

While the terms on which a landowner gives another a right of way through his land is not, considered as an isolated fact, evidence that he made the same terms with a third person using the way, admission of testimony, in an action to quiet title by prescription to an easement in a road, that defendants' predecessor in title, who was dead, had proposed to the witness and others that they help gravel the road and all travel it, was not error, though plaintiff's predecessor, also deceased, was not present at the time, in view of evidence that he was included in the proposition, and, with the others, graveled the road, used it in common, made repairs as needed, and paid annual fees for maintenance of gates.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by A. Ricioli against J. A. Lynch and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Geary & Geary, of Santa Rosa, for appellants.

Gil P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa, for respondent.

FINCH, P. J. The plaintiff had judgment, and the defendants appeal.

The complaint alleges:

"That for more than 40 years last past continuously the predecessors in interest of plaintiff and this plaintiff have been and are now the owners and entitled to the possession of an easement which is annexed and appurtenant to the lands of plaintiff of a road leading from the said lands of plaintiff across the lands of defendants, and that the lands of the said defendants are subservient to the said way and easement, * * * (here follows a description of the road by courses and distances), and for more than 40 years last past the said way and easement has been open, laid out, and used by the plaintiff and his predecessors in interest continuously and under a claim of right and with right openly, notoriously, uninterruptedly, and adversely to the said defendants and their predecessors in interest and each and every one of them."

The answer denies the foregoing averments of the complaint, and alleges that the road is a private road maintained by the defendants "for their special and particular use and not otherwise," and that plaintiff and his predecessors in interest, upon payment of an annual fee of \$10, have been allowed to use the road "by the permission and courtesy and consent" of defendants and their predecessors in interest and not otherwise. The court found in accordance with the allegations of the complaint, and, further, that for more than 5 years prior to the commencement of this action the plaintiff had used said road.

The defendants and their predecessors in interest, at all times herein mentioned, have owned two tracts of land, known as their upper and lower ranches. Since the year 1876 the plaintiff and his predecessors in interest have owned a large tract of land above defendants' lower ranch, and during all that time, up to October, 1921, have traveled the road in controversy. The road enters the lower ranch from a county road and runs past the defendants' residence up to that of plaintiff and to the residence on the upper ranch. The road has always been used also by defendants and their tenants and by a few others owning land above the lower ranch. The lands of defendants were owned by their father, John Lynch, at all times herein mentioned, up to his death in 1915, and defendants have been the owners thereof since. Plaintiff's land was acquired by Nick Nisson in the year 1876, and at his death in 1899 it passed to his

heirs who, in 1913, sold the land to plaintiff. The road in controversy is about 3 miles in length, two miles thereof being below the Lynch residence on the lower ranch and 1 mile above. It was in existence from the residence down to the county road prior to the year 1876. In that year Nick Nisson put a gate in the line fence between his land and the lower ranch, since which time the road has been traveled for its entire length as stated. The course of the road is through adobe soil, and about 1887 or 1888 John Lynch requested the persons living above the lower ranch who used the road to help gravel it. One witness, Mark Harden, testified:

"Mr. Lynch himself came to all of us and asked us to come over and help gravel that road, and all travel it. And we went over there, and we worked that road, we worked for 2 or 3 months the first year with men and teams, and we graveled every bit of that road, Mr. Nisson and us, * * * and all of us turned out and traveled that road. * * * And we have traveled that road ever since, and we have worked it every year except the last couple of years, * * * and kept it up and kept it in good condition. * * * Mr. Nisson and myself and my brother, all of us, we went to Mr. Lynch and talked to him, and got him to put those patent gates up, and we agreed to pay so much a year towards keeping those gates up. * * * We settled on \$5 a year on the start, and, as the gates grew older, Mr. Lynch charged us more. * * * I really never held any claim to the road, but still I always felt as though I had the right to travel it because I have done an awful lot of work on there. Three years ago we furnished men and horses for 2 weeks on that road to help fix it and haul gravel over it, and I always felt as though I was entitled to travel it, but I did not claim to own it. * * * Before this road was graveled we traveled through there; we hauled blocks through there 10 years before that, * * * without consent and without objection, and without paying anything, and without any opposition in the world. * * * I don't know of anybody that has ever asked permission, and I don't know of anybody that has been refused. As long as Mr. Lynch lived, he never said a word, and nobody else had ever said a word to me."

Other witnesses for plaintiff gave similar testimony. The evidence shows without conflict that plaintiff and his predecessors in interest and their tenants helped to gravel the road and keep it in repair.

Eric Nisson, a brother of Nick, testified that at one time Nick said he had "permission" to travel the road, had the "privilege to go through"; that witness did not know whether Nick said "he had the privilege to go through or the right to go through." Defendant J. A. Lynch, who was born in 1861, testified that in the year 1876 Nick Nisson "asked father's permission to go through and use the Lynch road, * * * and told him how he would care for the road and put in gates, and that father would suffer no loss from his going through. * * * He (Lynch) at last consented. * * *

And father says, 'Very well, Mr. Nisson, I will object to your hauling in the heavy season, for if I did, I would soon have no fields.' * * * He (Nisson) commenced (using the road) the second day afterwards. * * * He had to do a little work to get over the line fence, where he put in a gate. * * * Mr. Layton Harden and Mr. Mark Harden began to use it, I think in 1883 or 1884. Permission was first asked by Layton Harden, and a little while after that by Mark Harden. * * * I remember Mr. Thorp making blocks * * * on the Jeff Harden place * * * in the early '80s. * * * He used the Lynch road. * * * It was outside teams that were hauling the rock, * * * and father, for protection, charged for hauling the rocks, I think by the thousand." The witness further testified that he never heard his father say anything about using the road except to Nisson, as stated, but that the neighbors above the lower ranch who used the road paid an annual road fee for the privilege. Witnesses for plaintiff testified that such annual fees were not paid for the use of the road but for the maintenance of the patent gates. This annual fee was first fixed at \$5 for each user of the road and later raised to \$10, and after the death of John Lynch it was increased to \$15 for at least some of the users.

[1-4] Appellant contends that the evidence is insufficient to support the findings, in that it shows respondent and his predecessors in interest were mere licensees. It must be assumed in support of the findings that the annual fees referred to were paid for the maintenance of the gates and not for the use of the road. The evidence amply establishes that there was an open, visible, continuous, and unmolested use of the road for more than 40 years prior to the commencement of the action. As said in *Fleming v. Howard*, 150 Cal. 28, 30, 87 Pac. 908:

"Under these circumstances it will be presumed that the use was under a claim of right and adverse, and a prima facie title by prescription is thereby established. * * * 'A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission, to prove that fact by affirmative evidence. * * * Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a nonappearing grant; otherwise the presumption stands as sufficient proof, and establishes the right.' Jones on Easements, § 186."

[5, 6] The determination by the trial court that such prima facie case was not overcome by the testimony of a witness as to what was

said in a conversation which took place 45 years before the trial, at a time when the witness was but 15 years of age, is conclusive on appeal. If it be contended that the proposition of John Lynch in 1887 or 1888 that the landowners above the lower ranch "come over and help gravel the road, and all travel it" constituted a mere permission to use the road, the obvious answer is that, when those persons accepted the proposition and worked for 2 or 3 months on the road with men and teams, the license became irrevocable. *Miller & Lux v. Kern County, etc., Co.*, 154 Cal. 785, 99 Pac. 179; *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; *Irrigated Valleys L. Co. v. Altman*, 57 Cal. App. 413, 207 Pac. 401; *Stepp v. Williams*, 52 Cal. App. 237, 193 Pac. 661. Adverse use for 5 years after the license thus became irrevocable is sufficient to establish title by prescription. *Irrigated Valleys L. Co. v. Altman*, supra; *Cairns v. Haddock* (Cal. App.) 212 Pac. 222; *Myers v. Berven*, 166 Cal. 484, 137 Pac. 260.

[7] A tenant of plaintiff and a tenant of defendants, with the permission and consent of defendants, recently changed the course of the road for a distance of about 200 yards to avoid a steep hill. It is not perceived that the plaintiff's right to use the road, including the new section, is affected by such change.

[8] Nick Nisson was not present when in 1887 or 1888 John Lynch proposed to Mark Harden and others that they "help gravel that road and all travel it" Appellant urges that it was prejudicial error to admit the testimony. Considered as an isolated fact, the terms upon which an owner of land gives one person a right of way through it is not evidence that he made the same terms with another person who is shown to have used the way. The fact in question here, however, was not isolated. From the whole testimony of the witness, and the subsequent conduct of all the parties concerned, it is apparent that Lynch had in mind the graveling and use of the road by all the neighbors above the lower ranch. After relating the conversation with Lynch, Harden testified as follows:

"Q. Did Mr. Lynch at that time mention Mr. Nisson? A. Yes. * * * He said: 'Now, supposing we all turn in, we are all neighbors here, and we all turn in and gravel this road of mine, and have one good road out.' And we said all right, we would do that, and he went to see Nisson, and the Nisson came out, and our team came out, and Mr. Lynch's teams came out, and we graveled that road."

The evidence shows that such neighbors, including Nisson, together with Lynch, graveled the road, used it in common, and made repairs thereon from year to year as needed, until the defendants closed it shortly before the trial. Nisson and his successors in inter-

est paid the same annual fees for maintenance of the patent gates across the road as Harden and other neighbors. Nisson and Lynch are both dead, and there is no direct evidence of what was said when the latter went to see the former relative to graveling and using the road. Under such circumstances it was not error to admit the evidence of which complaint is made. It is not to be presumed that Nisson furnished men and teams for 2 or 3 months to gravel the road without some understanding as to his right to use it.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

65 Cal. App. 3d

PADDON v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, et al. (Civ. 4790.)

(District Court of Appeal, First District, Division 1, California. Dec. 21, 1923. Rehearing Denied Jan. 19, 1924. Hearing Denied by Supreme Court Feb. 18, 1924.)

1. Certiorari §5(1)—No relief against mere error.

In certiorari proceedings, the single question involved is whether the lower court has exceeded its jurisdiction, and if not, no matter how grievously it erred to the prejudice of the petitioner either in matters of fact or in matters of law, relief cannot be given, the writ of review not being a writ of error.

2. Certiorari §68—Court bound by finding of fact on conflicting evidence.

In certiorari to review and annul an order of court directing issuance of warrant of attachment to answer for contempt in disobedience of a subpoena duly served, a finding of fact by the court as to the petitioner's residence, upon conflicting evidence, is binding.

3. Contempt §54(1)—Disobedience of subpoena held contempt in presence of court requiring no supporting affidavit.

Where defendant on date set by judge for taking of his deposition before such judge filed an affidavit admitting that he was served with a subpoena, and that he refused to attend because he came within the provisions of Code Civ. Proc. 1989, relating to attendance of witnesses outside of the county of residence, he thus placed himself in contempt, committed in the presence of the court, requiring no supporting affidavit, in view of sections 1209, par. 10, 1211, 1991.

4. Depositions §71—Defendant held not entitled to contend contempt proceedings for refusal to testify must fail because subpoena duces tecum void.

Defendant who refused to attend and testify at all in obedience to a subpoena issued under Code Civ. Proc. § 1985, requiring him not only to attend as a witness, but to produce certain documents, cannot contend that contempt proceedings must fail because subpoena duces tecum

was void in that the affidavit upon which the order for taking the deposition was based made no showing of materiality, since the requirements of the statute as to attendance as a witness and as to bringing documents are severable, and he must purge himself of the contempt in refusing to testify before he can be heard to rely upon a secondary proposition.

Application by William Locke Paddon for certiorari to review an order of the Superior Court of the City and County of San Francisco and Walter Perry Johnson, Judge, directing petitioner to show cause why he should not be punished for contempt. Writ dismissed.

J. L. Smith, of San Francisco, for petitioner.

Preston & Duncan, of San Francisco, and William Anthony Andrews, of Oakland, for respondents.

ST. SURE, J. This is a proceeding to review and annul an order of the superior court of the city and county of San Francisco directing the issuance of a warrant of attachment to answer for contempt in disobedience of a subpoena duly served. Petitioner, together with several corporations, is defendant in two actions brought by his wife, Una Margaret Locke Paddon, to secure a divorce from him; also to set aside a certain property settlement agreement between the parties, and also to set aside certain alleged transfers of property to other defendants. Other defendants named are principally corporations of which, it is alleged, petitioner is the alter ego.

Petitioner alleges that he is a resident of Santa Cruz county, more than 50 miles distant from San Francisco; that on May 11, 1923, respondent judge, on affidavit of the attorney for plaintiff in said action, issued an order for the taking of the deposition of petitioner before himself at 4 o'clock p. m. May 21, 1923, and directing the clerk of the court to issue a subpoena commanding petitioner to appear before respondent court and testify in said action, and also requiring petitioner to produce books, records, etc., of said defendant corporations; that the subpoena was issued and served on petitioner the same day (May 11th); that on May 21st, and prior to the time set for the taking of the deposition, petitioner, by his attorney, served on the attorneys for plaintiff and on the respondent judge an affidavit showing that his residence was not in San Francisco, but at Palm Beach, Santa Cruz county; and thereupon petitioner declined to appear and testify in said cause; that thereafter, and on the same day (May 21st), respondent judge made an order directing the clerk to issue an attachment directed to the sheriff of any county in the state, directing that petitioner be attached and brought before respondent

court to answer for his contempt in not obeying said subpoena and in refusing to testify and give his deposition in said cause; that on August 10, 1923, after notice to plaintiff, petitioner moved to set aside the order of May 21st on the ground of lack of jurisdiction of the court to order petitioner's appearance and the taking of his deposition.

From statements contained in the affidavits filed in the lower court, and part of the record before us, we gather the atmosphere of the case. It appears from the affidavit of W. A. Andrews, one of the attorneys of record for Mrs. Locke Paddon:

That defendant William Locke Paddon is a resident of the city and county of San Francisco; "that heretofore, on the 19th day of December, 1922, plaintiff duly gave notice of the taking of defendant Locke Paddon's deposition. * * * and, although subpoena issued forthwith upon the giving of said notice, yet, nevertheless, after due and diligent search and inquiry, the said defendant witness was not found until the 2d day of January, 1923, and thereafter, and on the 4th day of January, 1923, when said witness was directed by the said subpoena to appear, the said witness did not appear, but on the contrary wholly failed to attend said deposition or to obey said subpoena in any way or manner whatsoever, on the contrary disobeying said subpoena in every particular; that effort has continuously been made since the 4th day of January, 1923, to locate said defendant for the purpose of serving process upon him; * * * that affiant is informed and believes, and therefore alleges the fact to be, that said defendant is now and has been continuously for a period of months last past, in hiding, and concealing himself for the purpose of avoiding the giving of a deposition."

Under this affidavit the respondent court, on May 11, 1923, made the order for the subpoena in question here, which subpoena was issued and served upon the petitioner in the city and county of San Francisco on said 11th day of May. Upon the hearing to set aside the order of May 21st, petitioner filed five affidavits, two by himself, one each by his two brothers, and one by J. L. Smith, his attorney, each affiant stating upon oath that petitioner is a resident of Santa Cruz county. Mrs. Locke Paddon filed a "reply affidavit" in which she sets forth in detail the abodes of her husband in numerous hotels and apartment houses in San Francisco at various times during the past seven years. She also states that petitioner at one time adopted an alias for the purpose of concealing and hiding his identity so as to avoid the service of process upon him by the court; that on or about the 10th day of June, 1923, he "left the jurisdiction of this court and departed from the state of California to a foreign country, to wit, the province of British Columbia, Dominion of Canada, and ever since continued and now continues to remain away from the state of California and from the jurisdiction of this court, with the intent

and purpose to avoid the service upon him of any and all orders or processes of this court." Mrs. Locke Paddon further states that her husband, petitioner herein, is the equitable owner and holder of all capital stock, and all the property and assets of the said defendant corporations. There are further similar allegations, all of which, of course, are denied by petitioner.

Upon said hearing, regularly had, respondent court denied the motion to set aside the order of May 21st upon which the attachment was issued, and said order is still in full force and effect.

Petitioner contends that the order in question is void because it seeks to compel him to give his deposition more than 50 miles from his place of residence, contrary to section 1989 of the Code of Civil Procedure. He asserts that the evidence contained in the affidavits presented at the hearing sustain such contention.

[1, 2] Nothing is better understood than that on this proceeding the single question involved is whether the lower court has exceeded its jurisdiction. If it has not, no matter how grievously it may have erred to the prejudice of the petitioner either in matters of fact or in matters of law, this writ will not afford an avenue of relief. *White v. Superior Court*, 110 Cal. 60, 64, 42 Pac. 480, and cases cited therein. If the order is one which the court had power to make, it is not for us to inquire whether its power was properly exercised or not. The writ of review is not a writ of error. *Von Roun v. Superior Court*, 58 Cal. 358. However, we may say in passing that the issue upon the question of petitioner's residence appears to have been determined by the respondent court upon conflicting evidence, when it denied the motion to set aside the order of May 21st and quash the attachment issued thereunder. The question was one of fact, and we are bound by the finding of the respondent court in that regard.

[3] Petitioner further contends that the order for attachment is void on its face. He calls our attention to section 1211, Code of Civil Procedure, providing that, where a contempt is not committed in the immediate presence of the court, an affidavit must be presented to the court or judge of the facts constituting the contempt. The section also provides that—

"When a contempt is committed in the immediate view and presence of the court, or judge at chambers, he may be punished summarily."

Section 1209, par. 10, Code of Civil Procedure, in its enumeration of the acts which are contempts, includes "disobedience of a subpoena duly served." Section 1991 of the Code of Civil Procedure provides that disobedience to a subpoena may be punished as a contempt by the court issuing the subpoena. In his affidavit, filed on the date set by re-

spondent judge for the taking of petitioner's deposition before said judge, petitioner admits that on the 11th day of May, 1923, he was served with a subpoena to appear before the respondent court on the 21st day of May, 1923, for the purpose of giving his deposition in said action in which he was a defendant. In his affidavit petitioner further said that the court had no jurisdiction to require his attendance for the purpose of taking his deposition because he came within the provisions of section 1989, Code of Civil Procedure, relating to the attendance of witnesses outside of the county of residence, and he further said: "He declines to submit himself for the taking of said deposition." Petitioner thus placed himself in contempt. Thereupon respondent court made its order of May 21st stating the facts, and directing an attachment to issue "directing that said William Locke Paddon be attached and brought before this court to answer for his contempt in not obeying said subpoena," etc. Upon this order an "attachment for disobeying subpoena" was issued. Such procedure was proper. In his said affidavit presented to the court, petitioner stated that he refused to obey the subpoena. This was a contempt committed in the presence of the court requiring no supporting affidavit. *Lamberson v. Superior Court*, 151 Cal. 458, 461, 91 Pac. 100, 11 L. R. A. (N. S.) 619. The procedure followed in the case last cited was similar to that adopted by respondent superior court herein. The Supreme Court, at page 461 of the opinion in *Lamberson v. Superior Court*, says:

"The court could have proceeded upon it summarily, or by citation to show cause—the course here adopted—and could have allowed a showing in defense, extenuation, or mitigation. * * * While conceding to the Legislature the fullest power in the matter of contempts to lay down rules of procedure, we repeat what was said in *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78: 'No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere. * * * It is founded upon the principle—which is coeval with the existence of the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, * * * fetter the power itself.'"

[4] The further contention is made that the contempt proceeding must fall because the subpoena duces tecum is void. It is ar-

gued that the affidavit upon which the order for taking the deposition is based makes no showing of materiality. Section 1985 of the Code of Civil Procedure is as follows:

"The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence."

It will be noted that the section unequivocally provides that a person may be required to appear and testify as a witness. Then follows an additional provision that the subpoena may also require the person to bring with him any books, documents, etc. The two propositions are severable. It may well be that a court has no power to order the production of books and papers by one party to be used as evidence for the other party without an affirmative showing that they contain evidence that is competent and material to the cause of action or defense of the party requiring them (5 Cal. Jur. § 17), but here it appears the petitioner refused to appear and testify at all. He must purge himself of this contempt before he can be heard to rely upon a secondary proposition. *Weeks v. Superior Court*, 187 Cal. 620, 203 Pac. 93.

We are of the opinion that the proceedings had in the court below, in the action entitled *Una Margaret Locke Paddon, Plaintiff, v. William Locke Paddon et al., Defendants*, which said action is numbered 130600 in the office of the county clerk of the city and county of San Francisco, state of California, are proper, and should be affirmed. It is so ordered, and the writ is dismissed.

I concur: TYLER, P. J.

65 Cal. App. 790

William Locke PADDON, Petitioner, v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, and Hon. Walter Perry Johnson, Judge of said Court, Respondents. (Civ. No. 4789.)

(District Court of Appeal, First District, Division 1, California. Dec. 21, 1923. Rehearing Denied Jan. 19, 1924. Hearing Denied by Supreme Court Feb. 18, 1924.)

Application for certiorari to review an order of the Superior Court, City and County of San Francisco, Walter Perry Johnson, Judge, directing petitioner to show cause why he should not be punished for contempt. Writ dismissed.

J. L. Smith, of San Francisco, for petitioner.

Preston & Duncan, of San Francisco, and William Anthony Andrews, of Oakland, for respondents.

ST. SURE, J. The questions presented in the above-entitled proceeding are the same as those involved in proceeding numbered 4790 of the same title, this day decided. 223 Pac. 91. Upon the authority of that case we are of the opinion that the proceedings had in the court below, in the action entitled *Una Margaret Locke Paddon, Plaintiff, v. William Locke Paddon et al., Defendants*, which said action is numbered 128432 in the office of the county clerk of the city and county of San Francisco, state of California, are proper and should be affirmed. It is so ordered, and the writ is dismissed.

I concur: TYLER, P. J.

65 Cal. App. 20

HUNTINGTON et al. v. PERRIN et al.
(Civ. 4200.)

(District Court of Appeal, Second District, Division 2, California. Dec. 20, 1923. Rehearing Denied Jan. 17, 1924. Hearing Denied by Supreme Court Feb. 18, 1924.)

1. Mortgages ⇨534—Purchaser at foreclosure sale substituted for mortgage debtor subject to right of redemption.

In sales of real property on foreclosure of mortgage, the provision of Code Civ. Proc. § 700, that the purchaser is substituted to and acquires all the title and interest and claim of the judgment debtor is qualified by and subject to section 703, which provides that, if no redemption be made within 12 months after the sale, purchaser or his assignee is entitled to a conveyance, but judgment debtor shall have 12 months from date of sale to redeem.

2. Tenancy in common ⇨19(4)—Purchase by one tenant at sale under mortgage given by former owner inures to benefit of all.

Title cannot be acquired by an owner of an undivided interest in land against his cotenants by purchase at a foreclosure sale under a mortgage created by a former owner through whom tenants in common derive title.

3. Tenancy in common ⇨1—Other than as between cotenants tenancy in common is a single entity.

While several owners of shares of a tenancy in common have severable interests as between themselves, the entire tenancy constitutes a joint estate in all dealings affecting it as a whole, and other than among themselves it is a single entity.

4. Tenancy in common ⇨19(4)—Purchase by one tenant in common of equity of redemption from foreclosure sale held to inure to benefit of cotenants.

Since mortgage on estate held by tenancy in common applies to the property as a whole, and when foreclosed purchaser acquires title subject to equity of redemption as a whole, in absence of agreement between the tenants the relation of cotenants toward one another remains the same in respect to the interest remaining in them after foreclosure, as existed

in the legal title out of which the equity of redemption arose, and where on foreclosure of the mortgage the mortgagee becomes the purchaser and assigns the certificate of sale, prior to the expiration of the period of redemption, to one of the tenants in common, the latter does not become the absolute owner of the right of redemption free and clear of the claims of his cotenants.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Partition by Howard Huntington and others against Edward Perrin, Jr., and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Stuart M. Salisbury, of Los Angeles, and Randolph V. Whiting, of San Francisco, for appellant.

Jefferson P. Chandler, C. P. Ward, of Los Angeles, Thomas, Beedy & Lanagan, of San Francisco, John F. Bowie, of New York City, and Jared How, of San Francisco, for respondents.

CRAIG, J. The plaintiffs sought partition of the real property involved in this action, alleging that they and the defendant E. E. Hewlett, trustee for Edward Perrin, Jr., and Edward Perrin, Jr., individually, were the owners and in possession as tenants in common of said property; that prior to the commencement of the action one J. C. Anderson had a mortgage thereon, given him by a common grantor of all the parties interested, which said mortgage was foreclosed by Anderson, and judgment rendered April 10, 1917; that a commissioner appointed pursuant to such judgment sold the property to the mortgagee on April 12, 1917, and the equity of redemption would expire 1 year thereafter. Plaintiffs averred that E. E. Hewlett, as trustee for Edward Perrin, Jr., had an interest in the equity of redemption to the extent of an undivided one-fifteenth interest in the fee of said property, and that plaintiffs Howard Huntington and Flora Dean Hobart had interests in the equity of redemption of eleven-fifteenths, and three-fifteenths, respectively; and alleged that it was for the best interest of the plaintiffs and the defendants that a partition be made as to the interest of E. E. Hewlett, trustee for Edward Perrin, Jr., and the interest of Edward Perrin, Jr., whatsoever it might be, as beneficiary under said trust; that it was not for the best interest of plaintiffs that the property be partitioned as between them, but that it should remain undivided, and that they continue to own their share as tenants in common.

Appellant answered, alleging that the plaintiffs and Hewlett, as his trustee, were not the owners or in possession as tenants in common or otherwise of said property, and denied that Hewlett's interest as his trustee

was one-fifteenth, but alleged that such interest was three-fourteenths. By way of affirmative defense appellant alleged that since 1907 he had been, and at the time of answering herein was, the owner of an undivided three-fourteenths interest in and to all the real property described in the plaintiffs' complaint. The property here in controversy constitutes but a portion of the whole for which partition was sought, and it is not denied that appellant and the other parties were tenants in common from 1907 until the time of Anderson's foreclosure. Appellant alleged that on March 27, 1918, and prior to the expiration of the period of redemption from said foreclosure sale, Randolph V. Whiting, attorney for appellant, purchased from said Anderson the certificate of sale for the benefit of appellant, and that Whiting at the time of the trial of this action was the owner and holder of such certificate as his attorney and agent.

It is stated in the briefs on behalf of appellant that the uncontradicted evidence shows that the plaintiffs Huntington and Hobart and the defendant Hewlett, as trustee for Edward Perrin, Jr., were the owners of said property as tenants in common, and that appellant, in thus purchasing the certificate of sale prior to the period of redemption having expired, did so with the intention of holding it for himself, individually, and not for the benefit of any other person claiming to be interested therein.

The court found as to the property sold under foreclosure that it was the intention of said Edward Perrin, Jr., in so purchasing the certificate of sale from said J. C. Anderson to purchase the same for himself individually, and not to purchase the same for the benefit of himself and his former cotenants, and that said Whiting, as attorney and agent of said appellant, was at the time of the trial of the action the owner and holder of said certificate of sale. It was further found by the trial court that the plaintiff Huntington was the owner of an interest in said equity of redemption and said certificate of sale to the extent of an undivided nine-fifteenths interest in the fee thereof, and that the plaintiff Hobart was the owner of three-fifteenths interest in the fee thereof, and by a general finding it was held that said plaintiffs and the defendant Hewlett, trustee for appellant, are the owners of and in possession as tenants in common of the property described.

It is appellant's contention that there was no redemption of the property as provided by sections 701 and 702 of the Code of Civil Procedure; that both the legal and equitable title to the property vested in Anderson upon his purchase at the foreclosure sale, and that consequently no title remained in any of the parties as tenants in common. It is argued that, had Anderson held the certificate of sale until the period of redemption had expired, his title would have become absolute;

that the tenancy in common had terminated with the sale of the property by Anderson, and therefore Randolph V. Whiting, as trustee for appellant, stands in Anderson's position as successor in interest.

Respondents contend that the purchase by appellant of the certificate of sale constituted no more than a redemption; that the purchaser at a foreclosure sale does not acquire the judgment debtor's title to the land, and can only do so by obtaining a sheriff's deed, as was provided by section 232 of the Practice Act, and now by section 703 of the Code of Civil Procedure. It is argued that one tenant in common will not be permitted to purchase an outstanding incumbrance and assert it against his contents in interest, even though his design be so to do, but that he must hold it for the common benefit of all. Respondents admit that this general rule does not apply in the case of a judicial sale, but assert that this has reference to absolute sales, which convey the complete title, and not to sales made subject to redemption; that the former sever the relationship of cotenancy, whereas the latter is not a consummated sale during the period of redemption, and therefore do not affect tenants in common until the happening of a certain event.

The provisions of the Code of Civil Procedure relied upon by the respective parties recite that a redemptioner or judgment debtor may redeem from the purchaser at any time within 12 months after the sale upon conditions prescribed by the statute. The provisions which here control appear as subdivisions of section 703, and are as follows:

"If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property."

[1] It cannot be successfully contended that had appellant been the owner of the fractional interest of his cotenants he would have been unable to redeem from Anderson's foreclosure; nor is it claimed in his behalf that one of several tenants in common may not legally redeem for all the parties in interest. It is difficult to agree with appellant that his intention can be considered as the controlling factor in determining the issues in this case, and particularly as to whether or not the purchase by Anderson at the foreclosure sale destroyed the common character of the original tenancy, and enabled him to convey to appellant during the redemptionary period all the right, title and interest of the mortgagor. In proceedings of this kind, the provisions of section 700, Code of

Civil Procedure, that "the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor," are qualified by and subject to the condition above quoted from section 703. *Leet v. Armbruster*, 143 Cal. 663, 667, 77 Pac. 653. This principle is one of long standing in California, and is so held in the cases cited by appellant. In *Duff v. Randall*, 116 Cal. 226, 48 Pac. 66, it is said that:

"The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time the right to a conveyance becomes absolute without any further sale, or other act to be performed by anybody."

In *Leaver v. Smith*, 47 Cal. App. 476, 190 Pac. 1050, this court said:

"The effect of this provision is to confer upon the purchaser full title, except that within the ensuing period of 12 months after sale an equity of redemption is possessed by the judgment debtor. When the full period of 12 months has elapsed there no longer exists any equity in the judgment debtor; hence the purchaser becomes possessed of an absolute title at that time."

Appellant also cites *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6, holding:

"The effect of the foreclosure sale 'is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim.' * * * It is only when the judgment debtor redeems that the effect of the sale is terminated and he is restored to his estate."

But by the latter statement the opinion so qualifies the beginning of the quotation as to leave its entire purport in harmony with other decisions, and in effect to say that a purchaser's title is not absolute, but subject to the mortgagor's right to redeem, and to be entirely divested thereby. Appellant furnishes no authority nor are we able to find one holding that a purchaser at foreclosure sale acquires the absolute title.

[2] Appellant insists that the tenancy in common was terminated by the sale to Anderson, citing *Smith v. McNutt*, 156 Cal. 769, 106 Pac. 70, and *McNutt v. Nuevo Land Co.*, supra. The former recognizes the general equitable principle "applicable in such cases as those of joint tenants, tenants in common, and generally persons placed in a situation of trust or confidence," that "it is not consistent with good faith, nor with the duty which the connection of the parties, as claimants, of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself and thus undermine and oust his companion," and holds that the one acquiring such

outstanding title will not be allowed to retain it for his own exclusive benefit. The Supreme Court points out, however, that such relationship did not there exist. In the second case cited the same rule is recognized, but it is said that under the trust there in controversy there was no community or privity of interest between the beneficiaries.

Respondents quote in their brief from decisions of the Supreme Court as to the nature of a purchaser's estate acquired at foreclosure sale, both under the Practice Act and under the provisions of the Code of Civil Procedure, to the effect that the dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it by execution of a deed to the purchaser. But we are not cited to any case in this state wherein the question of the effect upon the interest of tenants in common of a foreclosure of an incumbrance created by their predecessor in interest was involved. However, it has been settled by the courts of many other states, and with but the single exception of *Jackson v. Baird*, 148 N. C. 29, 61 S. E. 632, 19 L. R. A. (N. S.) 591, the authorities unanimously hold that title cannot be acquired by the owner of an undivided interest in land against his cotenants at a sale under a mortgage created by a former owner through whom tenants in common derived title. *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; *Oliver v. Hedderly*, 32 Minn. 455, 21 N. W. 478; *Moy v. Moy*, 89 Iowa, 511, 56 N. W. 668; *Barnes v. Boardman*, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; *Montague v. Selb*, 106 Ill. 49; *Savage v. Bradley*, 149 Ala. 169, 43 South. 20, 123 Am. St. Rep. 30; *Richards v. Richards*, 75 Mich. 408, 42 N. W. 954; *Wyatt v. Wyatt*, 81 Miss. 219, 32 South. 317; *Dillinger v. Kelley*, 84 Mo. 561; *Knolls v. Barnhart*, 71 N. Y. 474; *Carpenter v. Carpenter*, 131 N. Y. 101, 29 N. E. 1013, 27 Am. St. Rep. 569.

In *McPheeters v. Wright*, supra, the Supreme Court of Indiana quotes with approval from the opinion of Chancellor Kent in *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 409, as follows:

"I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which all are entitled to the common benefit, on bearing a due portion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject created, that one of them

(223 P.)

should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance or an adverse title to disseize and expel his cotenant. It cannot be tolerated, when applied to a common subject in which the parties had equal concern, and which created a mutual obligation, to deal candidly and benevolently with each other, and to cause no harm to their joint interests."

The same authority further holds, quoting from American and English Encyclopedia of Law, vol. 11, p. 1982, as follows:

"The general rule is that a cotenant's purchase of an outstanding title inures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments, or by acts of law, and in some states this rule seems to apply, however the tenancy may have been formed, whatever the relation of the cotenants with each other may have been and from whatever source the outstanding title may have been acquired." In addition to the authorities cited already, the following are cited: *Clements v. Cates*, 49 Ark. 242; *Olney v. Sawyer*, 54 Cal. 379; *Boskowitz v. Davis*, 12 Nev. 446; *Grimm v. Wicker*, 80 N. C. 343; *Threadgill v. Redwine*, 97 N. C. 241; *Page v. Branch*, 97 N. C. 97; *Braintree v. Bottles*, 6 Vt. 395; *Rountree v. Denison*, 59 Wis. 522. * * * Our own state is in accord with the general rule. *Wilson v. Peelle*, 78 Ind. 384; *Bender v. Stewart*, 75 Ind. 88; *Elston v. Piggott*, supra. [94 Ind. 14.]"

[3, 4] It is elementary that, while the several owners of the shares of a tenancy in common have severable interests as between themselves, the entire tenancy constitutes a joint estate in all dealings affecting the tenancy in common as a whole, and other than among themselves, it is a single entity. The mortgagor has not dealt with the shares constituting the tenancy in common separately; the mortgage applies to the property as a whole, and the tenancy in common as a whole. When the mortgage is foreclosed the purchaser also acquires his title, subject only to an equity of redemption in the whole. No holder of a fractional interest in the tenancy in common could come forward and offer to pay his share and demand a redemption of a proportional part of the property from the mortgage. The entire amount due and to which the purchaser is entitled in order that a redemption may be accomplished must be paid. Again, before foreclosure the tenancy in common held the legal title to the property, and any benefit secured for the estate in-

ured to the benefit of all cotenants. The equity of redemption can have no other source than the former legal title from which it sprang. Having that source, it follows that, in the absence of agreement between the parties or some statutory provision of law to the contrary, the relation of the cotenants toward one another remains the same in respect to the interest remaining in them after foreclosure called the equity of redemption, as existed in the legal title out of which that equity arose. If before foreclosure an outstanding interest of any kind acquired by one of the tenants in common would inure to the benefit of the entire estate, it necessarily follows that the same rule would apply after foreclosure and as long as any vestige of the joint estate, known as the tenancy in common, remain.

It results, therefore, that the tenants in common were not disseised of their respective interests in the right of redemption by the foreclosure sale, and that appellant is not the absolute owner free and clear of the claims of his cotenants.

The judgment of the trial court is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

(65 Cal. App. 114)

In re HUNSICKER.

HALTERMAN et al. v. FELLENCER et al.

(Civ. 2648.)

(District Court of Appeal, Third District, California. Dec. 31, 1923.)

1. Adoption ⇨10—Jurisdiction of adoption proceedings acquired when statutory requirements complied with.

A court acquired jurisdiction of adoption proceedings where all the jurisdictional facts required by statute in force at the time of the adoption were shown.

2. Evidence ⇨82—Proceedings of inferior court presumed proper when jurisdiction acquired.

When jurisdiction has been acquired by an inferior court, all proceedings in the exercise thereof are presumed to have been lawfully done, unless the contrary is shown.

3. Evidence ⇨89—Presumption of similarity of laws between different states held rebutted.

Proof that a statute of another state was the only law on a particular subject held to rebut the presumption of similarity existing between the laws of the different states.

4. Appeal and error ⇨1051(4)—Admission of parol evidence to prove adoption, if error, held harmless.

Where the validity of adoption proceedings were contested, and the record evidence of the adoption was complete, and nothing was presented to overcome such proof, admission of parol evidence to prove the adoption, if error, was harmless.

5. Adoption ⇨21—Natural relation of parent and child not restored upon death of adopting parent.

The death of the adopted parent prior to that of the natural parent does not restore the natural relation of parent and child so as to enable the child to inherit from the natural parent, there being nothing in the statute relating to adoption, which limits the effect of the adoption to the period of the lives of the adopting parent and the adopted child.

6. Trial ⇨377(2)—Granting, after setting aside order of submission, held not error.

In proceedings for the distribution of a decedent's estate, the court did not err, after the case had been argued and ordered submitted, in setting aside the order of submission and in granting a continuance for the introduction of additional evidence, where it did not appear that the rights of the defendants were in any manner affected by the course pursued, except that it permitted plaintiffs to produce evidence material to the issues involved.

7. Adoption ⇨21—Testator's omission to provide for children of adopted daughter in will held not to entitle them to inherit from him.

Where the will of testator failed to mention the children of his only daughter who had been legally adopted by others prior to his death, such omission would not, by reason of

Civ. Code, § 1307, entitle her children, she being still living, to inherit his estate, they not being the "issue of any deceased child," and, since their right of succession came through their mother, and her right to inherit decedent's estate was lost by adoption, her children had no such right.

Appeal from Superior Court, Modoc County; J. M. Jamison, Judge.

In the matter of the estate of Ervin L. Hunsicker, deceased. Petition for the distribution of the estate of Ervin L. Hunsicker by J. T. Sharp, Mrs. Mamie Essex, and Mrs. Minnie Miller, opposed by Stella May Halterman, guardian ad litem of Mary E. Halterman and Ralph A. Halterman, minors. From an adverse judgment, contestants appeal. Affirmed.

J. T. Sharp and J. S. Henderson, both of Alturas, for appellants.

Robnett & Wylie, of Alturas, for respondents.

FINCH, P. J. In the year 1884 Ervin L. Hunsicker, and Emma J. Hunsicker, his wife, and their only child, Stella May Hunsicker, then of the age of about 3 years, were residents of Monroe county, Pa., as was also Andrew S. Hinton. In that year, by a proceeding in the court of common pleas in that county, and with the consent of the parents of the child, Hinton duly adopted said Stella May Hunsicker as his child and heir, the decree of the court providing "that the said child shall assume the name of Stella May Hinton, and have all the rights of a child and heir of the said Andrew S. Hinton, and be subject to the duties of a child." It appears from the record, at least inferentially, that Hinton was married and living with his wife at the time of the adoption proceedings. It does not appear whether she consented to the adoption by her husband of the child. The child lived with the Hintons as their adopted child until her marriage in the year 1902 to Ralph A. Halterman. Mary E. Halterman and Ralph A. Halterman, hereinafter mentioned, are the only issue of such marriage. The Hintons had no child of their own blood, and, from certain evidence admitted in the instant case, it is to be inferred that upon their deaths Mrs. Halterman succeeded to the estates of her adopted parents.

Hunsicker and his wife were divorced, whether before or after the adoption proceedings does not appear. He came to California, where he died November 25, 1918, leaving an estate consisting of personal property of the appraised value of \$5,535.52, situate in this state. By his last will, executed in this state, he gave all of his property to strangers in blood, except \$1 each to his brothers and sisters. The will does not mention Mrs. Halterman or her children, nor does it contain any language to indicate that

the omission to mention them was intentional.

In due course of administration a petition for distribution of the estate was filed by the beneficiaries under the will, whereupon Mrs. Halterman appeared in opposition to the petition, and prayed that the whole estate be distributed to her as a pretermitted child and the only surviving child of decedent. A separate opposition was filed by the guardian ad litem of the two Halterman children, alleging that their mother "was adopted in the state of Pennsylvania in the year 1884," and praying that the whole estate be distributed to them as the pretermitted grandchildren of decedent. The court found in favor of the beneficiaries under the will, and distributed the estate to them. Both Mrs. Halterman and the guardian ad litem of her children have appealed.

[1-3] In support of the appeal of Mrs. Halterman it is urged that "there is an utter and complete lack of some of the jurisdictional facts required" in the adoption proceedings; that it does not appear that Hinton was 10 years older than the child adopted, that his wife gave her consent to the adoption, or that any of the parties to the proceedings were residents of the county where such proceedings were had. The written assent of Hunsicker to the adoption, duly acknowledged by him, recites that he and Hinton were both residents of Monroe county, Pa. This written assent was attached to the verified petition of Hinton, which recited that he and Hunsicker were both residents of Monroe county, and that the petition was signed by Emma J. Hunsicker, and prayed for a decree of adoption. This petition was signed by Emma J. Hunsicker. The decree recites that it was made "with the consent of the parents of said Stella May Hunsicker." The foregoing are the only jurisdictional facts required by the Pennsylvania statute in force at the time of the adoption, as appears by the evidence introduced at the hearing herein in the trial court. A witness for the beneficiaries under the will testified that the following law was the "only one pertaining to adoption" in force in the state of Pennsylvania at the time of the adoption:

"That it shall be lawful for any person desirous of adopting any child as his or her heir * * * to present his or her petition to such court in the county where he or she may be resident, declaring such desire, and that he or she will perform all the duties of a parent to such child; and such court, if satisfied that the welfare of such child will be promoted by such adoption, may, with the consent of the parents or surviving parent of such child, * * * decree that such child shall assume the name of the adopting parent, and have all the rights of a child and heir of such adopting parent, and be subject to the duties of such child, of which the record of the court shall be sufficient evidence. Provided, that if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them in case of in-

testacy; and he, she or they shall respectively inherit from and through each other, as if all had been the lawful children of the same parent." Act Pa. May 4, 1855, § 7 (P. L. 431).

It will be observed that the statute contains no provision to the effect that the adopting parent must be 10 years older than the child adopted, and, if it did so provide, it would not be a violent assumption, after the lapse of so many years, that Hinton was more than 13 years of age when he adopted the 3-year old child. The statute is silent, also, as to whether the consent of the adopting parent's spouse is necessary. Proof that the statute quoted was the only Pennsylvania law on the subject of adoption in the year 1884 rebuts any presumption that the laws of that state were the same as those of California relative to the respective ages of the adopting parent and the child adopted or to the necessity of a wife's consent to an adoption by her husband. Whether or not the construction given the statute by the courts of Pennsylvania is other than persuasive, it may be interesting to note that the decisions of that state seem to recognize that one parent may adopt a child without the consent of the other. In *re Carroll's Estate*, 219 Pa. 440, 68 Atl. 1038, 123 Am. St. Rep. 673; *Nulton's Appeal*, 103 Pa. 286. Since everything required by the statute is made to appear, it must be held that the court acquired jurisdiction. When jurisdiction has been acquired by an inferior court, "all proceedings in the exercise thereof are presumed to have been lawfully done, unless the contrary is shown." *Estate of Sharon*, 179 Cal. 458, 177 Pac. 288.

[4] It is contended that the court committed error in admitting parol evidence to prove the adoption. The record evidence of the adoption was complete, and nothing was presented to overcome such proof. The necessary conclusion from such evidence is that the child was regularly adopted by Hinton, and, since the exclusion of the parol evidence could not have changed the result, its admission, if error, was harmless.

[5] It is urged that upon the death of Hinton the natural relation of parent and child between Hunsicker and Mrs. Halterman was restored, and that therefore, upon the subsequent death of Hunsicker, Mrs. Halterman became his sole heir. In support of this contention the dissenting opinion in *Estate of Jobson*, 164 Cal. 312, 318, 128 Pac. 938, 43 L. R. A. (N. S.) 1062, is cited. The majority opinion and the decision of the court in that case, however, are contrary to appellant's contention. In the majority opinion, page 317 of 164 Cal., 128 Pac. 938, 939 (43 L. R. A. [N. S.] 1062), it is said:

"There is nothing in the statute which limits the effect of the adoption to the period of the lives of the adopting parent and the adopted child. To sustain the appellant's contention, we should have to hold that, although the re-

lation of parent and child, existing between him and the decedent, was supplanted by the new relation created by the adoption, it was again revived by the death of the foster parent. Such a holding would be to make, rather than to construe, a statute."

The same observation may be made relative to the Pennsylvania statute in question.

[6] After the case had been argued and ordered submitted, the court of its own motion set the submission aside "for the purpose of allowing either side to introduce further evidence." Thereafter several continuances were granted and additional evidence was introduced, all over the objections of appellants. It is urged that the court erred in so setting aside the order of submission and in granting such continuances. It does not appear that the rights of appellants were in any manner affected by the course pursued, except that it permitted respondents to produce evidence material to the issues involved. Appellants' contention is without merit. *Badover v. Guaranty Trust, etc., Bank*, 186 Cal. 775, 200 Pac. 638.

[7] It is contended that the Halterman children are the legal heirs of decedent, and that, since they are not mentioned in the will, they are entitled to have the estate distributed to them under the provisions of section 1307 of the Civil Code. That section provides:

"When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate."

These children are not "the issue of any deceased child," their mother being now living. It is argued that "the logical reasoning for the courts to pursue would be to hold that the adopted child would be considered civilly dead so far as the rights of her children are concerned." To so hold would be to make a statute rather than to construe the one made by the Legislature. Appellants say that adoption proceedings have "nothing to do whatever with the rights of any persons except parties to the adoption proceedings, that is, the natural parents, the adoptive parents and the child." If by this statement it is intended to imply that the children of an adopted child are not heirs of the adoptive parent, it may be said in reply that the courts have held to the contrary. *Estate of Winchester*, 140 Cal. 468, 74 Pac. 10; *In re Darling*, 173 Cal. 221, 225, 159 Pac. 606. A statute of Pennsylvania, enacted in 1889 (P. L. 168), provided, as does the statute herein quoted, that an adopted child "shall have all the rights of a child and heir of such adopting parent." In construing

that statute, it was held that it invested the adopted child with the right to become the heir at law of the adopting parent, including the right of succession in the children of such adopted child. *In re Webb's Estate*, 250 Pa. 179, 95 Atl. 419. Since the Halterman children's alleged right of succession comes through their mother, it seems to follow logically that if their mother did not have the right to inherit the decedent's estate the children did not have the right.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

65 Cal. App. 45

McFEELY v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (Civ. 4502.)

(District Court of Appeal, Second District, Division 1, California. Dec. 21, 1923.)

1. Master and servant §417(4)—Objection to evidence in compensation proceedings held too late on review.

In proceeding under the Workmen's Compensation Act, it is too late on application for writ of review to annul an award to complain that letters and reports admitted in evidence by the Industrial Accident Commission were inadmissible.

2. Trial §76—Objection must be made known to tribunal at time it is sought to be introduced.

A party who considers making an objection to the admission of testimony must make such objection known to the court or tribunal before whom such evidence is sought to be introduced at the time it is offered by the opposite party.

3. Master and servant §404—Letters and reports held admissible in compensation proceeding.

In a proceeding before the Industrial Accident Commission, evidence of physicians and X-ray specialists in the form of letters and written reports are admissible, in view of Workmen's Compensation Insurance and Safety Act of 1917, § 19, subd. (c), and section 60, subd. (a).

4. Evidence §574—Positive testimony of physicians as to cause of death held not conclusive against opinions of others.

Positive testimony of physicians, in proceeding for compensation, who made autopsy that decedent's lungs were normal and free from disease, and that death resulted from cancer in vertebra, was not conclusive against opinions of other physicians who were not present at the autopsy that death resulted from cancer in lungs.

5. Trial §143—Weight of expert testimony for jury or trial court.

When there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight.

6. Master and servant §405(4)—Finding death did not result from injury held sustained by evidence in compensation case.

In proceeding to obtain compensation for death of employee, a finding that death did not result from injury complained of held sustained by evidence.

Writ of review to annul an order of Industrial Accident Commission.

Proceeding by Effie McFeely, under the Workmen's Compensation Act to obtain compensation for the death of John H. McFeely her husband, opposed by the Federal Construction Company, the employer. There was an award, and the applicant petitions for writ of review to annul the order. Award affirmed.

Kaye & Siemon, of Bakersfield, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent.

CURTIS, J. Petitioner seeks by this proceeding to have annulled an award of the Industrial Accident Commission of the state of California, the respondent herein, made on the 13th day of June, 1923. Said award was based upon findings of said Commission made on the date thereof, and thereafter amended by said Commission on August 1, 1923, at which latter date said award of June 13, 1923, was confirmed. Petitioner is the surviving wife of John H. McFeely, deceased. The latter was in the employ of the Federal Construction Company on or about the 20th day of July, 1922, on which date the Commission finds that he "sustained an injury arising out of and in the course of said employment, consisting of a bruise upon the left side in the region of the tenth rib, from the blow of a short bar." The Commission also found that the employer had legal notice of said injury, but that said injury caused no disability. By finding 4, the Commission further found:

"The employee worked continuously from and after the date of said injury to and including the 30th day of September, 1922, at which time he became ill, and was later found to be suffering from metastatic carcinomæ of the liver and spine, which condition proximately caused his death on the 30th day of January, 1923, but the evidence herein is insufficient to establish as a fact that said disease or death were in any wise proximately or at all caused or exacerbated by the aforesaid injury."

The proceeding before the Commission was instituted by the said John H. McFeely and Effie McFeely, his wife, on December 8, 1922, for the purpose of obtaining an award for compensation during the period of disability alleged to have been caused by said injury. A hearing therein was held on January 4, 1923, at which time the testimony of the said John H. McFeely and his wife, Effie McFeely, and other witnesses was taken. The further

hearing therein was continued for the purpose of securing additional medical testimony and to determine the insurance carried by the said employer. On February 23, 1923, the hearing was resumed before the Commission. In the meantime the said John H. McFeely had died. Prior to his death he had been examined by a number of physicians and X-ray pictures had been taken of his lungs, back, and other parts of his body. His death occurred on January 30, 1923, on which day an autopsy was made by Doctors Veon and McLean. The testimony of one witness at the hearing was taken on February 23, 1923, and a further continuance was then had until March 23, 1923, when a final hearing was held. At this hearing, after the appointment of Mrs. McFeely as the guardian ad litem of her minor children, and an order made joining said children as parties to the proceeding, the two doctors who performed the autopsy gave their testimony, and written reports were received in evidence from a number of other doctors and X-ray specialists, to whom had been submitted the history of decedent's case, together with the X-ray pictures heretofore mentioned, and which had been previously taken of the decedent's lungs, back, and other portions of his body.

Doctors Veon and McLean testified at the final hearing that the autopsy showed that the decedent's lungs were free from any disease. They found, however, that the second lumbar vertebra had been almost destroyed by a cancer, and that the liver was affected by the same diseased condition. They gave as their opinion that the cancer of the vertebra was the result of the blow received by the deceased on July 20, 1922; that it was a primary cancer, while the cancer in the liver was metastatic, that is, it was caused by, and was secondary to, the cancer in the spine. The conclusion of these physicians was that the death of the deceased was directly and proximately the result of the injury received by him on July 20, 1922.

On the other hand, the other physicians and X-ray specialists to whom had been submitted the history of decedent's case, and who had examined the X-ray pictures of his lungs, back and other portions of the body taken prior to his death, and whose evidence was before the Commission only in the form of letters and written reports, were of the opinion that the injuries received by the deceased on July 20, 1922, contributed in no way to the development of the cancer found at the second lumbar vertebra, and was not directly or indirectly the cause of decedent's death. In the main they gave as their opinion that the decedent died of a cancer in the left lung, and that the cancers in the spine and liver were secondary, and were caused by and resulted from the primary cancer in the lung. In this opinion they were in a measure corroborated by Dr. Moore, who examined the

decendent a short time prior to his death, and who assisted in taking the X-ray pictures. Dr. Young, who acted with Dr. Moore in making the examination of the patient and in the taking of the X-ray pictures testified that he found a diseased condition of the lung, and that he could not connect the injury of July 20th with the lung condition. Further than this he expressed no opinion as to the cause of the patient's ailment.

Petitioner now seeks to have said award annulled, upon the ground that there was no evidence before the Commission to support the same. It is first contended by petitioner that the only legal evidence before the Commission as to the cause of decendent's death was that of Doctors Veon and McLean, who performed the autopsy, and who testified that they found the lungs normal and free from any disease, but that they found cancers in the spine and liver of said deceased, which caused his death, and that the cancer in the spine was a primary cancer, and was the direct result of the injury of July 20th; that this testimony was opposed by certain incompetent testimony contained in letters and reports erroneously admitted in evidence at the hearing before the Commission. In other words, that the only conflict in the evidence was that between the legal and competent evidence submitted by the petitioner, and the illegal and incompetent evidence admitted in behalf of the defendants in the proceeding before the Commission.

[1, 2] The record in this proceeding discloses the fact that these letters and reports were admitted in evidence without any objection on the part of petitioner herein and without any request on her part to cross-examine the authors of said letters and reports. In view of this fact, the objection, now made by the petitioner for the first time, that said letters and reports are incompetent comes too late, and cannot be taken advantage of by her in this court. No rule of procedure is more firmly established than that which requires a party who considers making an objection to the admission of testimony to make such objection known to the court or tribunal before whom such evidence is sought to be introduced, at the time it is offered by the opposite party. It would be manifestly unfair and unreasonable to permit one party to remain silent, and by his silence to tacitly acquiesce in a proceeding, and thereafter to allow him, after an adverse decision, to nullify this decision by insisting upon an objection which he refused to make when the opportunity was afforded him at the original hearing. This rule is too well known to require any citation of authorities, and applies with equal force both to trials in courts and proceedings before special tribunals, similar to the respondent herein.

[3] What we have said in answer to this contention of respondent has been under the

assumption that the objectionable testimony was incompetent, and therefore should not, had a proper objection been made thereto, have been admitted by the Commission. We think, however, that there cannot be any question of the competency of this testimony in the light of the statutory law and decisions of this state. Workmen's Compensation Insurance and Safety Act of 1917, § 19, subd. (c), and section 60, subd. (a) Stats. 1917, pp. 849, 871; Western Indemnity Co. v. Industrial Accident Commission, 174 Cal. 315, 163 Pac. 60; Employees' Liability Assurance Corporation v. Industrial Accident Commission, 179 Cal. 432, 443, 177 Pac. 273; Pacific Gas & Electric Co. v. Industrial Accident Commission, 180 Cal. 497, 499, 81 Pac. 788.

[4] The further contention is made by the petitioner that this evidence, although competent, is not sufficient to raise a conflict in the testimony as against the positive, undisputed evidence in behalf of petitioner. The testimony of Doctors Veon and McLean, who performed the autopsy, as we have already seen, was that decendent's lungs were normal and were free from disease. As opposed to this testimony, we have the opinions of the doctors and X-ray specialists that decendent at the time of his death had a cancer in his left lung, and that his death was due primarily to this condition of the lung. They based their whole theory that decendent's death was not the result of the injury received by him on July 20, 1922, upon the fact that he had a cancer in the left lung. Petitioner claims that the positive testimony of the two physicians who performed the autopsy that no cancer was found in the lungs effectually and conclusively establishes that fact as against the mere opinions of the doctors and specialists who were not present at the autopsy, and whose testimony therefore would be nothing more than a conclusion.

[5] This question seems to be conclusively decided against petitioner by the decisions of this state. When there is a conflict between scientific testimony and testimony as to facts the jury or trial court must determine the relative weight. 10 Cal. Juris. p. 972.

In the late case of Rolland v. Porterfield, 183 Cal. 466, at page 469, 191 Pac. 913, 914, we find the law upon this subject enunciated as follows:

"Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character, and that, when there is a conflict between scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence. Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; Watson v. Watson, 58 Mich. 507, 25 N. W. 497."

The case of *Rolland v. Porterfield*, supra, is cited with approval in the *Estate of Nelson* (Cal. Sup.) 216 Pac. 368.

[6] In view of these decisions of our Supreme Court we are constrained to hold that there was a conflict in the evidence as to the cause of decedent's death, and the Commission having found that the injury received by him from the blow on the spine was not the cause of his death, the award must be affirmed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

64 Cal. App. 695

In re LITTLE'S ESTATE.

LITTLE et al. v. CURSON.

(Civ. 4246.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1923. Rehearing Denied Jan. 9, 1924. Hearing Denied by Supreme Court Feb. 8, 1924.)

1. Wills ⚡278—Petition for revocation held sufficient to charge undue influence.

A petition to set aside a will, while not directly alleging that it was procured by undue influence, was sufficient to justify submission of questions as to undue influence and instructions thereon, where facts and circumstances were set out which, if true, would be tantamount to a direct allegation of undue influence; it appearing that defendant so considered such allegations, and that the case was tried on the theory that undue influence was alleged.

2. Wills ⚡384—Proponent could not complain of failure to submit issue of fraud in will contest where issue of undue influence found adversely to her.

Where a will was attacked on the ground of undue influence and of fraud, and the issue of undue influence alone was submitted to the jury, which found in favor of the contestant, proponent could not complain of failure to submit also the issue of fraud, since a finding for contestant on either issue would be fatal to the validity of the will.

3. Wills ⚡166(1)—Finding of undue influence sustained.

In a contest of a will executed by testatrix when she was 89 years old, and of a codicil executed when testatrix was 94 years old, the ground of contest being undue influence exerted by her daughter and her attorney, and it appearing that testatrix was alone and of limited education and of practically no business experience, held, that the finding of undue influence was sustained by the evidence.

4. Wills ⚡333, 384—Form of verdict finding undue influence in will contest held not contrary to statute.

Where a will and codicil were contested on the ground of undue influence, a form of verdict requiring answers by the jury as to whether the instruments were procured by the undue influence of four persons named or either or any of such persons, was not in violation of

Code Civ. Proc. § 1314, as failing to find that the undue influence of a particular named individual had been exerted; proponent not having objected to the form of the questions, and objection, even if meritorious, being too late when first made on appeal.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Proceedings by Samuel M. Little and others against Anna F. Curson, executrix of the last will and testament of Mary D. Little, deceased, to contest the will. From an order vacating an order admitting the will to probate, and from an order denying a new trial and refusing to vacate judgment, the executrix appeals. Affirmed.

Rehearing denied; Myers, J., disqualified.

Randall, Bartlett & White, of Los Angeles, for appellant.

Clement L. Shinn and John L. Fleming, both of Los Angeles, and Percy Hight, of Long Beach, for respondents.

CURTIS, J. This is an appeal from a judgment vacating and setting aside an order admitting to probate the will of Mary D. Little, deceased, and from an order denying a new trial, and also from an order refusing to vacate and set aside said judgment.

The contest of said will was instituted by respondents, and was based upon fraud, unsoundness of mind, and undue influence of Anna F. Curson, Samuel T. Curson, Albert E. Curson and W. I. Foley. At the conclusion of respondents' testimony and upon their motion the court dismissed the contest as to the issue of unsoundness of mind of decedent.

Mary D. Little died February 3, 1920, at Los Angeles, California. At the time of her death she was, and for many years prior thereto had been, a resident of said city. She left surviving her as her heirs at law the appellant, Anna F. Curson, her daughter; and the respondents Samuel M. Little, her son, and Victor Thompson, Mary L. Knapp, Ruby Harris, Jane R. Spencer, Adah F. Dolson, and Emma J. Held, grandchildren of said deceased and children of her deceased daughter, Mary M. Thompson; also Lewis P. Ferguson, her great-grandson by Mary D. Ferguson, deceased, daughter of Emma J. West, deceased, daughter of said Mary D. Little, deceased; and also a daughter, Lula M. Scott, who was a beneficiary under her mother's will. Neither Lula M. Scott nor Lewis P. Ferguson is a party to this proceeding.

On February 20, 1920, after the death of the said Mary D. Little, there was filed for probate two documents—one bearing date October 30, 1913, and purporting to be her last will and testament, and the other bearing date November 7, 1918, purporting to be a

codicil to said last will and testament. The said Anna F. Curson was named in each of said documents as the executrix thereof, and with said documents filed a petition for the probate of the same as the last will and testament of Mary D. Little, deceased. Upon the hearing of said petition said documents were admitted to probate as the last will and testament of said deceased, and the said Anna F. Curson appointed executrix thereof, and letters testamentary were issued to her. Thereafter this contest was instituted by respondents, and resulted in a verdict by the jury finding that the purported will and codicil were executed under undue influence. On this verdict the court rendered judgment vacating and setting aside its order previously made, admitting the will to probate, and adjudging said purported will and codicil to be null and void and of no effect. The court did not submit to the jury the issue of fraud.

The deceased, Mary D. Little, was the wife of Samuel W. Little, deceased, who died January 30, 1911, and from whom she received a large amount of property. Prior to his death, appellant, Anna F. Curson, had lost her husband, and about the year 1905, with her two sons, Samuel T. and Albert E. Curson, took up her residence at her father's house, and they so lived until the time of her father's death. After his death they continued to live in the family residence with Mrs. Little, the mother of appellant. The sons lived there until their marriage, and the appellant until the date of the death of her mother. Mary D. Little, at the date of her husband's death, was 87 years old, and at the time of the execution of said purported will was 89 years of age, and at the date of the execution of said codicil was of the age of 94 years. She was a woman of limited education, and at the time of the death of her husband had had practically no business experience. Her daughter, Mrs. Curson, after the death of Samuel W. Little, acted for her mother in practically all business matters. We are not informed as to the terms of the will of Samuel W. Little, deceased, but it appears that there was considerable dissatisfaction with his will on the part of his heirs at law, and particularly on the part of appellant, Anna F. Curson. The evidence shows that when the will was read for the first time, a few days after the death of Samuel W. Little, Mrs. Curson was greatly disappointed with the manner in which she had been treated in her father's will, and turning to her mother said, "Oh, mother, what am I going to do, who is going to keep me?" To which statement the mother replied, "I will look after you, Annie." Some time thereafter a contest was filed of the will of Samuel W. Little, deceased; the contestants being the said Mary D. Little, his daughter Anna F. Curson, his son Samuel

M. Little, a daughter, Mary M. Thompson, the mother of the respondents herein, with the exception of Samuel M. Little, another daughter, Lula M. Thompson (who later became Lula M. Scott), and said Lewis Ferguson, a grandson. The attorneys for the contestants in this proceeding were Messrs. Henry T. Gage and W. I. Foley, and they were brought to the Little home shortly after the death of Samuel W. Little and introduced to Mrs. Little and Mrs. Curson by the son of the latter, Samuel T. Curson. Mr. Foley had direct charge of this litigation, and from the date of his employment, which was prior to April, 1911, until her death he was the legal advisor of Mrs. Little. He was also during this time the attorney of Mrs. Curson. The evidence does not show the exact date of the institution of the contest of the will of Samuel W. Little, deceased, but it was probably in April, 1911. Respondent Samuel M. Little states that he became one of the plaintiffs in the contest of his father's will shortly after the latter's death. In October, 1913, and while this contest of the will of Samuel W. Little, deceased, was pending, and two years and a half after its commencement, Mrs. Little and Mrs. Curson, with Samuel T. Curson, and possibly Mary M. Thompson, went to the office of W. I. Foley. Mrs. Curson testifies that on this occasion Mr. Foley suggested to Mrs. Little:

"Now we will withdraw the contest and you remember the children their father did not remember."

On another occasion Mrs. Curson states that Mr. Foley at this time said to Mrs. Little:

"You and Mrs. Curson withdraw from the contest and you remember your daughters Mrs. Anna F. Curson and Mrs. Lula M. Thompson, and that will make it equal."

Mrs. Curson further testified that the following conversation took place on this occasion:

"At the time this will was under discussion in the presence of my mother, I told Mr. Foley about the long time I had lived with my mother and cared for her. I think Mr. Foley at that time said to my mother, 'Mrs. Little, you ought to remember your daughter, Mrs. Curson, well because she has been faithful to you.'"

Following this conversation the decedent and Mr. Foley repaired to the private office of Mr. Foley while Mrs. Curson remained in the reception room. On that day, or very soon thereafter, the will was prepared by Mr. Foley and brought to the home of Mrs. Little, where it was signed by her. Mrs. Curson testified that she saw the will in Mr. Foley's office the day it was signed and also at the residence of Mrs. Little, and read it before it was signed. The will was left with Mrs. Little and afterwards taken by Mrs. Curson and placed in a safe deposit box.

None of the other heirs knew of the contents of the will. Some time after its execution they learned of its existence, and Samuel M. Little requested his mother for permission to read it. She referred him to Mr. Foley, who denied his request.

The will provided that after a bequest of \$100 each to Samuel M. Little, Mary M. Thompson, and Lewis P. Ferguson, an undivided three-fifths of all the rest and residue of the property of said deceased should go to Anna F. Curson, and an undivided two-fifths thereof to Lula M. Thompson. The bequest to Mrs. Lula M. Thompson was for life, with the remainder over to her children. It was further set forth in the will that it was the intention of the decedent to provide in part by deeds and conveyances of property to her daughters Mrs. Curson and Mrs. Lula M. Thompson. Thereafter the decedent executed four deeds as follows: One on November 4, 1913, in favor of Anna F. Curson to the home place on Burlington avenue, Los Angeles, Cal., for which the decedent had paid \$8,500, and one on September 29, 1914, in favor of Anna F. Curson to property situated in Lincoln, Neb., valued at about \$75,000; one in June, 1917, in favor of Lula M. Thompson for five-twelfths interest in property situated at the southeast corner of First and Broadway, and five twenty-fourths interest in a lot in Moreno Tract, Los Angeles, Cal.; and one in July 1917, in favor of Lula M. Thompson to property situated at Brooklyn Heights, Los Angeles, Cal. Mrs. Curson testified that her mother discussed with Mr. Foley and herself the disposition of her property by means of deeds at the time they went to Mr. Foley's office on the first occasion when the will was prepared. These deeds were all prepared by Mr. Foley, with one possible exception, which was the deed to the property in Lincoln, Neb. This deed was either prepared by Mr. Foley or by an attorney in Lincoln, Neb., at the request and under the direction of Mr. Foley. Mrs. Curson further testified as follows:

"After the conversation in Mr. Foley's office, in which it was agreed to withdraw the will contest and make a will and certain deeds, we got the consent of Samuel M. Little and the guardian of Lewis Ferguson to the withdrawal of the will contest. I never told Mary M. Thompson or Samuel M. Little or Lula M. Thompson or the guardian of Lewis Thompson that mother had agreed that when the contest was withdrawn that she would make a will leaving her estate to me and Mrs. Scott, or would deed me her property."

On November 7, 1918, the codicil to this will was prepared by Mr. Foley and sent to Mrs. Little at her home, where the same was signed by her. Mrs. Curson testified that at the request of her mother she telephoned to Mr. Foley and he came out to the house and Mrs. Little talked with him. Mrs. Curson

had informed Mrs. Griffith, one of the subscribing witnesses, that a codicil was to be made; and asked Mrs. Griffith if she would sign as a witness. After the preparation of the codicil, it was brought by Mrs. Curson into the room where the subscribing witnesses and Mrs. Little were. Mr. Richards, the other subscribing witness, then said:

"Now, Mrs. Griffith, we are not supposed to know anything that is in this codicil. We are simply to witness here that Mrs. Little is well and of sound mind."

The codicil was not read to Mrs. Little nor by her in the presence of either of the subscribing witnesses. There is no evidence that Mrs. Little ever read the codicil or had it read to her before she signed it. By this codicil the decedent increased the bequest of \$100 to Samuel M. Little to \$500. Mary M. Thompson having died in the meantime, the bequest of \$100 to her was revoked, and a bequest of \$100 was made to each of the six children of the said Mary M. Thompson, deceased. In her codicil the decedent refers to the four deeds executed by her and requested that the same be respected by her children and grandchildren. The residue of her estate, in the codicil, was given to Mrs. Curson and to Mrs. Lula M. Thompson in the same proportions specified in the original will. It does not appear what the value of the estate finally left by Mrs. Little was, but in the petition for the probate of the will it is given as \$8,000. The value of the three pieces of property conveyed to Mrs. Thompson was approximately \$40,000.

We have already referred to the fact that Mary D. Little was at the date of the death of her husband of the age of 87 years, and from that time until the date of her death Mrs. Curson resided with her and transacted all her business, and that during this time Mr. Foley was her legal advisor. Mrs. Curson testifies that whenever any question arose of any serious moment, her mother would say, "Let us go and ask Mr. Foley," and that during this time she looked to Mr. Foley for direction in all legal matters concerning her property. The evidence further shows that between the date of the death of Mr. Little and that of the decedent the latter referred almost everything in the nature of business to her daughter, Mrs. Curson. Whenever she was asked by other members of the family anything about her property or her business, she invariably replied, "I don't know, ask Annie" (meaning Mrs. Curson). The evidence also shows that when Mrs. Lula M. Thompson discovered that Mrs. Curson had received deeds to certain property from her mother, she called upon her mother and insisted upon the latter deeding property to her. The mother replied that she would do so, but that she would first have to see Mrs. Curson. Upon seeing Mrs. Curson about the matter, the latter replied,

"Sure, you can have it." The result was that Mrs. Little executed in favor of Mrs. Lula M. Thompson the two deeds before referred to. The evidence in the controversy was voluminous, but the above recitals contain, in our opinion, the salient points brought out at the trial.

Appellant advances three reasons why the judgment should be reversed: (1) That the court erred in submitting to the jury the question of the exertion of undue influence upon the decedent by W. I. Foley. (2) That the jury did not find upon the issue of fraud. (3) Insufficiency of the evidence to support the verdict.

At the conclusion of the evidence the court submitted to the jury the following questions:

"Was the execution of the will dated October 30, 1913, procured by undue influence of Anna F. Curson, Samuel T. Curson, Albert E. Curson, and W. I. Foley, or any or either of them?"

"Was the execution of the codicil dated November 7, 1918, procured by undue influence of Anna F. Curson, Samuel T. Curson, Albert E. Curson, and W. I. Foley, or any or either of them?"

The answer of the jury to each question was "Yes."

The court also gave to the jury the following instruction:

"If you believe from the evidence that the deceased in making her will or codicil was unduly influenced so to do by Anna F. Curson, Samuel T. Curson, and W. I. Foley, or any or either of them, and that but for such influence unduly exercised as in these instructions defined, she would not have made or executed the said will or codicil in controversy, your verdict should be that the execution of such will and codicil so procured was the result of the undue influence of such person or persons."

[1] It is now insisted by appellant that there is no allegation in the petition for the revocation of the will charging undue influence on the part of W. I. Foley, and therefore it was error for the court to submit to the jury either of the above questions in so far as they related to the exertion of undue influence on the part of W. I. Foley. For the same reason appellant complains of the giving of the foregoing instruction. It is true that there is no direct allegation in said petition that said will and codicil were procured by the undue influence of W. I. Foley, yet there are facts and circumstances set out in said petition which if true would be tantamount to a direct allegation of undue influence on the part of W. I. Foley. It would appear that appellant so considered these allegations, as they are specifically denied by her in her answer to said petition, and from the evidence it is apparent that the case was tried upon the theory that undue influence was alleged to have been ex-

erted over the decedent by the said W. I. Foley. We therefore are of the conclusion that the court committed no error in the submission of these questions to the jury, nor in the giving of the above instruction.

[2] It is next claimed by the appellant that the jury did not find upon the issue of fraud. We have already noted the fact that the contest was based originally upon fraud, undue influence, and unsoundness of mind, and that contestants dismissed as to the issue of unsoundness of mind, leaving two issues to be decided by the jury, namely, fraud, and undue influence. In the two questions above set out, the court submitted to the jury the issue of undue influence. These were the only questions submitted to the jury. The question of fraud, as will be readily seen, was not included in either one of these questions. In the Estate of Snowball, 157 Cal. 301, 107 Pac. 598, the issue of undue influence and the issue of fraud were submitted to the jury. The jury in their verdict found in favor of the contestant upon the issue of undue influence, but failed to find upon the issue of fraud. On appeal the judgment based on said verdict setting aside the will was affirmed. The finding of the jury in favor of the contestant upon either issue would be fatal to the validity of the will; therefore, after a finding on one issue adverse to the will, a failure to find on the other issue would not constitute an error prejudicial to the rights of the proponent. A finding by the jury upon the second issue, either for or against the proponent, would not in any way be of any benefit to her. Therefore she cannot complain of such failure on the part of the jury.

In support of her contention that the evidence is insufficient to justify the verdict, appellant relies upon Estate of Anderson, 185 Cal. 700, 198 Pac. 407. Quoting from page 708 of 185 Cal., 198 Pac. 407, 411, of this decision, we find that—

"The outstanding features of the case are simply: That the testatrix was a mature and intelligent woman of sound mind; that she was married to a man of wealth very much older than herself; that she was devotedly attached to her aunt, whom she regarded as her mother; that she had a little property of her own given her by her husband consisting almost entirely of stock in the corporation managed by her aunt's husband; that she was expecting a child and was fearful of the result of her confinement; that she wished to make provision as to the disposition of her estate and the care of her possible child in case she should die; that under the circumstances she made a will after consultation with a lawyer, and when she and the aunt were away from their home together; and that the will provided for the division of her estate between the aunt and her child, if there should be one, and otherwise for its all going to the aunt, requested that the aunt be appointed guardian of the child, and stated that no provision was made for her husband as he had ample means of his own."

It will readily be seen that the facts in the Estate of Anderson, *supra*, are materially different from those in the case before us. Here we have a woman past the age of 80 years, left with considerable property by the death of her husband, inexperienced in the conduct of business, and dependent wholly upon the advice and assistance of others. The proponent, her daughter, living with her, assumed to advise and assist her mother, and the latter accepted this advice and assistance in the management of her business affairs. An attorney represented them both in a will contest then pending. The decedent and proponent were in the office of the attorney. There is no evidence that decedent went to her attorney's office on this occasion with any intention of making a will, but while there the attorney suggested to her, not only that she make a will, but that she make it in favor of the proponent and her sister, Mrs. Thompson. Following immediately this suggestion of the attorney, and without any intimation on the part of the decedent as to whether she would act favorably upon the suggestion, the proponent, in the presence of her mother, reminds the attorney of the long time she had lived with her mother and cared for her. Whereupon, the attorney again, addressing the mother, says to her, "Mrs. Little, you ought to remember your daughter, Mrs. Curson, well because she has been faithful to you." Following this conversation the decedent and the attorney repaired to the private office of the latter, where the will was prepared and later signed by the decedent.

In the opinion of the Estate of Anderson, *supra*, is to be found an extended reference to the authorities of this state wherein the Supreme Court has held that the evidence was insufficient to set aside a will upon the ground of undue influence. In none of these cases, in our opinion, do the facts present so strong a case against the validity of the will as is found in the facts before us. Probably the strongest case of all these against the validity of the will is the Estate of Purcell, 164 Cal. 300, 128 Pac. 932, wherein it was sought to set aside a will on the ground of undue influence of three beneficiaries named therein. The Supreme Court held that a confidential relation existed between the decedent and these beneficiaries, but refused to set aside the will for the reason that "there is no evidence that either of them suggested to her (the decedent) any of the provisions contained in the will." How different are the facts in the case before us from these facts. The relation existing between the decedent on one hand and Mrs. Curson and her attorney on the other was no doubt of a confidential nature, and the testimony of Mrs. Curson herself is to the effect that the will in her favor was the result of the suggestion of the attorney, aided and support-

ed by the supplication and importunities of herself.

[3] In our opinion there is ample authority to sustain respondents' contention that the evidence in this case is sufficient to support the verdict. In the Estate of Snowball, 157 Cal. 301, 307, 107 Pac. 598, 601, the court said:

"The sum and substance of contestants' evidence was that the testatrix was unable to resist the importunities of her daughter and made the will under the influence thereof, so that, so far as provision for H. H. Snowball was concerned, the will was in reality the will of the daughter and not that of the testatrix. There is nothing in the claim that the undue influence was not exercised directly upon the testamentary act. There was sufficient in the evidence of contestants to support a conclusion that it was used purely for the purpose of procuring the will, and that the will was the direct result thereof. While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence, * * * such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix. (See Estate of Arnold, 147 Cal. 589, 82 Pac. 252; Estate of Welch, 6 Cal. App. 50, 91 Pac. 336.)"

In Estate of Arnold, 147 Cal. 583, 82 Pac. 252, upon the motion of the proponent of the will, the court granted a nonsuit, but on appeal the Supreme Court reversed the case and held the evidence sufficient to require the submission of the case to the jury. The evidence upon undue influence was entirely circumstantial, but the court held it sufficient and further intimated that, had the case been submitted to the jury and the jury returned a verdict in favor of the contestant, the Supreme Court would not have disturbed the verdict.

In Estate of Gallo, 214 Pac. 496, the appellate court set aside an order of nonsuit in favor of the proponent of the will, and held that—

"The mere existence of a confidential relation between a testator and one who unduly profits by the will is not sufficient to overturn it, but, when such beneficiary 'has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud.' Estate of Baird, 176 Cal. 381, 384, 168 Pac. 561; Estate of Ricks, 160 Cal. 450, 117 Pac. 532; Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915; Estate of Packer, 164 Cal. 525, 129 Pac. 778."

In the Estate of Ramey (Cal. App.) 217 Pac. 135, the contest was based upon undue influence. This also was a case in which the evidence of undue influence was entirely circumstantial. The proponent of the will was a nephew of the deceased and attended to

her business for some time prior to her death. One of the subscribing witnesses to the will, an attorney, testified that before he would act as a witness to the will he examined the decedent privately and went over all of the terms of the will with her; that she thoroughly understood its contents and executed it voluntarily and without the exercise of undue influence over her by any person. The attorney who prepared the will corroborated the subscribing witness, and there was no direct evidence to contradict the testimony of either of these witnesses, yet the jury found against the validity of the will and the appellate court affirmed the judgment.

Viewing the facts in this case in the light of these authorities and of others that could be mentioned, we are unable to say that the evidence is not sufficient to support the verdict.

What we have heretofore said applies entirely to the execution of the will. The codicil was signed some five years thereafter and under somewhat different circumstances. During the time, however, intervening between the signing of these two documents, the relation of the parties had not changed. Mrs. Little, however, was 94 years of age at the date of the codicil. It had been prepared and sent to her home. The subscribing witnesses, or at least one of them, had been called in by Mrs. Curson, who produced the codicil for her mother's signature. Mrs. Little did not read it, nor was it read to her, nor were its contents made known to her in the presence of the subscribing witnesses before she signed it, or at any other time. Nor is there any evidence by any witness that Mrs. Little had ever read the codicil or knew of its contents before she signed it. We think it but reasonable to infer, as there was evidence sufficient to justify the jury in finding that the will itself had been executed by the decedent while under the undue influence of Mrs. Curson, and the evidence further showed that the relation of these parties at the time of the signing of the will continued up to and existed at the time of the signing of the codicil, that the latter document was the result of the efforts exerted by Mrs. Curson over her mother, and therefore must be held to be void as executed under the same undue influence that invalidated the will.

The deeds executed by Mrs. Little in favor of Mrs. Curson and those in favor of Mrs. Thompson are not involved in this proceeding. The circumstances, however, of their execution may shed some light upon the issues involved herein. In the purported will of Mrs. Little is found an expression of an intention on her part to execute deeds in favor of these two daughters, and the evidence shows that immediately after the will was signed, that is, some four days thereafter, Mrs. Little deeded to Mrs. Curson the home place, and in September, following the sign-

ing of the will, she also deeded to Mrs. Curson the property situated in Lincoln, Neb. Nothing, however, was done toward executing deeds in favor of Mrs. Thompson until June, 1917, and then only after Mrs. Thompson had discovered that her mother had made deeds in favor of Mrs. Curson. Upon learning this fact, Mrs. Thompson called upon her mother and asked for deeds to the property which her mother was to give to her. Mrs. Little, while intimating that she wanted Mrs. Thompson to have her share of the property, referred Mrs. Thompson to Mrs. Curson, and the latter, on being approached by Mrs. Thompson in regard to the matter, replied, "Sure, you can have it." The result was that the two deeds in favor of Mrs. Thompson were executed during the months of June and July, 1917, almost four years after the will was signed. We think it is only reasonable to infer from this testimony that Mrs. Little, in her advanced years, acted in business matters at least only upon the suggestion of others, and that during this time she relied so completely upon Mrs. Curson that she was unable without the assistance of the latter even to carry into effect her expressed intention to provide for Mrs. Thompson. We are of the opinion that from this testimony the jury could reasonably draw the conclusion that Mrs. Little during this time was under the influence and domination of Mrs. Curson to such an extent that she acted in important business matters only upon the advice and direction of Mrs. Curson, and that whatever matters were transacted by her, even to the signing of her purported will and codicil, were done at the suggestion and under the direction of Mrs. Curson.

[4] In addition to the grounds for reversal which we have already discussed, appellant criticizes the form of verdict rendered in this proceeding and claims that it is in violation of section 1314 of the Code of Civil Procedure. It will be noted that the questions submitted to the jury required answers from them as to whether the will and codicil were procured by the undue influence of four persons named therein, or either or any of said persons. Appellant insists that she was entitled to a finding as to whether or not the will was secured by the undue influence of a particular individual, and not such a finding as that which was rendered in this action, which she claims is merely a general verdict and therefore prohibited by the terms of section 1314, Code of Civil Procedure. There is nothing in the record of this case that suggests that the appellant, in the trial court, made any objection to the form of the questions submitted to the jury or that she requested any other or different form of questions for the jury's consideration than that which the court submitted. The objection in our opinion, even if meritorious, comes too

late when first made in this court. As to its merits, the only authority submitted by appellant in support of her contention is the *Estate of Hewitt* (Cal. App.) 218 Pac. 778. In that case the verdict was a general verdict and bore no resemblance to the verdict in the case before us. In our opinion the verdict as rendered by the jury meets the requirements of section 1314 of the Code of Civil Procedure.

The order denying appellant's motion for a new trial and the order refusing to vacate and set aside the judgment, being nonappealable orders, the appeals therefrom are dismissed. Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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HINDS v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 4604.)

(District Court of Appeal, Second District, Division 1, California. Jan. 9, 1924.)

1. Judgment  **153(2)—Application for relief from default for mistake, excusable neglect, etc., must be made within 6 months.**

Under Code Civ. Proc. § 473, an application for relief from a default judgment taken through mistake, inadvertence, surprise, or excusable neglect must be made within 6 months after default was taken.

2. Judgment  **131—Clerk's inadvertent filing of proof of service with papers in another case held not to affect right to enter default.**

Where the necessary affidavit of proof of service of an amended complaint on which the right to enter default judgment was based had been left with the clerk of the court for filing, but he inadvertently filed it with papers in another case, he had the right to enter the default, and this right was not affected by the misplacement of the affidavit, and, having been regularly entered, the judgment could not be affected by the erroneous act of the clerk in attempting to cancel the same.

3. Judgment  **153(2)—Six-month limit for making motion to open default held applicable to judgment regularly entered.**

Where a default judgment not void on its face was regularly entered after the clerk had received for filing an affidavit showing service of the amended complaint, though affidavit had been misplaced, the 6-month limitation of time under Code Civ. Proc. § 473, for making a motion to open default on the ground of mistake, inadvertence, and excusable neglect, was applicable.

4. Pleading  **336 — Service of proposed amended complaint at time of giving notice of application for permission to file same held sufficient.**

Where a proposed amended complaint was served on defendants with notice of application for permission to file same, it was not necessary for plaintiffs to serve another copy thereof after the order granting the applica-

tion had been made, especially as defendant's attorney contested the order granting the motion.

Application for certiorari by Hugh H. Hinds to review an order of the Superior Court of Los Angeles County, setting aside a default judgment in an action by petitioner against Charles M. Johnson and another. Order annulled.

Alfred E. Dennis, of Los Angeles, for petitioner.

C. M. Johnson, of Gridley, for respondent.

CONREY, P. J. This is a proceeding on writ of review in relation to an order made by respondent court granting an application to set aside the default of the defendants in an action wherein petitioner, Hinds, was plaintiff and Charles M. Johnson and Donald Johnson were defendants. The default had been entered on the 4th day of January, 1923. The motion to set aside default was made upon the ground that the default of the defendants was taken and entered by reason of mistake, inadvertence, and excusable neglect of the defendants to file their appearance in said action, and on the ground that neither of the defendants nor their attorneys were served with copies of the notice of motion to file an amended complaint, filed on November 28, 1922, and upon the ground that neither of the defendants was served with notice of the order of the court made on December 5, 1922, granting permission to file an amended complaint, and on the ground that neither of the defendants nor their attorneys were served with a copy of the amended complaint filed on December 6, 1922.

The application of the defendants for an order to set aside said default was presented to the court on the 21st day of September, 1923, pursuant to notice thereof served and filed on the 14th day of that month.

[1] An application for relief from a default taken against a party through his mistake, inadvertence, surprise, or excusable neglect must be made within six months after such default was taken. Code Civ. Proc. § 473; *McLain v. Llewellyn Iron Works*, 56 Cal. App. 58, 204 Pac. 869. In the cited case it was held, in accordance with an earlier decision by the Supreme Court, that the clerk's entry of the default, and not the entry of the judgment, fixes the beginning of the six months within which the application must be made.

[2] Counsel for respondent contends that the entry of default as made by the clerk on January 4, 1923, was void because the clerk did not at that time have before him proof of service of the amended complaint, upon which service the right to enter the default depended; that the clerk, having discovered this defect, later destroyed and eras-

ed the entry; that the clerk did not again enter the order for default until July 23d, and then attempted to enter the order nunc pro tunc as of January 4th; that a clerk has no authority to enter an order nunc pro tunc. From the affidavit of the clerk who entered the default, which affidavit was used on the motion now under review, it appears that the necessary affidavit of proof of service on which the right to enter the default depended had been left with the clerk for filing, but inadvertently had been filed with the papers in another case. On this condition of the record we are of the opinion that the clerk had authority to enter the default on January 4, 1923, and that his right and obligation so to do on demand of the plaintiff was not affected by such misplacement of the document proving service of the amended complaint. "It is the fact of service which confers jurisdiction." *Spaulding & Co. v. Chapin*, 37 Cal. App. 573, 577, 174 Pac. 334, 335. The default thus having been regularly entered, its validity could not be affected by the erroneous act of the clerk in attempting to cancel the same.

[3] Respondent further contends that on the motion to open default there were affidavits on file denying personal service on the defendants of the amended complaint; that the court had jurisdiction to pass on this question, and that the court had a right to find and presumably did find that the amended complaint had not been served on the defendants; that, this being so, the court had authority under the provisions of said section 473, Code of Civil Procedure, to set aside the judgment and allow the defendants to answer at any time within one year after the rendition thereof. In this connection it should be noted that this contention of respondent is based upon a claim that there was a total absence of service of the amended complaint, and not on the ground that the default rested upon constructive service only. But since, as we have held, the default was regularly entered by the clerk after he had received for filing an affidavit showing service of the amended complaint, and since the judgment was not void on its face, it follows that the six months' limit of time for making the application was applicable to the case. *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Spaulding & Co. v. Chapin*, 37 Cal. App. 573, 578, 174 Pac. 334; *Young v. Fink*, 119 Cal. 107, 50 Pac. 1060.

[4] It has been further suggested that the proof of service of the amended complaint was insufficient to authorize the entry of default because the affidavit on which the clerk relied only proved personal service of the amended complaint at the time of giving notice of application to the court for permission to file such amended complaint, and that there was no proof of a subsequent personal

service of the amended complaint after the court made its order allowing plaintiff to file the same. We are of the opinion that the one service of the proposed amended complaint at the time of giving notice of the motion was sufficient, when followed by filing of the same amended complaint after the order had been made. The court minutes of December 5th, of the hearing at that time, showed the presence in court of defendants' attorney, contesting the motion, which motion was then and there granted.

The order of respondent court setting aside the default of the defendants in said action is annulled.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 214

**BOARD OF PUBLIC SERVICE COM'RS OF
CITY OF LOS ANGELES v. SPEAR.**
(Civ. 4465.)

(District Court of Appeal, Second District, Division 2, California. Jan. 7, 1924.)

1. Landlord and tenant §216—Court must exercise legal discretion as to trebling rent.

A court must exercise its discretion as to trebling the rent under Code Civ. Proc. § 1174, in case of forcible entry or detainer, in a sound, fair, and reasonable manner, in conformity with the spirit of the law, to serve the ends of justice; such a discretion not being a mental one to be exercised ex gratia, but a legal discretion.

2. Landlord and tenant §216—Trial court held bound to render judgment for treble amount of rent found due, in view of willfulness in holding over.

Assuming that Civ. Code, § 3345, providing that when a tenant willfully holds over after demand and notice in writing he must pay treble rent, was repealed by Code Civ. Proc. § 1174, providing that for forcible entry or unlawful detainer judgment may be entered in the court's discretion, either for the amount found due, or for three times such amount, where tenant willfully remained in possession, deliberately and obstinately, with knowledge that the tenancy was terminated, the court was bound to treble the rent found due, and a judgment for less than this sum would have been an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Board of Public Service Commissioners of the City of Los Angeles against Joseph Spear. Judgment for plaintiff, and defendant appeals. Affirmed.

Grant Jackson, of Los Angeles, for appellant.

Page & Hurt and Eugene D. Williams, all of Los Angeles, for respondent.

CRAIG, J. The only question raised upon this appeal is whether or not the trial court

had discretion under the facts presented to render a judgment against a tenant holding over for rental only, without trebling the amount. Respondent purchased certain premises of which appellant held possession under a verbal agreement which respondent alleged was a tenancy from month to month, and served upon him a 30-day notice to vacate; upon his failure to do so, it served the statutory 3-day notice, and subsequently brought this action for possession of the premises and treble rents. Appellant's answer alleged that he was in possession under a parol lease for one year, and that his term had not expired. The findings of the trial court were in favor of the owner for all demands, and among other things recited:

"The court having found that the defendant willfully held over the premises involved in this action after demand made and one month's notice in writing given requiring the possession thereof, now finds that such willful holding over was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated and that defendant was holding over without and against the consent of the landlord, and that by reason thereof the plaintiff, as a matter of law, is entitled to have judgment for treble rent during the time the defendant continued in possession after such notice; but the court, in so finding and in ordering judgment for treble damages, is not doing so in the exercise of its discretion, but because it is of the opinion that it cannot under the law exercise any discretion in the premises, and is compelled under the law to give judgment for treble damages."

Appellant's contention is that section 1174 of the Code of Civil Procedure afforded the court discretion to enter judgment for the rent due, or for treble such amount, basing his argument upon the following provision thereof:

"Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found."

Section 735 of the Code of Civil Procedure also provides that:

"If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed."

The finding referred to and respondent's position are based upon section 3345 of the Civil Code, which reads as follows:

"*Tenant Willfully Holding Over.* If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice."

[1, 2] It is contended by the appellant that inasmuch as the Codes were adopted in 1872, with the last two quoted sections as they now appear, and since section 1174, Code of Civil Procedure, was since amended to include the provision as herein set forth, it effected a repeal in this respect of section 3345, Civil Code. Although this argument presents an interesting question, we think it is one which we are not required to pass upon in the instant case. The facts of this case place it squarely within the provisions of section 3345, Civil Code. If it be conceded that this section was repealed, and that the provisions of section 1174, Code of Civil Procedure, are applicable here, we think the trial court would still have been bound to render judgment for treble the amount of rent found due. When a court is given discretion in the exercise of authority it must exercise that discretion in a sound, fair, and reasonable manner; it may not arbitrarily render judgment for either treble the amount or for the actual amount of rent found due; the facts must warrant the decree rendered.

"It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." *Bailey v. Taaffe*, 29 Cal. 424.

In *Alden v. Mayfield*, 33 Cal. App. 724, 166 Pac. 382, it was contended that the court was not justified in assessing treble rents. It was there said, quoting from the opinion of the Supreme Court in passing upon a former trial of the same case, that:

"The defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery. * * * Still further in this connection it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff."

It is then said:

"All these things seem to show conclusively a willful withholding of the premises on the part of respondent. Doubtless the word '*willful*' is used in different statutes with various shades of meaning, but herein the conduct of defendant in refusing to surrender possession was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the will and consent of the landlord. We think nothing more is required to constitute *willfulness* on the part of the tenant." (Italics quoted.)

It is true that the provision there under consideration was section 3345, Civil Code. Nevertheless, if appellant's contention is correct, section 1174, Code of Civil Procedure, includes all that was within the scope of section 3345, Civil Code, and it is clear that the case at bar is one within that portion of section 1174, Code of Civil Procedure, which was included in section 3345, Civil Code. (The assumption that the latter section has been repealed being indulged here merely for the sake of argument.) Hence what is said in *Alden v. Mayfield* applies by analogy to the instant case. Authorities to which our attention is directed do not hold that the rents should be trebled where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain, but that if his conduct be intentional, with knowledge of the termination of the tenancy, and the holding over is against the will and without the consent of the landlord, section 3345 of the Civil Code is mandatory. *Alden v. Mayfield*, supra; *Vatuone v. Cannobio*, 4 Cal. App. 422, 426, 88 Pac. 374. The trial court, having found that appellant in the instant case leased the premises from month to month until notified in writing of the change of ownership, and demand was made upon him for possession, and that thereafter he willfully remained in possession, deliberately, intentionally, and obstinately, with knowledge that the tenancy was terminated, it would have been an abuse of discretion had the judgment been other than for treble the amount of the rent found due. The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

65 Cal. App. 211

NAKAMURA v. KONDO. (Civ. 4383.)

(District Court of Appeal, Second District, Division 2, California. Jan. 7, 1924.)

1. Partnership § 344—Debts must be paid and assets reduced to money before personal judgment for one partner against other.

Where partnership property consists of assets other than money, and there are partnership debts, until such debts have been paid and the assets reduced to money there can be no definite basis for a division between the partners which could be the basis of a judgment that one pay to the other any specific sum of money.

2. Partnership § 344—Personal judgment cannot be rendered for one partner against other for advances till the partnership assets exhausted.

On sale of partnership assets, the proceeds constitute a partnership fund from which, after paying firm debts, the claims of the partners for money advanced as capital must be paid before any other division of the fund

among the partners, and as long as such fund is in existence no personal judgment should be rendered in favor of one partner against the other.

3. Judgment § 194—Ordering sale of partnership assets and division of proceeds and personal judgment for one partner against other held not final determination under statute.

A judgment, ordering the sale of partnership property and a division of the proceeds, and granting personal judgment for one partner against the other for the amount of his contribution to capital in excess of other partner's, could not be sustained, since it did not finally determine all the rights of the parties under Code Civ. Proc. § 577.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Shiro Nakamura against Masaharu Kondo. Judgment for plaintiff, and defendant appeals. Reversed.

Ingle Carpenter and M. J. Finkenstein, both of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

CRAIG, J. In this action the plaintiff sought a dissolution of the partnership between himself and the defendant, and an accounting. The copartnership had been conducted under the name of M-K Fisheries Company. After a hearing the court rendered an interlocutory judgment, which provided:

"(1) That the partnership heretofore existing between the plaintiff and defendant, under the name of M-K Fisheries Company, be and the same is hereby dissolved. (2) That the plaintiff is entitled to an accounting, and an accounting is hereby ordered, showing the accounts of each of the parties hereto in the said partnership. (3) That the interests of the partners, amounting to \$100,000 in the Mexican Industrial Development Company, be sold, and that all just debts and demands against said copartnership be paid, and the balance, if any, be divided among the copartners in the following way: Four-fifths to the defendant, Masaharu Kondo, and one-fifth thereof to the plaintiff, Shiro Nakamura."

The matter of accounting was then referred to a referee, who in due time rendered a report. To this the defendant filed objections, and the court approved the report, except as to an item of \$500, and subsequently rendered final judgment. After reciting that the plaintiff's contribution to the partnership in addition to his original investment was \$1,595.87 in excess of the contribution of the defendant, of which sum the defendant owed the plaintiff four-fifths, or \$1,195.88, this judgment decrees:

"Now, therefore, it is hereby ordered, adjudged, and decreed, in addition to the interlocutory judgment heretofore rendered in this matter, that plaintiff Shiro Nakamura have and recover

judgment of and against the defendant Masaharu Kondo for the sum of \$1,195.88, and for costs of suit amounting to \$472.50."

This last provision is the portion which is the basis of dispute upon this appeal.

[1, 2] It is contended by appellant that no personal judgment should have been rendered against him until all of the assets of the copartnership had been disposed of, and that the judgment is erroneous on that account. It is the general rule that, where the property consists of assets other than money, and where there are partnership debts, until such debts have been paid and the assets reduced to money there can be no definite basis for a division between the partners which could be the basis of a judgment that one pay to the other any specific sum of money. But respondent argues that where, as in the present instance, an accounting had already been ordered and completed, and no debts remain to be paid, and a portion of the partnership property consists of money which is in the hands of one of the partners, the judgment may and should be made in favor of the other partner for his share of such money.

The weakness of this position lies in the fact that the claim of a partner, even for money advanced by him in respect to capital of the partnership, is to be paid out of the assets of the partnership before there is a division among the partners of the proceeds of any residue after paying all debts and liabilities of the firm, either to persons who are not partners or to the partners themselves. *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446; *Bates on Partnership*, § 971. In the instant case the partnership owned an interest in the Mexican Industrial Development Company. The interlocutory decree directed that this be sold and divided between the partners. Upon its sale the proceeds would constitute a partnership fund from which the claim of respondent for money advanced as capital should be paid, and as long as such partnership fund is in existence with which to liquidate a debt due one of the partners no personal judgment should be rendered against the other partner.

[3] Another reason why the judgment cannot be sustained is that it does not finally determine all the rights of the respective parties. Code Civ. Proc. § 577. The judgment is not one for division of partnership property as was that in the case of *Shuken v. Cohen*, 179 Cal. 279, 176 Pac. 447, but is one ordering the sale of the property and thereafter the division of the proceeds. It is apparent that further litigation between the parties is possible, and might be necessary, before their respective rights are finally determined.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

65 Cal. App. 147

BROWN et al. v. SUPERIOR COURT OF IMPERIAL COUNTY et al. (Civ. 4576.)

(District Court of Appeal, Second District, Division 1, California. Jan. 5, 1924.)

1. Prohibition — 11—Defeated party held not entitled to complain of judgment failing to state amount of costs.

Even if a judgment for defendants was defective in that the amount of costs recoverable was not stated therein as provided by Code Civ. Proc. § 896, a valid judgment remained as respects negating plaintiff's right to recover from defendants, and the defect, being entirely in plaintiff's favor was not one of which he could complain on writ of prohibition.

2. Justices of the peace — 155(1)—Notice of entry of judgment held substantially to comply with statute.

A notice of entry of judgment which omitting the title of the action and of the cause, recited: "1923. Judgment. In the Justice Court of El Centro Township, County of Imperial, State of California, before I. Mayfield, Justice, March 9th, 1923, judgment rendered and entered denying plaintiff his claim, and assessing cost against plaintiff. [Signed.] I. Mayfield, Justice of the Peace, El Centro Township" held to be substantially in the form provided by Code Civ. Proc. §§ 893, 897.

3. Appeal and error — 798—Appellant's contest of motion to dismiss appeal waives defect in notice.

Appellant's appearance at the hearing of motion to dismiss the appeal and his contest thereof is a waiver of objection to the sufficiency of notice to dismiss.

4. Appeal and error — 798—Finding of service of notice of appeal held warranted by evidence outside record.

Where, the record of the hearing of a motion to dismiss an appeal contained no evidence of the service of notice of rendition of judgment on appellee, but affidavits and oral testimony by moving party clearly established such service without contradiction, the court properly determined that service was actually made.

5. Justices of the peace — 160(4)—Notice of appeal condition precedent to superior court's jurisdiction.

Service of notice of appeal from justice court within 30 days of rendition of judgment is a condition precedent to giving the superior court jurisdiction of the appeal.

Application for writ of prohibition by John N. Brown and another against the Superior Court of Imperial County and another, to prevent further proceedings in an appeal from justice's court. Writ granted.

E. R. Simon, of El Centro, for petitioners.
Harry W. Horton, of El Centro, for respondents.

HOUSER, J. Prohibition. A judgment in a justice's court was entered in the docket on March 9, 1923, as follows:

"March 9, 1923. After due and careful deliberation upon the evidence adduced in the above-entitled action, the court finds for the defendants, and denies plaintiff his claim. It is therefore ordered and adjudged that plaintiff take nothing from said defendants, and that said defendants recover their costs herein expended."

On the same day, to wit, March 9, 1923, plaintiff's attorney was served with a notice that judgment had been rendered against plaintiff which, omitting the title of the court and the cause, was as follows:

"1923. Judgment. In the Justice Court of El Centro Township, County of Imperial, State of California, before I. Mayfield, Justice, March 9th, 1923, judgment rendered and entered denying plaintiff his claim, and assessing cost against plaintiff. [Signed.] I. Mayfield, Justice of the Peace, El Centro Township."

Within the time prescribed by the statute plaintiff filed with the justice's court his notice of appeal to the superior court of Imperial county from the judgment of said justice's court made and entered against plaintiff; and on April 13, 1923, which was 35 days after the entry of the judgment in the docket of the justice's court, plaintiff served a copy of the notice of appeal upon the attorney for one of the defendants. The other defendant was never served with any notice of said appeal. On the 18th day of April, 1923, defendants filed with the clerk of the superior court their motion to dismiss the appeal taken by plaintiff on the ground "that said appeal had not been perfected within time—notice of appeal not having been served upon the defendants or upon the attorneys for the said defendants within the time required by law"; that said notice was originally noticed for hearing on April 20, 1923, but by order of the court was continued until April 27, 1923. On April 24th a new notice was served of the hearing of the motion on April 27th, and with the notice were served copies of certain affidavits. The new notice contained the statement that the motion to dismiss would be heard "upon the files, pleadings and papers in the said cause," together with affidavits therein referred to, "and oral testimony." On April 27, 1923, the attorney for plaintiff filed a counter affidavit in answer to the affidavits which had theretofore been interposed by the attorneys for defendants. But such answering affidavit merely denied, on information and belief, that notice of the rendition of the judgment was given as required by law. When the matter came on for hearing the plaintiff objected to the introduction of the affidavits and the oral testimony interposed by defendants, as well as to the introduction of anything other than the records and files as they were as of date April 18, 1923, when the original notice of motion to dismiss was filed; but, notwithstanding such objection, said affidavits and oral evidence were in-

roduced at such hearing. Thereafter, and on the 30th day of June, 1923, the superior court denied said motion to dismiss the said appeal. In the petition for prohibition herein it is stated that said action "is now pending in the superior court of Imperial county, Cal., and the said court and the attorney for said plaintiff therein are threatening to set said cause down for trial, and will set said cause for trial unless prohibited by the order of this honorable court." The purpose of this proceeding is to arrest such proposed action by said superior court.

[1, 2] As a matter of form it is possible that the judgment of the justice's court might bear some improvement; but its legality is not seriously questioned except as to that part thereof which purports to carry costs as against plaintiff. As to the judgment itself, counsel for the respondent here makes the admission that "the judgment entered herein is probably sufficient in form to make the judgment a basis for appeal." Section 896 of the Code of Civil Procedure provides that "the justice must tax and include in the judgment the costs allowed by law to the prevailing party." Assuming (without deciding) that the judgment is defective in that the amount of costs recoverable by defendants from plaintiff is not included therein, there would remain a valid judgment as far as negating plaintiff's right of recovery on his claim against defendants is concerned. The alleged defect being entirely in plaintiff's favor, is not one of which he should be heard to complain. Neither is it apparent that the notice of the entry of the judgment was insufficient. It was substantially in the form required by the provisions of sections 897 and 893 of the Code of Civil Procedure.

[3] Respondent herein contends that, because of the alleged insufficiency of the notice of motion to dismiss the appeal, in that said notice contained the statement that said motion would be made on "all the files, pleadings and papers in said cause," evidence as to the service by the justice of the peace of the notice of the rendition of the judgment should not have been received on the hearing of such motion. But the motion also contained the further notification to appellant therein that it would be heard on certain affidavits and oral testimony; and, as hereinbefore stated, a counter affidavit was filed by appellant. That the appearance of said appellant at the hearing and his contest of the motion to dismiss the appeal is a waiver of the sufficiency of the notice to dismiss is settled by the following authorities: *Acock v. Halsey*, 90 Cal. 220, 27 Pac. 193; *Bell v. Thompson*, 8 Cal. App. 483, 97 Pac. 158; *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997; *Bohn v. Bohn*, 16 Cal. App. 179, 116 Pac. 568. It is held in *Dalzell v. Superior Court*, 67 Cal. 453, 7 Pac. 910 (syllabus), that, where the record of a

case on appeal is silent as to the service of the notice of appeal, the fact of service may be proved by an affidavit filed pending the motion to dismiss the appeal on that ground.

[4] Respondent here also urges that, because on the hearing of the motion to dismiss the appeal a question of fact arose as to the service on the attorney for the plaintiff of the notice of the rendition of the judgment, it might have been determined by the court that no such service was made, and consequently that the motion to dismiss should be denied. Affidavits and oral testimony adduced by the moving party clearly established such service, and there was no contradiction thereof. The "files, pleadings and papers in the cause" referred to in the notice of motion to dismiss contained no evidence of the service of the notice of the rendition of the judgment; hence it became necessary to determine that fact by evidence outside the record. There being no evidence to the contrary of that produced showing such service, no conclusion other than that such service was actually made could have been reached by the judge by whom the motion was heard.

[5] Section 974 of the Code of Civil Procedure provides that an appeal from a justice's court may be taken at any time within 30 days after notice of the rendition of the judgment, and that the appeal is taken by filing a notice of the appeal with the justice of the peace and by serving a copy of the notice on the adverse party. The notice of the appeal herein was not served on either of the defendants until after the time prescribed by the statute had expired. Such service within the time limited was a fact without the establishment of which the superior court could not acquire jurisdiction. *Coker v. Superior Court*, 58 Cal. 177; *Dalzell v. Superior Court*, 67 Cal. 453; *McCracken v. Superior Court*, 86 Cal. 74, 24 Pac. 845; *Niles v. Gonzales*, 152 Cal. 93, 92 Pac. 74; *Crowley, etc., Co. v. Superior Court*, 10 Cal. App. 344, 101 Pac. 935.

It follows that the writ should be granted. It is so ordered.

We concur: CONREY, P. J., CURTIS, J.

65 Cal. App. 133

MAGGINI v. McBAIN et al. (Civ. 4770.)

(District Court of Appeal, First District, Division 2, California. Jan. 3, 1924. Hearing Denied by Supreme Court March 3, 1924.)

1. Appeal and error §1010(1)—Judgment affirmed if evidence supports particular finding in turn supporting judgment.

If there is any evidence to support any one of the court's findings, which in turn is sufficient to support the judgment, it must be affirmed.

2. Vendor and purchaser §44—In purchaser's action to rescind evidence held to support finding of nonreliance on representations.

In purchaser's action for rescission because of misrepresentations as to acreage planted to fruit trees and previous production of the property, evidence that plaintiff, instead of talking with the owners personally, relied upon what she learned when inspecting the property and talking with her servants, and that the acreage planted to trees was plainly visible, held to support a finding that she did not rely upon defendant's alleged misrepresentations.

3. Contracts §94(5)—Proof of reliance upon misrepresentations essential to rescission.

To entitle one to succeed in action for rescission because of false representations, it is not sufficient to show merely that the representations were false and made with intent to deceive, but that they actually misled and deceived the plaintiff, and were relied upon by her.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action for rescission by Lucille J. Maggini against John McBain and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Ralph C. McComish, of San Jose, for appellant.

Maurice J. Rankin, of San Jose, for respondents.

NOURSE, J. This is an appeal from a judgment in favor of the defendants in an action based upon fraud. The complaint contains two causes of action, one for rescission and the second for damages; but the second cause was abandoned, and plaintiff elected to rely solely upon her claim for rescission. The controversy arises out of the sale of certain real property in the county of Santa Clara, and the basis of the action is that defendants, as owners, induced the plaintiff to purchase the property through two material misrepresentations of fact—one in regard to the acreage planted to trees and the other in regard to the previous production of the property. The trial court found that all the allegations of paragraphs 3, 4, and 5 of plaintiff's complaint were untrue. These allegations covered the making of the false representations, the falsity of the representations made, the intent to deceive, and the reliance of plaintiff upon the representations. On these findings judgment was entered in favor of the defendants, and plaintiff appeals.

[1, 2] The sole ground urged for the reversal of the judgment is that the evidence is insufficient to support the findings hereinbefore referred to. In support of the judgment respondent quotes at length from the evidence upon which the trial court based its findings. Under the well-known rule, if we

find that there is any evidence in the record to support any one of the findings which in turn was sufficient to support the judgment, it is our duty to affirm the action of the trial court. On this basis we may direct our attention to the finding that the appellant did not rely upon the alleged misrepresentations, and that she did not believe them to be true, but that she did rely upon the representation of her own servants and her own agents, and went upon and inspected the land herself and investigated the truth of all representations or statements made in regard to the same. In support of this finding the evidence is that the appellant did not talk with the owners personally, but that she formed her judgment as to the value of the property and made her determination to complete the purchase upon representations of her own agents and what she saw herself when she visited the property; that prior to the sale she went with her agents for a personal inspection of the property, and walked among the trees and took a general view of the entire property. It also appeared that the only portion of the land which was planted to trees was west of or below the public road running through the property, and that the land east or above the road was used entirely for pasture. It further appeared that a portion of the land west of the road was entirely bare, and that this could be easily seen upon a casual inspection of the property. Evidence was then offered to show that the portion of the land west of or below the road consisted of forty-five acres only, and that there was no misrepresentation as to this fact. Seven or eight acres of the land below the road were not planted, and it was a small matter, therefore, to ascertain the number of acres which were actually planted in bearing fruit trees. Upon the second charge of misrepresentation, that relating to the previous production of the property, the only evidence in the record is that no such representations were made by the respondents.

[3] There is therefore sufficient evidence in the record to support the finding that the appellant did not rely upon the alleged misrepresentations and was not induced thereby to enter into the contract, but that, on the other hand, she relied entirely upon her own judgment and upon the advice and representation of her agents. This finding covers an essential element of appellant's right of action. To entitle one to recover in rescission because of false representations, it is not sufficient to show merely that the representations were false and made with intent to deceive, but it must also be shown that the false representations actually misled and deceived the party seeking rescission, and that they were relied upon by such party. *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 511, 137 Pac. 240; *Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 603, 171 Pac. 431;

Hackleman v. Lyman, 50 Cal. App. 323, 195 Pac. 263. Thus the finding of nonreliance went to an essential element of the case which the appellant was required to prove before she could have rescission. This being so, that finding in itself is sufficient to support the judgment in favor of the respondents.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

65 Cal. App. 218

BORKHEIM v. BORKHEIM. (Civ. 4684.)

(District Court of Appeal, First District, Division 2, California. Jan. 9, 1924. Hearing Denied by Supreme Court March 6, 1924.)

1. Divorce ⇐184(6)—Conflict in evidence is decided by trial court, not by appellate court.

In an action for divorce for extreme cruelty, in which defendant set up a cross-complaint, the conflict in the evidence offered by the parties, to support their theories, was for determination of the trial court, and not of the appellate court.

2. Divorce ⇐127(4)—Wife's testimony supporting allegations held sufficiently corroborated.

In action for divorce based on extreme cruelty, consisting of alleged communication by defendant to plaintiff of venereal disease, contracted, as alleged, by defendant in adultery, wife's testimony held sufficiently corroborated.

3. Evidence ⇐99—Testimony to be admitted if admissible for any reason.

Evidence, if it is admissible for any reason, should be admitted.

4. Divorce ⇐116—Evidence relevant to issue of cruelty was not inadmissible merely because it proved another offense.

In an action for divorce based on extreme cruelty, consisting of an alleged communication by defendant to plaintiff of venereal disease, contracted, as alleged, by defendant in adultery, evidence that defendant committed adultery, and in so doing contracted a venereal disease which he later communicated to plaintiff, was not inadmissible, though it tended to prove the offense of adultery.

5. Evidence ⇐548—Testimony of doctor as to what he saw was not opinion.

A doctor's testimony naming and describing certain objects which he saw in his physical examinations of plaintiff and defendant was not opinion or hearsay.

6. Trial ⇐85—Overruling objection to hypothetical question held not error in absence of proper objection separating objectionable from nonobjectionable parts.

If plaintiff's hypothetical question to an expert commingled statements of facts as testified by another doctor with statements of some matters which were matters of professional opinion as distinguished from matters of fact, defendant should have so framed his ob-

jection to the hypothetical question as to separate the objectionable from the parts not objectionable, and in failing to do so it was not error to overrule the objection.

Appeal from Superior Court, Marin County; Edward Butler, Judge.

Action by Grace Watson Borkheim against Milton Borkheim, who set up a cross-action. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, for appellant.

Thos. P. Boyd, of San Rafael, for respondent.

STURTEVANT, J. This is an appeal by the defendant husband from a decree awarding a divorce to his wife.

The complaint charged extreme cruelty, and specified as one of the circumstances that the defendant communicated to the plaintiff a venereal disease, gonorrhea. The defendant interposed an answer and cross-complaint. The plaintiff answered the cross-complaint and a trial was had by the trial court sitting without a jury, and thereafter it made findings in favor of the respondent and against the appellant on nearly all of the issues tendered by the pleadings.

[1] It was the theory of the plaintiff that in the summer of 1920 the defendant committed adultery and at the same time contracted the disease mentioned, and that thereafter he communicated the disease to the plaintiff. On the other hand, it was the theory of the defendant that he never had the disease, although, about the time mentioned, he was afflicted with a catarrhal discharge of a prostatic origin, and that he did not communicate to the plaintiff the disease complained of. Each party offered evidence to support its theory. The conflict was a matter to be decided by the trial court, and not by this court.

The appellant contends that plaintiff had no cause of action unless she proved that defendant had gonorrhea, and, knowing that to be the fact, that he communicated the disease to the plaintiff. The respondent does not question the importance of the element of scienter, but claims that every person is supposed to know whether he is sick or well, and that we may therefore assume that at all times the defendant knew whether he was sick or well. The appellant also claims that the mere fact that one spouse was found to have a venereal disease raised no presumption that it was communicated to him or her by the other spouse. Conceding that to be the rule, we fail to find any part of the record presenting the point. The plaintiff in the trial court did not rest her case on any presumption. On the other hand, she was the first witness called to the stand, and testified fully as to her health from the day she

was married down to the date of the trial, and stated all facts from which the trial court could infer, or not infer, that the defendant had communicated to the plaintiff the disease complained of.

[2] The appellant argues that a divorce may not be granted upon the uncorroborated statement, admission, or testimony of the parties; but the decree in the instant case does not rest on that basis. The plaintiff stated facts showing that she was not suffering from any disease until after her intercourse with the defendant; she stated facts showing or tending to show that at the time of the intercourse, and for a short period of time prior thereto, the defendant was suffering from some sickness affecting his procreative system; and she stated facts showing that shortly after a certain act of intercourse with the defendant she was suffering from the disease above mentioned. The very nature of the case caused several doctors to see, hear, and know facts and circumstances which enabled them, at least in part, to corroborate the story told by the plaintiff. Furthermore, the plaintiff called Russell I. Wisler, who was the husband of the plaintiff's sister. The witness testified that in June the defendant admitted to him that he had had sexual intercourse with another woman about a year prior thereto. No want of corroboration appears to us, and the appellant does not specially call our attention to any element of the charge which was not corroborated.

[3, 4] Appellant objected in the trial court and now contends that the testimony of the witness Wisler tended to prove the commission of adultery, and that the issue on trial was not adultery, but was extreme cruelty. Counsel seems to claim that, if evidence is objectionable for any reason, it should be excluded. On the contrary, if it is admissible for any reason it should be admitted. *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506. If the defendant wronged the plaintiff by committing adultery, and, in so doing, contracted a venereal disease, and if later he communicated that disease to the plaintiff, all of the facts were open to proof, and no one of the facts should be excluded merely because it proved an additional wrong.

[5, 6] After the date on which the plaintiff claimed that she became infected with the disease complained of, she and the defendant were treated by Dr. Hartman. For the purpose of the treatment of each case Dr. Hartman made at least one examination of the diseased parts of each patient. Later, and after this action was commenced, Dr. Hartman's deposition was taken. On the trial of the case the plaintiff read the deposition in evidence. A little later on she called Dr. Duffy as an expert witness. To him the plaintiff's attorney propounded a long hypothetical question. To that question appellant's attorney interposed a long objection,

interspersed with argument. The objection contained, among other things, these passages:

"It is asking this witness as an expert to diagnose the case of Mr. Borkheim upon the diagnosis of another physician. * * * This hypothetical question, if it were based entirely upon the history given to Dr. Hartman or upon Dr. Hartman's answers, would be * * * hearsay upon hearsay."

The trial court overruled the objection and the witness answered the question. The defendant now argues vigorously that the ruling was error. The point is not supported by the record. The question did not include an opinion stated by Dr. Hartman; or, if it did, that part of the question which did involve an opinion testified to by Dr. Hartman was not specifically called to the attention of the trial court. When Dr. Hartman made his examination he saw certain objects. Later, in his testimony, he named and described them. In doing so he was not necessarily expressing an opinion, but was stating facts. If the question commingled such statement of facts with statements of some matters which were mere matters of professional opinion, as distinguished from matters of fact, then the appellant should have so framed his objection as to call to the attention of the trial court the objectionable parts—separating the objectionable parts from the parts not objectionable. This he did not do. There was no reversible error in the ruling.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 65

FREEMAN v. DONOHOE et al.
(Civ. 2589; Sac. 3308.)

(District Court of Appeal, Third District, California. Dec. 26, 1923. Hearing Denied by Supreme Court Feb. 21, 1924.)

1. Partnership §53—Finding of relationship held sustained by evidence.

In action for accounting in partnership affairs, evidence held to sustain a finding that the relation of partners had existed between the parties.

2. Action §32—Distinction still exists between equity and law action.

It is a mistake to say that under our system of Code pleading there is no longer a distinction between actions of a legal and those of an equitable character such as formerly prevailed when separate courts of law and equity obtained.

3. Partnership §313—Action for settlement of affairs equitable.

An action for settlement of partnership and its affairs is an equitable action and is

to be considered as such in the courts of the state.

4. Equity §87(1)—Statutes of limitation not specially favored in equitable cases.

While statutes of limitation must be heeded in actions in equity and the period of time therein specified within which actions may be brought regarded as in legal actions, they are not specially favored and esteemed as are those great principles of equity which have developed through the centuries.

5. Limitation of actions §53(4)—Accounting between partners may extend back further than period specified by statute of limitations for equitable actions.

Statute of limitations does not run between partners until the accounts are settled and the balance agreed on, and items can be included in a partnership account which precede the period prescribed by Code Civ. Proc. § 343, relating to equitable actions.

6. Appeal and error §1008(1)—Determination of sufficiency of evidence in partnership accounting peculiarly within province of trial court.

The determination of the sufficiency of the evidence in an action for partnership accounting was a matter peculiarly within the province of the trial court.

7. Evidence §177—Report of expert accountant based upon partnership books admissible.

In an action against copartners after dissolution for an accounting, an account prepared by an expert accountant based on partnership books and books of other companies controlled by defendant partners was admissible, where the books of the firm both before and after dissolution were kept entirely by the defendants or under their supervision and plaintiff had nothing to do with their keeping nor with the management of the properties.

8. Partnership §282—Partners in possession of properties after dissolution, trustees.

Partners who, upon dissolution of the copartnership, held possession and control of its properties, became trustees for another partner and were at all times bound to such other partner in the highest good faith.

9. Trusts §289, 325—Duties of trustee as to keeping proper books of account.

Trustees are under the obligation to render to their beneficiary a full account of all their dealings with the trust funds, and, where there has been a negligent failure to keep true accounts or a refusal to account, all presumptions will be against the trustee upon a settlement.

10. Partnership §306—Value of lands of partnership on account, based on value when disposed of by defendant partners.

Where, after dissolution of partnership, defendant partners put it out of their power to deliver to the plaintiff partner, on the settlement of the partnership affairs, real estate held by the firm by selling it, the proper and only method of determining what was the interest of plaintiff in the properties was the value thereof at the time of the sale.

11. Appeal and error ☞1013—Province of determining valuations within jurisdiction of trial court.

The province of determining the valuations to be fixed upon land of partnership sold by defendant partners for the purpose of ascertaining plaintiff's interest as a partner was one within the jurisdiction of the trial court, where the evidence was conflicting.

12. Partnership ☞333—Duty of defendants in action for accounting to report dealings and transactions, and effect of failure as to credits not allowed stated.

In action by partner after dissolution for an accounting, it was the duty of defendants who were in control of the business at all times after dissolution to report an account of their dealings and transactions on account of the partnership affairs, and having claimed that there was no partnership, and having failed to so account, cannot complain because court did not allow credits to which they were entitled.

13. Partnership ☞333—Expenses incurred by partners as trustees not credited in absence of honesty.

Necessary expenses incurred by partners and trustees in relation to the management of property intrusted to their care, or over which they had control, are ordinarily allowed in proper cases; but this rule is applicable in cases of accountings made by honest and faithful members of a copartnership, and not where defendants in action for accounting absolutely denied under oath that there had ever been a partnership, maintaining this position at all times during the trial and until the filing of their brief on appeal.

14. Partnership ☞344—Joint judgment against defendants in partnership accounting held proper.

In action for partnership accounting after dissolution where all the books and properties of the partnership had been in the hands of the defendants, who denied that there was any partnership, the latter cannot complain of that joint judgment against both defendants was erroneous, in that there was no showing that defendants jointly received or were jointly responsible for the amount in respect of which the judgment was rendered.

15. Partnership ☞70—Copartners "trustees" for each other.

Partners are trustees for each other within Civ. Code, tit. Trusts, c. 1 (sections 2215-2244), and their obligations as such trustees are defined by that chapter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee.]

16. Trusts ☞240—Cotrustees jointly and severally liable for breach of trust.

Where a breach of trust has affected two or more or all cotrustees with a common liability, they are liable jointly and severally, and each is liable for the whole loss sustained or the whole amount due and a decree obtained against them jointly may be enforced against any of them.

17. Partnership ☞321—Partner suing for accounting not guilty of laches.

Partner who failed to sue for an accounting for about four years after mutual dissolution held not guilty of laches, in view of evidence disclosing attempts on his part for over a year to bring about an amicable settlement and concealment by the defendants.

18. Equity ☞67—Rule as to determination of laches stated.

The question of laches must be determined by a consideration of all the facts and circumstances of the particular case; laches being a question of fact on the evidence, and each case becoming largely a law unto itself, and the matter reposing in the sound discretion of the chancellor.

On Hearing in Supreme Court.

19. Limitation of actions ☞24(2)—Action held not one upon instrument in writing.

Where partnership was formed under instrument in writing and subsequently one partner surrendered his copy of the contract to a third party, who was permitted to become partner in his place, an action for an accounting by the substituted partner cannot be regarded as one upon a contract, obligation, or liability founded upon an instrument in writing under Code Civ. Proc. § 339, subd. 1.

20. Limitation of actions ☞39(9)—Time for suit for partnership accounting.

Code Civ. Proc. § 343, is the statute of limitation applicable in all cases involving the settlement of all the affairs of a copartnership whose existence is denied and an accounting required.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

Action by Frank Freeman against C. L. Donohoe and another. Judgment for plaintiff, and defendants appeal. Affirmed in District Court of Appeals, and hearing denied in Supreme Court.

See, also, 188 Cal. 170, 204 Pac. 593.

Hankins & Hankins, of San Francisco, and W. T. Belieu, of Willows, for appellants.

George R. Freeman, of Willows, and Jackson Hatch, of San Francisco, for respondent.

BARTLETT, Presiding Justice pro tem. By this action the plaintiff seeks an accounting and settlement of a copartnership between himself and defendants, alleged to have been entered into on or about January 1, 1907, and dissolved by mutual consent on or about the 1st day of June, 1910. The complaint in the action was filed in the superior court of Glenn county, Cal., on May 26, 1914. An amended answer to the complaint was filed on May 1, 1915. On May 19, 1915, the trial of the action began before the late Judge J. E. Prewett of Placer county, and on July 25, 1921, findings of fact and conclusions of law and judgment in favor of plaintiff and against defendants were filed

in the superior court of Glenn county. An appeal from this judgment has been taken by defendants to the Supreme Court and the matter has been assigned for hearing to the Appellate Court of the Third Appellate District.

As alleged in the complaint, a finding was made by the court that a copartnership was entered into between these parties in Glenn county, Cal., on or about January 1, 1907, with the object and purpose of buying and selling real estate in California, and particularly in the county of Glenn in said state, and the sale of lands and city lots on commission, and, in general, engaging in the conducting of a real estate business therein; and all profits and properties of the copartnership should be acquired equally; that it was agreed by the parties that the partnership business should be conducted under the name of H. J. Barceloux & Co.; that in accordance with the agreement a real estate business was opened in the city of Willows, Glenn county, state of California, and business continued therein until on or about June 1, 1910, at which time the partners, by mutual consent, dissolved the copartnership; that no copartnership since said dissolution has existed between the parties; and that no accounting of the partnership business has ever been had between the copartners, save and except the accounting involved in this action.

The trial court found that during the existence of the copartnership its business affairs were conducted continuously by the defendant without consultation on their part with plaintiff; that after the dissolution of the partnership, defendants denied that the relation of partners had ever existed between them and plaintiff, and from the time of dissolution continuously denied such relationship, and retained in their possession all the property of the copartnership, claiming to own the same themselves and claiming plaintiff had no interest therein; and that he had never been a member of the copartnership; and that though requested so to do after the dissolution, appellants refused to recognize plaintiff as a partner, and refused to account to plaintiff for any of the business and transactions that had been had, and excluded plaintiff from any participation in the affairs and business, and any enjoyment of any of the profits and properties of the copartnership.

The trial court also found that plaintiff, after the dissolution, repeatedly demanded an account of the receipts and disbursements of the copartnership, and a one-third part therein which plaintiff claimed to be his, and that defendants at all times refused to in any manner account to plaintiff, or to deliver any part of the properties of the copartnership to plaintiff.

By their amended answer defendants, after denying all the allegations of the com-

plaint, set forth, as separate answers and defenses: One, alleging that the cause of action set forth in the complaint, and the whole of the same, was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure; another, that the cause of action set forth in the complaint, and the whole thereof, was barred by the provisions of subdivision 1 of section 339, Code of Civil Procedure; another, that the cause of action set forth in the complaint, and the whole thereof, was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure; and, another, that plaintiff was guilty of laches and unreasonable delay in bringing the action.

The trial court found against defendants on each of the separate defenses interposed, as well as upon the main cause of action.

At every stage of the trial in the superior court the defendants vigorously resisted respondent's claim that a copartnership of any kind ever existed between the parties, as alleged in the complaint; but that such a copartnership existed they now admit in the briefs, both opening and reply, which they have submitted on this appeal. In the opening brief (pages 4 and 5) defendants say:

"We do not propose to challenge the findings of the court as to the existence of the alleged partnership and will confine ourselves to the points hereinafter set forth."

And in the closing brief (page 2):

"We expressly stated in our opening brief that we did not intend to dispute such finding, although we disputed, and still dispute, that certain properties included in the accounting did not form a part of the partnership assets."

This admission of the defendants simplifies, in great degree, the solution of the question presented by this appeal.

The trial of the cause was conducted by Judge Prewett on these lines: First, evidence showing the partnership relation, both oral and documentary, was taken. At its close, an interlocutory decree directing an accounting before a referee was made. The referee was appointed, and thereupon he heard evidence, oral and documentary, and said referee secured the services of an expert accountant to examine and submit a report on the business transactions from the beginning of the partnership to the time of accounting. The findings of the referee were then reported to the court, after which the court heard evidence, and a number of objections interposed by defendants to the referee's findings and made and filed an order directing the findings and judgment in favor of the plaintiff involved herein. The interlocutory decree and opinion of the court before referred to will assist in an understanding of the matters and evidence involved in this action, they being as follows:

"Interlocutory Order.

"* * * In this case it is ordered that the motion of defendants for a nonsuit (having been made after the submission of the case) be and the same is hereby dismissed.

"By this interlocutory order, it is further ordered and adjudged that the plaintiff is entitled to an accounting of the affairs of the partnership described in the complaint, and it is further ordered that such accounting be had.

"It is further ordered that such accounting be had before John Graves, hereby appointed as a referee for that purpose.

"It is further ordered that said referee take evidence and report a finding of facts as to the following properties:

"The Hastings Land, section 16; Deveny tract; Bailey tract; Dixon tract; Watt land; Barceloux 320 acres; Igllick land; Rice land; Reager or Rogers land and commissions thereon under contract with Armstrong, Quatman & Co.; also other commissions due from said firm; Glenn county irrigated farms and commissions; Kelly lands; Willows Land & Improvement Company's lands; Selby lands; Cartenberg lands, as follows; to wit:

"(a) As to lands heretofore sold, the amount of proceeds arising from such sales;

"(b) As to commissions earned by H. J. Barceloux & Co. or by any of the parties to this action, the amount thereof;

"(c) As to any of the above-mentioned lands that yet remain unsold, the value thereof and the amounts contributed by each party to the purchase and handling thereof; the amount received by each party in the way of rents or other profits;

"(d) A division of the unsold lands in three parts of equal value and a memorandum of office fixtures and personalty.

"(e) Independently of the matters embraced in the subdivisions of this order marked or designated 'd' the amount due from the two remaining partners to the plaintiff, as may be shown by items 'a' and 'b'.

"It is ordered that the said reference be completed at the earliest practicable date, and duly reported to this court.

"Done in open court this 22d day of October, 1915. J. E. Prewett, Judge.

"Filed October 25, 1915."

"Opinion and Order.

"The complaint avers the formation of a partnership between Frank Freeman, C. L. Donohoe, and H. J. Barceloux, commencing about the beginning of the year 1908, and terminating about June 1, 1910.

"The above parties from time to time in various real estate transactions—sometimes each singly, at other times two participating, and at other times all three. Whether those transactions in which all three participated constituted partnership transactions or merely joint ventures constitutes the principal question for the determination of the court.

"The relations of the parties appear to be exceptionally strained, and the case itself has developed much bitterness. The case is replete with charges of fraud, forgeries, mutilations, erasures, perjury, suppression of evidence, and destruction of books. This court will make no attempt to determine those matters save

as they may necessarily arise in the course of the decision of the case.

"In the year 1907, C. L. Donohoe, H. J. Barceloux, and Mr. Gutman formed a copartnership for the purpose of dealing in real estate. Each partner contributed a small sum for the purpose of starting the business. Near the close of the year, Mr. Gutman retired from the business and turned his interests over to Frank Freeman, delivering to the latter his copy of the copartnership agreement. Mr. Gutman inquired of the remaining copartners whether or not it was satisfactory for Mr. Freeman to enter the partnership, and was informed by them that it was. Thereupon he informed Mr. Freeman of this fact, and Mr. Freeman claims that he thereupon and thereby entered the partnership.

"Mr. Donohoe and Barceloux insist that upon the retirement of Mr. Gutman the copartnership was dissolved and was never reorganized. This contention, however, cannot be sustained. Whether or not Mr. Freeman became a member of the partnership, there seems to be no question whatever, and that the firm of H. J. Barceloux & Co. continued to do business for a number of years. It kept a set of books, employed and paid a bookkeeper, rented and maintained an office, paid rent, displayed signs, used letter heads, and handled a vast volume of business. I take it that every resident of Willows during the years 1908 and 1909 would have stated without hesitation that there existed a well-known firm transacting business under the firm name of H. J. Barceloux & Co.

"That Mr. Freeman was a member of this firm is not quite so certain, yet the burden of proof very largely predominates in favor of that conclusion. If the evidence of the parties to this action be eliminated, there is scarcely a doubt of it. It seems that practically every fact in the case which does not in any way depend upon the oral testimony of the litigants tends to show that he was such a partner.

"Exhibits 2, 3, and 4 (copies) if genuine, establish the plaintiff's case. That they are genuine must be held by the court. It is true that they emanate from unfriendly sources, but the manner of their production, and especially the testimony of Miss Pierce, tends to show that they are genuine. (Copies of Exhibits 2 and 3 and 4 follow this opinion herein.)

"Exhibit 1 was written on the typewriter usually used by Mr. Donohoe. Examination of the characters '08,' 'a,' 'bar,' and especially the bottom of the letter 'x' show this. The fact that it was so written is not by any means conclusive, but it is a circumstance of much weight. Even if it was written at the instance of the plaintiff, it was written at a time when the parties were very warm friends, and when there existed no temptation to fabricate a case.

"The loss by the defendants of their copartnership books is an unfortunate circumstance and must be permitted to weigh to some extent against them. It seems quite certain that these books would throw much light upon the question now under review.

"The correspondence between the parties tends to show that the copartnership existed. Out of the 30 or 40 exhibits, letters offered in evidence, almost all of them emanate from the plaintiff.

"The contention that a settlement was arrived at between the parties in June, 1910, is clearly a mistake. This conclusion seems to be almost mathematical in its certainty, since many of the items included in it did not transpire until long after that date. At most, the defendants are mistaken in their remembrance of the fact.

"Exhibit 15 was given by defendants to plaintiff as a memorandum showing the probable profits of their joint efforts. This exhibit is a very important document in this connection. Not only does it go far to establish the existence of a partnership, but it purports to contain a résumé of its transactions and properties. (A copy of Exhibit 15 follows this opinion.)

"Upon the whole, the conclusion seems to be fully established that the copartnership set out in the complaint was formed at the time stated and that it handled the properties enumerated in Exhibit 15.

"The motion to strike out the answer must prevail for the reason that it was filed without leave of the court. The evidence as to the stipulation is so conflicting that it must be held that the burden (which admittedly rests upon the defendants) has not been sufficiently overcome.

"Moreover, courts are very loath to permit amendments whose purpose it is to plead the statute of limitations.

"Let an order be entered striking out the amended answer.

"The case is perhaps in condition for final judgment. Still, if either party wishes to offer any further evidence upon the point as to the properties and values, such party may so indicate within five days and the case will be set down for further hearing as to said point.

"If no such wish be indicated, then the plaintiff will prepare, serve, and file proposed findings and decree. Prewett, J."

Nothing appears in the record showing that either of the parties availed themselves of the opportunity to offer further evidence after Judge Prewett made his order as to findings and judgment, as above set forth.

The judgment entered and from which this appeal is taken adjudges that plaintiff have and recover from defendants jointly and severally the sum of \$31,504.85, in lawful money of the United States, with interest thereon from the date of the institution of the action, May 26, 1914, at the rate of 7 per cent. per annum, making a total of \$47,260.31.

The judgment adjudges and decrees that plaintiff and defendants were copartners doing a general real estate business in Glenn county, state of California, during the times stated in the complaint and until the dissolution of the partnership on June 1, 1910; that a number of parcels of real properties, particularly described in paragraph 8 of the judgment, was and is the property of the copartnership, and that plaintiff, when the action was instituted and when the judgment

was rendered, was the owner of an undivided one-third of these real properties, and that defendants were and are the owners of the remaining two-thirds thereof; that all of the debts and obligations of every kind of said copartnership from its organization to the time of the accounting and from that time to the giving of the judgment are fully paid, satisfied, and settled; that the partnership did not have when the action was commenced, nor has it had since, nor is it now the owner of any other property, real, personal, or mixed, other than its profits in the lands above referred to, save and except certain interests in properties which are described in subdivision 6 of the judgment, to which properties described in said subdivision 6 of the judgment plaintiff filed a relinquishment of any right and interest which he might have, renouncing all claims of every kind and nature thereto and consenting that the same be awarded by the judgment to the defendants, and the same were so awarded.

The judgment further created a lien against the defendants in favor of plaintiff upon and against all the right, title, and interest of the defendants, and each of them, in and to the unsold real property, which was undisposed of and described in paragraph 8 of the judgment, to secure the payment of the money judgment in favor of the plaintiff rendered in the action.

The unsold partnership real property is fully described and set forth in paragraph 8 of the judgment, and these properties are directed to be sold, either as a whole, or in separate parcels, by the sheriff of the county of Glenn, who is appointed a commissioner and invested with the legal title to said real property and directed to sell the same as a whole, or in separate parcels as he might determine to be to the best interests of the parties at public sale, at a time to be fixed by the commissioner within 90 days from the entry of the judgment, upon notice of at least 15 days, and that at the sale any of the parties to the action might become a purchaser of any part thereof, and directing the commissioner to acknowledge and deliver deeds by the commissioner, conveying to the purchasers of the properties all the right, title, and interest of the copartnership and of the plaintiff and defendants in and to said properties upon receipt of the purchase prices from the purchasers and directing that the commissioner retain out of the proceeds received by him costs, charges, and expenses paid out and due him and the payment of the remainder of said proceeds to the clerk of the trial court, said clerk to pay to the plaintiff one-third of the net proceeds for and on account of his one-third interest in such properties and so much of the remaining two-thirds of these proceeds as may be necessary to the liquidation of any liens remaining unpaid at that time on the judgment; said clerk to thereupon enter in the

judgment book of the court in which the judgment is recorded a credit of the amount of money paid to plaintiff representing the two-thirds interest of the defendants, and the clerk to pay to the defendants any proceeds remaining after the payment ordered made to the plaintiff. The judgment also adjudges and decrees that the plaintiff recover his costs, which were taxed at the sum of \$731.85. The judgment is dated July 19, 1921, and signed by J. E. Prewett, as judge, and indorsed as filed July 25, 1921, by W. H. Sale, county clerk.

Exhibit 15, referred to in the opinion and order of Judge Prewett, hereinbefore set forth, is as follows:

"Report on Barceloux & Co. business to date showing profits actually earned and values made in purchase of land, and commissions for sales, as follows:

	Profit
Eibe land, 160 acres \$60.00 per.....	\$ 4,000 00
Hastings land, section 16.....	6,000 00
Deveny tract	5,000 00
Bailey tract	9,000 00
Dixon land	4,800 00
Watt land	3,000 00
Barceloux 320 acres.....	1,600 00
Winkler land \$150 an acre offer made.....	6,800 00
Iglick land	1,037 75
Rice land	1,272 00
Reager or Rogers land under contract with Rogers	1,333 33
Commissions in sale of Rogers tract under contract with Armstrong-Quatman Co. 5 per cent.	5,000 00
Commission from Armstrong-Quatman Co. on land already sold at Orland.....	3,360 00
Commissions G. C. irrigated farms.....	1,800 00
Commissions on options for Pittsburg Syndicate	9,000 00
Kelly land	800 00
Profit in Willows Land & Improvement Co. at what it can be sold for to-day.....	7,500 00
	\$71,303 08
In addition the members of Barceloux & Co. have a united interest in the Irrigated Farms Company land of the value of Profit in Colby land to Barceloux.....	7,500 00
To Donohoe and Freeman each.....	5,700 00
In addition to the above the contracts now under contract with Armstrong-Quatman Co. for sale of land at Orland not yet sold, exclusive of Rogers tract, will net Barceloux & Co. when sold.....	3,900 00
	10,000 00
	\$27,100 00
	\$98,403 08

"The above figures are made either on sales actually consummated or values fixed on bona fide offers to buy, and the figures show a profit over and above all liabilities.

"Dated this 23d day of November, 1909."

Exhibit 1, referred to in Judge Prewett's opinion and order for findings and judgment, hereinbefore set forth, is as follows:

Plaintiff's Exhibit 1.

"Know all men by these presents: That H. J. Barceloux, G. A. Gutman, and C. L. Donohoe, all of the county of Glenn, state of California, have this day associated themselves together as copartners, and by these presents

do agree to become copartners in business together, under the firm name and style of H. J. Barceloux & Co., in the business of buying and selling real estate and personal property in the state of California, and in doing a general insurance business in the county of Glenn, state of California. This partnership is to commence on the date hereof and to continue until hereafter dissolved by mutual consent, operation of law or judgment of a court, and it is agreed that at all times during their copartnership that they shall and will bear, pay and discharge equally between them all rents and other expenses that may be required for the support and management of the said business; that all gains, profits and increase that shall come, grow, or arise from or by means of said business shall be divided between them share and share alike, and that all loss that shall happen to their joint business by bad debts or otherwise shall be borne and paid equally between them.

"In witness whereof, the parties have hereunto set their hands and seals this 2d day of March, 1907.

Charles L. Donohoe.

"G. A. Gutman.

"H. J. Barceloux."

[1] The statement of Judge Prewett, "In the year 1907 C. L. Donohoe, H. J. Barceloux, and Mr. Gutman formed a copartnership for the purpose of dealing in real estate. Each partner contributed a small sum for the purpose of starting the business. Near the close of the year Mr. Gutman retired from the business and turned his interests over to Frank Freeman, delivering to the latter his copy of the copartnership agreement. Mr. Gutman inquired of the remaining copartners whether or not it was satisfactory for Mr. Freeman to enter the partnership, and was informed by them that it was. Thereupon he informed Mr. Freeman of this fact, and Mr. Freeman claims that he thereupon and thereby entered the partnership,"—is a clear and concise statement, fully supported by the evidence as to the inception and creation of the formation of the copartnership involved herein.

G. A. Gutman was examined as a witness at the trial of the action, and his evidence shows that, prior to the transfer to Mr. Freeman of his interest, some business in the way of insurance and commissions had been transacted by himself and the defendants under the copartnership.

In their able and elaborate opening brief on this appeal, appellants urge the following grounds for reversal: (1) The plaintiff's right to an accounting was barred by the statute of limitations; (2) even if the plaintiff's right to an accounting was not barred by the statute, the accounting could not extend backwards for a period of more than two years prior to the commencement of the action; (3) the accounting improperly included therein transactions not the subject of accounting between the parties; (4) evidence was improperly admitted to ascertain the figures upon which the accounting was

made; (5) the referee and the expert accountant considered and passed upon matters not within the scope of their authority; (6) the court erred in not allowing defendants credits to which they were entitled; (7) the court failed to charge the plaintiff with moneys with which he was properly chargeable; (8) the valuation of certain properties disposed of after dissolution should have been made as of the time of the same being acquired or of dissolution and not as of disposition, and the values found by the referee were against the weight of the evidence; (9) the judgment is erroneous in that it is a joint judgment against both defendants based upon an accounting which fails to show that such defendants jointly received or were jointly responsible for the amount in respect of which the judgment was rendered; (10) the judgment is erroneous in that it is a joint judgment against both defendants, whereas the evidence shows that some of the moneys included in the judgment were received by one of the defendants alone; (11) the judgment is erroneous in that there is no finding that either defendant was a constructive trustee; (12) the findings of the court and referee were erroneous and also fail to justify the judgment; (13) plaintiff was guilty of laches.

[2, 3] Because of this being an action in equity, and not one at law, much of the argument of counsel for appellants and the authorities cited do not uphold the positions which they urge as reasons for the reversal of the judgment. A mistaken idea is often entertained and asserted that, under our system of Code pleading, there is no longer a distinction between actions of a legal and those of an equitable character, such as formerly prevailed when separate courts of law and equity obtained. The provisions of section 4, art. 6, of the Constitution of the state, providing that the Supreme Court should have appellate jurisdiction of appeals from the superior court in all cases in equity, except such as arise from justice's courts; that the District Courts of Appeal "shall have appellate jurisdiction in all cases, matters and proceedings pending before the Supreme Court which shall be ordered transferred by the Supreme Court to the District Courts of Appeal for hearing and decision," and section 5 of article 6 of the Constitution, providing that "the superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title of real property, etc.," of themselves, show the recognition of a distinction in the legal and equitable proceedings in actions brought on for trial in the superior courts of the state. There can be no question that an action for the settlement of a partnership and its affairs is an equitable action and to be considered as such in the courts of this state. In the case of *Marston v. Kuh-*

land, 2 Cal. App. 316, 84 Pac. 357, the court said:

"This is an action for the enforcement of a trust and for an accounting. The appeal is taken directly to this court. By section 4, article VI, of the Constitution of the state, 'appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justice's courts,' is given to the Supreme Court. By the same section and article of the Constitution it is provided that 'no appeal taken to the Supreme or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed to.' In perfecting the appeal, these provisions of the Constitution were doubtless overlooked by appellant. When the cause was argued and submitted here it was assumed by the court that it was here by order of reference of the Supreme Court, the notice of appeal not having been called to our attention. The case is clearly one 'in equity' and is appealable only to the Supreme Court, which alone has jurisdiction in the first instance."

It is clear that an action for an accounting of a partnership is an action in equity, for it is beyond question that it is an action to carry out a trust arising because of the provisions of section 2410 of the Civil Code, "the relations of partners are confidential. They are trustees for each other within the meaning of chapter 1 of the title on trusts, and their obligations as such trustees are defined by that chapter."

"Where a fiduciary relation exists between parties, and the duty rests upon the defendant to render an account to the plaintiff, equity will entertain jurisdiction of a suit for an accounting, although the account is neither mutual nor complicated. The most common of such cases are those involving trustees, guardians, executors and administrators, partners, agents and cotenants. Although it is the trust relation involved in such cases which gives jurisdiction to a court of equity, the relation need not be the strictly technical relation of trustee and cestui que trust, a quasi relation being sufficient." *Pomeroy's Equity Jurisprudence* (2d Ed.) § 2358.

" * * * The equitable jurisdiction is also practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm affairs between the copartners themselves; suits for a settlement of the firm affairs between the survivors and the executors or administrators of the deceased, when a partner has died; and suits to settle the affairs of an insolvent firm, and to adjust the demands of the firm creditors and the creditors of the individual partners. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief." *Pomeroy's Equity Jurisprudence* (2d Ed.) § 2362.

Subdivision 1 of section 339, Code of Civil Procedure, under which appellants claim plaintiff's action is barred which reads: "Within two years, (1) an action upon a contract, obligation or liability, not founded upon an instrument of writing, other than that mentioned in subdivision 2 of section 337 of this Code," does not authorize defendants' contention that plaintiff is barred from any relief by the provisions of this section. Neither can his contention be upheld that plaintiff's cause of action was barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure, which provides that an action must be commenced within three years where it seeks relief upon the ground of fraud or mistake and that a cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. It is clear that the section regarding limitations applicable towards actions such as that now before the court is section 343, Code of Civil Procedure, which is as follows:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

While this court is satisfied that the only statute of limitations that can be pleaded as a bar to an action seeking an accounting and settlement of a copartnership is the above section, where an accounting and settlement is refused one of the partners, there is the further statute of limitations contained in section 337, Code of Civil Procedure, which provides that any action upon any contract, obligation, or liability founded upon an instrument in writing may be brought within four years, which, under the facts in this case, would overcome any pleas of the action being barred, as the original agreement out of which this case arises was the partnership agreement in writing made among Gutman, Donohoe, and Barceloux, the organization thereunder of the firm of H. J. Barceloux & Co., and the subsequent transfer of the interest of Gutman in such partnership to the plaintiff with the consent of the two other members, Donohoe and Barceloux, the defendants herein.

The distinction between cases at law and those in equity has been drawn in a number of instances by the Supreme Court of this state from a very early period. In *Barnstead v. Empire Mining Co.*, 5 Cal. 299, it was held that one partner could not sue the other in an action at law. The remedy is by bill in equity for a dissolution and an accounting. In *Wheeler v. Farmer*, 38 Cal. 203, it was held that no action at law can be maintained, nor can an attachment be sued out by one partner against another for any money involving partnership affairs. In *Ross v. Cornell*, 45 Cal. 133, it was held that one

partner retiring from a firm cannot be sued for money alleged to be due in partnership transactions until there has been a final settlement of firm accounts and a balance has been struck. In *Gleason v. White*, 34 Cal. 258, it is held that the relation of debtor and creditor between the surviving partner and the representative of a deceased partner does not arise until the affairs of the copartnership have been wound up and the balance struck, and this balance is to be struck after all the partnership affairs have been settled and not while they are being wound up. In *Pico v. Cuyas*, 47 Cal. 174, it is said:

"If the lessor of a hotel, after the lease is made, enters into a contract of partnership with the lessee in keeping the same, the lessor cannot sue at law for the rent reserved in the lease, but must sue in equity for a partnership accounting."

In *Fisher v. Sweet*, 67 Cal. 228, 7 Pac. 657, it is held that a partner cannot maintain an action against his copartner to recover his proportion of the partnership proceeds until the accounts of the firm have been settled.

In *Dukes v. Kellogg*, 127 Cal. 563, 60 Pac. 44, it was held that a partner cannot sue his copartner in an action at law unless an accounting and settlement of the partnership accounts is alleged in the complaint.

The issuance of the writ of supersedeas in the case at bar by the Supreme Court of California, reported in 188 Cal. 170, 204 Pac. 593, and the suspension thereby of the bond in double the amount of the money judgment to stay the issuance and levy of an execution as would be required in the case of the ordinary legal action, has arisen through this case requiring a special equitable procedure to carry out the judgment and strongly illustrates the distinction which obtains between actions of a legal and equitable nature.

[4] While statutes of limitation must be heeded in actions in equity and the period of time therein specified within which actions may be brought regarded as in legal actions, they are not specially favored and esteemed, as are those great principles of equity which have developed through the centuries. Statutes of limitation have well been denominated "statutes of repose." There are actions where it is salutary to invoke their aid. But, as said by the trial court in this case, in his order for findings and judgment, hereinbefore set forth, "moreover, courts are very loath to permit amendments whose purpose it is to plead the statute of limitation." That section 343, Code of Civil Procedure, is the statute of limitation applicable in the courts of this state in all cases involving the settlement of all the affairs of a copartnership whose existence is denied and an accounting required, is clearly established by the decisions in a number of instances by the appellate courts of California.

The case of *Piller v. S. P. Co.*, 52 Cal. 42, is considered and discussed by counsel for

both appellants and respondent in their briefs. That was a personal action for negligence, brought over two years after the injuries were suffered. Claim was made that section 343, Code of Civil Procedure, applied instead of section 339, Code of Civil Procedure, subdivision 1. The court held that the action, being one at law, subdivision 1 of section 339 governed, saying:

"We are of opinion that the two years' limitation found in the first clause of the first subdivision of section 339 is applicable to all actions at law not specifically mentioned in other portions of the statute. We say actions at law advisedly, since section 343 fixes the time within which certain bills in equity may be filed. In arriving at the intent of the law-makers, as expressed in the statute, it is proper to consider the history of legislation in respect to the same subject in our own state, and in the country from which our laws in the main derived. The English statutes of limitations were not, by their terms, applicable to suits in equity, because the words used applied only to particular legal remedies. It was at one time much discussed whether courts of equity acted in analogy to, or were within the spirit of, the statutes, and so, in a sense, acted in obedience to them; it is certain, however, that, except in cases of concurrent jurisdiction, courts of equity acted only in analogy to the limitations at law.

"While by our Code all distinctions in pleading between suits at law and in equity are abolished, the different forms of declaration at the common law existed so long, and became so ingrained in the legal habit of thought, that the very codifiers themselves have been contented to copy the provisions of the English statutes in respect to personal actions, sometimes substituting for the technical names employed in those statutes what was supposed to be their equivalent in ordinary English. Thus reading the statute, the four years' limitation of section 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity."

In *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100, which was a case brought upon a foreign judgment, it was held that it was not barred by the statute of limitations within two years under section 339, Code of Civil Procedure, but falls within the provisions of section 343, representing actions not otherwise provided for, and is not barred by the statute until four years after the cause of action has accrued. In *West v. Russell*, 74 Cal. 544, 16 Pac. 392, which was an action brought by the administrator of an estate against the administrator and heirs of an estate for an accounting of property and for a judgment directing the delivery of certain properties to the plaintiff, it was held that the statute of limitations under which the demurrer to the complaint was sustained was section 343 of the Code of Civil Procedure, and that the same barred the relief asked; many years in excess of four years having elapsed before the commencement of the action. In the case of *Rowe v. Simmons*, 113

Cal. 688, 45 Pac. 983, which was an action to dissolve an alleged partnership, the statute of limitations was pleaded, and the court found that the cause of action set forth in the amended complaint was barred by the provisions of section 343 of the Code of Civil Procedure. In *McArthur v. Blaisdell*, 159 Cal. 604, 115 Pac. 52, an action for an accounting, alleging the existence of a partnership between parties and in which the trial court found that the cause of action set forth in the amended complaint, was barred by the provisions of sections 337 and 339 of the Code of Civil Procedure. In reversing the same it was held that, as the complaint alleged that the contract was completed on July 21, 1899, which was the basis of the action, and which was not denied, the cause of action having been begun on July 20, 1903, it was not barred, citing Code of Civil Procedure, § 343. In *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 228, 90 Pac. 39, an action for an accounting between the agent and the principal, it was held that the statute of limitations applicable was section 343, Code of Civil Procedure.

It is clear that plaintiff's right to an accounting in this case is not barred by any statute of limitation of the state of California.

[5] The contention that "even if the plaintiff's right to an accounting was not barred by the statute, the accounting could not extend backwards for a period of more than two years prior to the commencement of the action," cannot be sustained.

The doctrine in this regard is as given in the case of *Hendy v. March*, 75 Cal. 566, 17 Pac. 702:

"The statute of limitations does not run between partners until the accounts are settled and the balance agreed upon."

It must be borne in mind that the accounting in this case is an accounting of the affairs of a copartnership in an equitable proceeding, and that in the term "accounting" in such action is included many things that would not be included in that term if the account were a legal one based upon the transactions of merchants in the ordinary affairs of trade, or on a mutual, open, and current account in which the charges and credits might consist of something other than mere money charges. Here the matters in dispute were not only moneys, but of interests in lands and other matters for adjudication and settlement. The trial court, in the interlocutory decree directing an accounting, orders and adjudges that the plaintiff is entitled to an accounting of the affairs of the copartnership described in the complaint, and orders that such accounting be had. It does not limit the account to any fixed period of time preceding the bringing of the action. The purpose of the account was to arrive at a balance ascertained from the time of the

creation of the partnership to the time of the conclusion of the taking of evidence by the referee, or by the court, if further evidence were required.

Appellants' authorities which they cite do not support their claim that no items can be included in a partnership account which precedes the period prescribed by the statute for the recovery on ordinary accounts. Great reliance is placed by them on *Flynn v. Seale*, 2 Cal. App. 665, 84 Pac. 263, and *Hamilton Brass Co. v. Barr Cash, etc.*, 38 Canada S. C. R. 216. In the case of *Flynn v. Seale*, supra, the partner defendant, Seale, had paid out moneys to a bank for the purpose of liquidating and discharging an obligation of his to the bank, which was his individual obligation under the terms of the partnership contract. The court held:

"An individual obligation is not a matter of set off to a partnership claim or to a claim by the plaintiff in a representative capacity; nor can a partnership debt be a set-off to a claim by one of the members of the partnership."

In the case of *Hamilton Brass, etc., Co. v. Barr Cash, etc.*, supra, an examination of the decision discloses that the relation of the parties was that of agency instead of partnership, and that quarterly reports and accounting of sales were agreed to be made, and divisions of the profits made thereon, and the right to sue existed from the time these profits were determined at the end of each quarter. The court holds the relation was not in the ordinary sense a partnership, and it also holds that if questions of fraud were involved the statute of limitations would not be applicable even in the action on the account the Supreme Court of Canada was discussing.

The case of *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346, has no application, as the action involved merely the ascertaining of a balance of account on a claim for legal services and payments, in money made on the claim. No partnership matter was involved.

[6] The appellants' contention that "the accounting improperly included therein transactions not the subject of accounting between the parties" cannot be upheld under the evidence introduced before the referee and the court. The determination of the sufficiency of the same was a matter peculiarly within the province of the trial court. The evidence in regard to the ownership and disposition of what are described as "Willows Land & Improvement Company's Lands," the "Bailey" land, the "Rogers" land, and "Cartenberg" land, is conflicting; but there is evidence showing transactions in relation to these lands prior to the dissolution of the partnership, and it has been determined by the trial court on the evidence introduced that they were properties of the partnership and subject to an accounting in this action.

[7] Appellants' contention that "evidence

was improperly admitted to ascertain the figures upon which the account was made" cannot be sustained. The evidence shows that the preparation of the accounts was referred to an expert accountant, and in the trial court objection was made to the admission of the account on the various grounds of irrelevancy, immateriality, and incompetency, and these objections were heard and considered by the trial court and overruled and the report admitted and almost entirely adopted by the referee and the court. The records used by the expert from which he made his report were the books of *Barceloux & Co.* and those of the *Armstrong-Quatman Company*. The *Armstrong-Quatman Company* conducted the *San Francisco* end of the business, in which they were interested with the firm of *H. J. Barceloux & Co.*

The books which the accountants examined were the books of the partnership during the time of its existence and after its dissolution up to the time of the accounting. Also the books of the *Sacramento Valley Realty Company*, which were controlled entirely by the defendants in this case from the time of its incorporation up to the time of the accounting, also books of the *Armstrong-Quatman Company*, in which were kept a good portion of the accounts as to land subdivisions involved in this action and commissions earned and which accounts were balanced and compared by *Barceloux & Co.* and relied upon by *Barceloux* in all such matters, *Barceloux* being the member of the firm in charge of the books of account of *H. J. Barceloux & Co.* The books of the firm both before and after the dissolution of the partnership were kept entirely by the defendants, or under their supervision, the plaintiff had nothing to do with their keeping nor with the management of the properties, and all the properties, both real and personal, of the partnership, were after the dissolution of the copartnership held in the possession and control of the defendants.

[8] The two defendants upon the dissolution of the copartnership became trustees for the plaintiff, and being trustees, were at all times during the existence of the partnership and after its dissolution bound to the plaintiff in the highest good faith.

[9] The rule relative to the duties of trustees as to keeping proper books of account and the rendering of full accounts of their dealings with the trust funds is clearly announced in the case of *Purdy v. Johnson*, 174 Cal. 521, 163 Pac. 893, where it is said that—

"Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund, and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement."

The case of *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. 16, which was a case for dissolution

of a copartnership and accounting, disclosed a condition of the books of account such as compelled the preparation of books prepared by experts who were employed by the referee and which books were made up of imperfect books kept by the defendant in the case. Speaking of the books kept by the defendant, the court, on page 396 of 73 Cal., 15 Pac. 17, said:

"Many of the accounts which he did keep were false, and credit was not given to plaintiff in cases where it ought to have been. It will not do for defendant to take refuge behind such books as these. If the result which the referee and the court arrived at was not correct, the record should have made the error appear. The only thing which is clearly apparent from this record beside the misconduct of the defendant is hopeless confusion in the accounts. It is eminently a case where the action of the court below should not be disturbed."

[10-12] The contention of appellants that "the referee in the said accounting considered and passed upon matters not within the scope of his authority" cannot be sustained. They insist that under the interlocutory decree specifying the respective portions of land in respect to which the account was to be made limited the referee to the taking of evidence and reporting simply an account of the money proceeds from sales. The report of the referee shows that his valuations on some of the lands involved was based upon evidence taken before the referee showing what the value of the land was at the time of the making of the sales. The sales made by the defendants after the dissolution put it out of their power to deliver to the plaintiff on the settlement of the partnership affairs his share of the property sold, and it would appear that the only methods of determining what was the interest of plaintiff in those properties, of which he was deprived through the sale, would be the value thereof at the time of the making of the sale. As to the evidence taken for the purposes of determining the value of these lands sold, the province of determining the valuations to be fixed was one within the jurisdiction of the trial court; it being based on conflicting evidence. Appellants urge that the court erred in not allowing defendants credits to which they were entitled. Had defendants, in response to plaintiff's complaint, appeared in the action and by their answers submitted a report and account of their dealings and transactions on account of the partnership affairs, as it was their duty to so do, they would then be in a position to complain of the action of the trial court. This they did not do, but, on the contrary, denied there were any partnership affairs to adjudicate.

[13] In relation to the contention of defendants that the necessary expenses incurred by partners and trustees in relation to the management of property intrusted to their

care, or over which they had control, are ordinarily allowed in proper cases, it may be said that this rule is applicable in cases of accountings made by honest and faithful members of a copartnership. These defendants absolutely denied under oath that there had ever been any partnership existing between them and the plaintiff, and they maintained this position at all times during the trial of this case and until the filing of their brief in this court. From the time of the dissolution of the copartnership they denied that plaintiff had any interest whatever in any of the properties included in the accounting. The report of the expert set forth in the appendix to appellants' opening brief shows that no exceptions were taken to the expert's report on the Deveny tract, in which there were net profits of \$4,750.34, of which plaintiff's share was \$1,583.45, of the Dixon tract on the property of which there was due plaintiff \$509.43, of the Watt tract, in which the plaintiff was entitled to profits of \$1,177.54, of the Rice land, in which plaintiff's share of profits was \$424.00, of the Kelly land, in which plaintiff's share of profits was \$423.17, and the Selby lands in which plaintiff's share of profits was \$1,238.89, and net commissions from various transactions, of which plaintiff's share of profits was \$917.98. Their answer to plaintiff's complaint denied the having of any moneys or properties of plaintiff in their hands.

Having failed to present anything in any way of an answer to plaintiff's complaint requiring an examination by the court into the transactions on behalf of the defendants with the partnership which would show the amount of moneys expended by them and with which they should be charged in the settlement of any account, they are not now in a position to claim error on behalf of the trial court in not allowing defendants credits to which they were entitled, if there are any to which they were entitled. They did not even avail themselves of the opportunity afforded to offer any evidence they desired to produce by virtue of the order allowing further time to submit further evidence, if they so desired, made by the trial judge when he directed findings and judgment in this case.

[14] There is no merit in the contention of appellants that the judgment is erroneous because it is a joint judgment against both defendants based upon an accounting which fails to show that such defendants jointly received or were jointly responsible for the amount in respect of which the judgment was rendered. The matter of showing how the moneys were received by defendants, and the amounts and disposition of the same, was peculiarly within the knowledge of the defendants. They handled the partnership properties and proceeds therefrom, had charge of the partnership accounts, and plaintiff had nothing to do with this function of the partnership business. If defendants desired in this action a settlement of its affairs

between themselves, they could have secured such adjudication through proper pleadings admitting the partnership relation and setting forth the transactions and asking the proper relief. The only relief they sought by their answer was "that the prayer of plaintiff's complaint be denied in whole and that the defendants have judgment for their costs."

The case of *Eisentraut v. Cornelius*, 134 Wis. 532, 115 N. W. 142, 126 Am. St. Rep. 1027, cited by defendants, does not uphold the contention, but, on the contrary, shows that the procedure taken and followed in that case was along the lines above suggested.

The contention that the trial court failed to charge plaintiff with moneys with which he was properly chargeable is not sustained by the evidence. Defendants claim that at the time of the dissolution of the partnership there was due from one C. M. Wooster \$15,737.24 commissions earned by the partnership, and that defendants sued to collect this sum, making plaintiff a party defendant because he would not join with them in the action. Plaintiff afterwards, defendants claim, compromised the action and accepted \$7,240.80 as a consideration of the compromise. Defendants dismissed the action, plaintiff paid part of the moneys received by him to the defendant Donohoe, and a settlement and adjudication as to these moneys is contained in finding No. XI of the trial court. As to whether the amount of these commissions was \$15,737.24, as claimed by defendants, or \$7,240.80, the evidence was conflicting, and the statement (Exhibit 16) made by the defendant Donohoe to plaintiff makes as the estimate of profits in this matter \$9,000 instead of \$15,737.24. Under the rules applying to findings of trial courts on conflicting evidence, it cannot be said that the matter of the Wooster commissions was not properly settled by the trial court.

The claim that the judgment is erroneous because of being a joint judgment against both the defendants, and that the evidence shows that some of the moneys included in the judgment were received by one of the defendants alone, cannot be upheld. Defendants, had they admitted the partnership in this action and alleged by appropriate allegations in separate answers, if there was a dispute between them, or in a joint answer if they were agreed upon the balances as to moneys and properties of the partnership in their hands, might have obtained a decree settling all the affairs of the partnership between the individual partners. By their answer denying a partnership they precluded the determining of the liabilities of defendants Donohoe and Barceloux each to the other. What is adjudged by the decree to belong to plaintiff is his share of the properties of the partnership, determined to be in the custody and control of both defendants; they

did not at the trial of the action by any pleading ask that the court determine the condition of the partnership moneys and properties as between the defendants Donohoe and Barceloux; and if there exist any differences in these regards, those are matters for settlement either in proceedings after the partnership properties are sold in this action regarding any proceeds, if any there be, after settling the plaintiff's judgment or by any such action as may be proper between the defendants Donohoe and Barceloux relating to the properties and moneys in their hands.

The rule as to when it is proper for the rendering of a joint judgment against partners in suits for accounting is clearly stated in *Bloomfield v. Buchanan*, 14 Or. 181, 12 Pac. 238:

"In an ordinary accounting between partners, where neither is guilty of such acts, omissions or concealments as involve a breach of legal or equitable duty, trust or confidence justly reposed, and which are injurious to another, or by which an undue or unconscientious advantage is taken of another, the rule of liability is that each partner is liable to account to each other severally, but not jointly. * * * But an examination of the evidence in this case has satisfied us that the rule could not * * * be applied here. Whatever may be the general relations between parties, the facts developed in this case made it fiduciary, and the principles of law applicable to that relation must be applied."

[15, 16] In this state partners are trustees for each other within the meaning of chapter 1 of the title on Trusts contained in the Civil Code, and their obligations as such trustees are defined by that chapter.

"A trustee is responsible for the wrongful acts of a cotrustee to which he consented, or which, by his negligence, he enabled the latter to commit, but for no others." (Civ. Code, § 2239; *Perry on Trusts*, § 848; *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822.

"The rule is firmly settled that where a breach of trust has affected two or more or all of cotrustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them." *Pomeroy's Eq. Juris.* (4th Ed.) § 1081; *In re Thompson*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

As a trust relation between the parties was created by the provisions of the Civil Code hereinbefore set forth, the argument of the appellants that the court should have made a finding that the defendants were constructive trustees is without merit in view of the facts shown by the evidence in this case.

[17, 18] The contention of appellants that plaintiff was guilty of such laches as should defeat his action cannot be sustained. The evidence discloses attempts on the part of plaintiff for over a year after the dissolution

to bring about an amicable settlement of the partnership affairs and division of its properties; of a written request for a report of the partnership affairs; of the writing soon thereafter by the defendant Donohoe to one W. S. Armstrong, who was in charge of the Armstrong-Quatman Company, in San Francisco, a letter as follows:

"Henry and myself are having some difficulty in effecting an adjustment of our affairs with Freeman, and I wish you would refrain from giving Freeman or anyone else any information concerning our past transactions should they apply to you in the way of oral statements, written statements or copies of papers or inspection of papers which you may have"

—and the absence of the reasons generally for which the refusal of relief because of laches is sometimes given in equity.

Delay in bringing the action is the main reason urged by defendants for applying the doctrine of laches.

"There is no artificial or hard and fast rule either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. The question must be determined by a consideration of all the facts and circumstances of the particular case. Laches is a question of fact, on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor." 10 Cal. Juris. § 64.

Speaking of this rule and its application, it is said in *Pratt v. Pratt*, 43 Cal. App. 261, 184 Pac. 956:

"A large discretion is confided to the trial judge, and the disposition of an appellate court is, and should be, to respect that discretion and not to interfere with his conclusion unless manifestly an injustice has been done."

In all matters involved in this appeal the determination of the questions presented were peculiarly within the hands of the trial judge for the solution of the facts. The findings and decree are supported by the evidence introduced.

No sufficient reason has been presented by appellants for a reversal of the judgment appealed from in this action, and said judgment is therefore affirmed.

We concur: HART, J.; PLUMMER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [19, 20] We do not approve that portion of the opinion of the District Court of Appeal herein which seems to hold that this action may be regarded as upon a contract, obligation, or liability founded upon an instrument in writing. We are satisfied with the conclusion of the District Court of Appeal to the effect that the statute of limitations applicable to the case at bar is the

one prescribed in section 343 of the Code of Civil Procedure.

The petition for transfer to and hearing by this court is denied.

65 Cal. App. 136

PHILLIPS v. STARK et al. (Civ. 4486.)

(District Court of Appeal, First District, Division 1, California. Jan. 4, 1924.)

1. Trial $\Rightarrow$ 397(5)—Court's failure to find on question, made immaterial by other findings, held not error.

In an action on a contract, in which the defendant denied the allegations of the complaint, and set up a contract different from that alleged by plaintiff, and pleaded the rescission thereof, court's failure to find on issue of rescission held not error, in view of findings that the parties had entered into the contract pleaded by plaintiff, and that defendant had violated such contract, since the court, in making such findings, found by implication that the contract alleged in the answer was not made, and the question of whether such contract was rescinded therefore became immaterial.

2. Trial $\Rightarrow$ 397(5)—Findings necessarily decisive of case render unnecessary other findings.

Where issues on which findings are made are necessarily decisive of the case, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become immaterial.

3. Appeal and error $\Rightarrow$ 1071(6) — Failure to find on issue not reversible error, if finding would have been adverse to appellant.

The failure to find on an issue raised either by answer or cross-complaint is not reversible error, where the finding, if made, would have been adverse to appellant.

4. Sales $\Rightarrow$ 92—Evidence held to sustain finding that contract for sale of business was not rescinded by mutual agreement.

In seller's action for breach of contract to purchase business, evidence held to sustain finding that defendant procured check, given plaintiff in part payment of purchase price, after defendant had taken possession, by artifice, and destroyed check, and refused to be bound by the contract, as against defendant's contention that the contract was rescinded by mutual agreement.

5. Sales $\Rightarrow$ 181(11)—Evidence held to sustain finding that buyer had taken possession.

In seller's action for breach of contract to purchase business, evidence held to sustain finding that defendant had taken possession of the property as owner.

6. Sales $\Rightarrow$ 383—Evidence held to sustain finding that seller was forced to make resale after buyer's refusal to consummate transaction.

In seller's action for breach of contract to purchase business, it appearing that seller had sold business to third party on defendant's refusal to consummate transaction, evidence held to sustain findings that plaintiff was forced to sell business to third party, and that he ex-

exercised good faith in making sale, and was ready and willing to follow any proper instructions defendant might give as to the time and manner in which the sale should be made.

7. Sales $\Rightarrow$ 181(11)—Evidence that buyer of business was placed in possession held to prove seller's ability to perform.

In seller's action for breach of contract to purchase business, evidence that the merchandise was delivered to the buyer and that he was placed in complete possession thereof at the time of the transaction held to sustain judgment for seller, as against contention that seller should not be allowed to recover, because he could not have performed the contract.

8. Sales $\Rightarrow$ 52(5)—Evidence held to prove meeting of minds of parties as to terms of contract.

In seller's action for breach of contract to purchase business, evidence held to sustain finding as to meeting of minds of parties on terms of contract.

9. Sales $\Rightarrow$ 50—Buyer held precluded from claiming rescission on ground of mistake.

Buyer could not claim a right to rescission of contract for purchase of bakery business because of a mistake in not including ovens built into building, where receipt dictated by him excluded "anything attached to building."

10. Sales $\Rightarrow$ 51—Particular facts held not to show acquiescence by seller in rescission by buyer.

The fact that an employé of seller of business accepted from buyer proceeds of sales made while buyer was in possession of the business did not preclude seller from recovering damages for buyer's breach of contract on buyer's refusal to consummate the transaction, where seller, on discovery that his employee had accepted such money, kept it as a part of the receipts of the sale, and not as his (seller's) property.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by A. Phillips against B. Stark and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

See, also, 186 Cal. 369, 199 Pac. 509.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for appellant.

Lester William Roth, of Los Angeles, for respondent.

SHORT, Justice pro tem. This is an appeal by the defendant B. Stark from the judgment in favor of the plaintiff for the sum of \$3,920.50 as damages suffered by the plaintiff by reason of the alleged failure of the defendants to complete the purchase of a certain grocery and bakery business, which plaintiff claimed he sold to defendants for the sum of \$10,000. A motion for a new trial was denied by the trial court. The appellant desires a review of the ruling of the

court on said motion, and a consideration of the judgment as a whole. The testimony in the case developed the following facts:

The plaintiff was the owner of a grocery and bakery, and sold it to the defendants for the price of \$10,000. The defendants, at the time, gave plaintiff a check for \$500 on account, agreed to pay the balance the next day, and received immediate possession. The next day the plaintiff called upon the defendant Stark to obtain the balance of \$9,500, and in the course of the interview was tricked into giving him temporary possession of the check for \$500. As soon as he got the check, the defendant had it torn up, refused to pay anything on the purchase price, and told the plaintiff that the sale was off; that he would have nothing to do with the property, and he could do with it as he pleased. The defendants then abandoned the bakery, and the plaintiff retook possession and sold it at public auction, but without giving the notice to the defendants required by the Code for a sale in enforcement of a vendor's lien. Defendant and appellant purchased the business in question primarily for the purpose of selling the same to another auctioneer on a quick turnover at a profit of \$500, or, failing in this, of auctioning the place of business to the public. Appellant admitted that he never intended to run the place as a going business, and further admitted that, although offered to him as a part of the same bargain, and with no increase in the purchase price, he did not want the 10-year lease which respondent held on the premises. Early in the morning following the evening on which the sale was made, appellant called up an auctioneer and expert appraiser, one Kohn, and requested said Kohn to go to the place of business in question, look the same over, and make him an offer on the same. Kohn made his appraisal at appellant's request, and was accompanied by appellant's agent while he was making the same. Although his attention was directed to various kinds of portable machinery, nothing at all was said to him about ovens, either by appellant's agent or by appellant himself. On Kohn's returning to appellant's place of business, appellant asked Kohn what he would give him for it. Kohn responded that he was not spending his time appraising stock for appellant, and that, if appellant wanted to do business, he would have to name the price he had paid, and tell Kohn how much profit he wanted. Appellant stated that he paid \$10,000 and wanted a profit of \$500. Kohn told appellant that, if he paid \$10,000, he could not pay him a profit thereon. It was only during the conversation between Kohn and appellant that the question of ovens came up for the first time, and appellant thereupon turned to Singer, his brother-in-law, and said, in the language of Kohn, "That that

would be a point they would claim on; whatever he meant by that, I don't know."

[1] The first point made by appellant is that the findings are insufficient in this:

"That the trial court failed to find upon certain material issues raised in the affirmative defense set forth in the answer of defendant B. Stark to plaintiff's amended complaint;" that one of the affirmative defenses set forth in the answer is that there was a mutual rescission of any and all contracts entered into by and between plaintiff and defendant in regard to the sale of said grocery and baking business; that said defense was a material issue, and that the trial court's failure to find on said issue should entitle him to a new trial.

The amended complaint in the case at bar pleads the following contract:

"Plaintiff and defendants entered into an agreement whereby the plaintiff agreed to sell, transfer, and deliver, and the defendants agreed to buy and take possession of, all stock and fixtures and bakery fixtures and machinery, exclusive of fixtures attached to the building then located and on the premises at said place of business."

Appellant in his amended answer denies specifically all of the allegations of the amended complaint, and then sets up a new and different contract, as follows:

"Plaintiff agreed to sell, transfer, and deliver to defendant B. Stark all the stock and fixtures, including bakery fixtures and machinery, and also bakery ovens and fixtures attached to the building, with exception of shelving in front store room for the sum of \$10,000."

And then he pleads an alleged rescission of said contract alleged in his amended answer and insists that there should have been a finding upon his contract and the rescission thereof. The trial court found for the plaintiff in the identical language of the amended complaint.

The trial court having found that the contract alleged in the amended complaint was made and breached, it necessarily found, by implication, that the contract alleged in the amended answer was not made, then there could be no contract to rescind, and the question of rescission became immaterial. *Parker v. Power*, 28 Cal. App. 332, 152 Pac. 935; *Black v. Black*, 74 Cal. 520, 16 Pac. 311; *Churchill v. Baumann*, 95 Cal. 541-545, 30 Pac. 770.

[2] Where issues upon which findings are made are necessarily decisive of the case, it is unnecessary that the findings should dispose of any further issues as all other issues thereby become immaterial. *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *McCourtney v. Fountain*, 57 Cal. 617; *Porter v. Woodard*, 57 Cal. 535; *Shank v. Blackburn*, 53 Cal. App. 620, 200 Pac. 762; *Spaulding v. Dow*, 118 Cal. 424, 50 Pac. 543. The trial court having decided and found, in the language of the complaint, that the contract pleaded

by the amended complaint was the contract made and breached, by necessary implication, found against the contract set up in the amended answer. *Parker v. Power*, 28 Cal. App. 332, 152 Pac. 935; *Black v. Black*, 74 Cal. 520, 16 Pac. 311; *Churchill v. Baumann*, 95 Cal. 541-545, 30 Pac. 770.

[3] Failure to find on an issue raised either by answer or cross-complaint is not reversible error where, if the finding had been made, it would be adverse to appellant. *Reveal v. Stell*, 56 Cal. App. 463, 205 Pac. 875; *Cross v. Thiele*, 51 Cal. App. 780, 197 Pac. 974; *Arrelano v. Jorgensen*, 52 Cal. App. 622, 199 Pac. 855; *Thresher v. Lopez*, 52 Cal. App. 219, 198 Pac. 419; *Kendrick v. Gould*, 51 Cal. App. 712, 197 Pac. 681; *Furlong v. White*, 51 Cal. App. 265, 196 Pac. 903. The trial court in the case at bar, having found each and every allegation of the amended complaint to be true, must necessarily have found adversely to the affirmative defense set up in said amended answer, even had findings been made on the issue complained of.

The appellant alleged in his answer that plaintiff returned to B. Stark the said check of \$500, and that the defendant and plaintiff agreed to cancel said sale and purchase of said stock and fixtures, and defendant returned to plaintiff his receipt for the \$500, and that the said receipt was destroyed and canceled by mutual consent of plaintiff and defendant. Upon this subject the court found:

"That on the following day, more particularly, to wit, on Monday, November 24, 1919, at or about 10 o'clock a. m., plaintiff went to the place of business of defendant B. Stark to receive, in accordance with aforesaid contract, the balance of the purchase price of nine thousand five hundred dollars (\$9,500.00), and said defendant B. Stark did then and there, by trick, misrepresentation, artifice, and fraud, obtain possession of said check for five hundred dollars (\$500.00), and destroyed the same, and refused to make a repayment of the said five hundred dollars (\$500.00), or any sum at all, and refused to pay the balance of nine thousand five hundred dollars (\$9,500.00), or any sum at all, on account of said contract; and, further, defendant B. Stark, who was then the owner and possessor of all the aforesaid personal property, did then and there tell plaintiff that, so far as he was concerned, the deal was off, and refused to have anything further to do with the same; that plaintiff thereupon demanded the return of said receipt which he had given to defendant B. Stark, and defendant B. Stark did then and there, and in the presence of plaintiff and others, destroy said receipt"

—which completely contradicts the claim that plaintiff voluntarily surrendered the check, and agreed to a rescission, or agreed to have said receipt torn up, and, the trial court having also found that the contract alleged in the complaint was the true one, there was no necessity for further findings on said

affirmative defenses. The findings support the judgment and are sufficient.

[4] The appellant claims that certain findings are not supported by the evidence. He contends that there is no evidence from which the trial court was justified in finding that the defendant B. Stark obtained possession of the \$500 check from the plaintiff by means of trick, misrepresentation, artifice, or fraud, or that the defendant B. Stark was then the owner or in possession of the said personal property involved in said action as set out in finding III. The evidence shows that, the morning after the agreement, defendant called a Mr. Kohn, who was an auctioneer and an appraiser of stocks of goods in stores, and sent him over to look at the stock in the store of plaintiff, and, when he returned, tried to sell it to said Kohn at a profit of \$500, but Kohn, after ascertaining the price defendant had agreed to pay, told him that it was not worth what he asked, and declined to purchase; that defendant mentioned the ovens in the store, and Kohn told him he could not figure on them; that then the defendant addressed Singer, his brother-in-law, and said, "That would be a point they could claim on; * * * that would be the point upon which he could recall the bargain."

Thereafter defendant had plaintiff called, and asked him to come to his place of business, and after his arrival appellant testified:

"* * * 'Are you ready to settle?' He said, 'Yes.' I asked him, 'I can make out a check for \$10,000, and see Mr. Smith, the attorney, to make out a bill of sale.' I asked Mr. Phillips, 'Have you got the check for \$500 I borrowed from Mr. Singer?' 'Yes.' 'If you don't mind, I will take that check and give it to Mr. Singer, and he will give you a check for \$10,000.' He took out the check, giving it to me. I gave it to Mr. Singer, and Mr. Singer destroyed it."

Again the appellant testified as follows:

"Q. Didn't you tell him, when you asked him for the check to give—'Give me the check for \$500, and I will write it out for you?' A. I didn't say that right there; I said, 'I will give you one for \$10,000.'"

The attention of the appellant was then called to testimony given in his deposition taken prior to the time of trial, in which he testified as follows:

"Question by Mr. Roth: When I came, I found him in the office waiting for me. I said, 'Are you willing to do business?' A. 'Perfectly willing.' I said, 'I am ready myself.' I went down to my safe and got a check to give him for \$10,000. I said, 'Mr. Phillips, have you got that check last night you got from Mr. Singer?' He said, 'Yes.' I said, 'If you don't mind, give me the check for \$500, and I will make a check for \$10,000, as per contract.' He took out the check for \$500, and gave it to Mr. Singer, and I and Mr. Singer and Mr. Phillips and his manager went to Smith the attor-

ney. Q. You testified that way? A. I don't testify any different. I said I would give him a check according to the contract."

The evidence further shows that, as soon as he had secured and had destroyed the \$500 check, he began to talk of a new agreement, and raised the question about the ovens for the first time, and then repudiated the agreement made the previous evening. This, with other evidence contained in the record, fully supports the finding complained of.

[5] As to the objection there is no evidence which sustains that part of finding III "that defendant B. Stark was the owner and in possession of all the aforesaid property": The evidence shows that appellant took possession of the premises, and every part and portion thereof, on the night the sale was made, and, further, that immediately, after he had paid the deposit of \$500, he also agreed to pay the workmen in the bakery shop for that evening, so that he could have the results of the evening baking; that he nailed down all the doors with a hammer, and then locked the front door with a lock; that he hired a watchman to guard the premises all night, and that he sent Singer to the place early the next morning to take charge of the same; and that he remained in charge of same until about 11 o'clock of the morning after the sale, after which he ordered his man to leave the place purchased, and completely abandoned the property he had bought, which evidence was not seriously disputed by appellant. The evidence sustains the finding objected to.

[6] Appellant objects to finding VIII, in that the evidence does not show "that plaintiff was forced to sell his business." The evidence upon this subject shows that appellant or his agents told respondent's customers the next day not to wait for bread, to buy somewhere else; that they could not get any more there, because they had stopped baking, and that the bakers and milkmen were sent away, saying that they were going to close the store, and it would not be opened up until there was an auction sale; that he had to sell, because the creditors were alarmed, and they all came to Phillips' place of business and thought he was going bankrupt, and they all wanted their money; that his business was ruined, because they had turned away bakers and his business. The above evidence is sufficient to sustain the finding objected to; in fact, under the circumstances shown it was his best remedy.

The next finding complained of is that plaintiff exercised good faith in making said sale, and was ready and willing to follow any proper instructions defendant B. Stark might give as to the time and manner in which said sale should be made. No notice was given appellant of the sale, but there was evidence that respondent called appellant several times on the phone; that each

time the person who answered immediately put up the phone as soon as he heard respondent's voice. Though no notice was given of the sale, the parties stipulated in open court and the court found that the sum of \$6,079.50 was the market value of said property at said time and place, and we think the evidence sufficient to sustain said finding, taking it altogether.

[7] Appellant asserts that respondent should not be allowed to recover because he could not have performed the contract. The evidence shows, and the court found as a fact, that the merchandise in question and every part thereof was delivered to appellant and that he was placed in complete possession thereof the night the transaction was made, and, as the court said in *Phillips v. Stark*, 186 Cal. 369, 370, 199 Pac. 509, 510:

"The delivery of possession to the defendants, of course, operated to pass title, there being nothing to indicate a contrary intent."

Thus it appears that he not only could perform, but that he did perform.

[8] Appellant claimed there was no meeting of minds of the parties as to the terms of the contract. A receipt was introduced in evidence for the \$500 payment, which receipt sets forth the terms on which the parties agreed, and is as follows:

"I hereby sell stock and fixtures, including bakery fixtures and machinery, and anything attached to building not included, for the sum of \$10,000. Received \$500 deposit; the balance to be paid in escrow Monday, November 24th"

—which receipt was dictated by appellant and written by the daughter of respondent. This receipt and the oral evidence amply supports the finding that:

"On or about the 23d day of November, 1919, at or about 8 o'clock p. m., at the plaintiff's place of business, located at No. 910 West Temple street, in the city and county of Los Angeles, state of California, plaintiff and defendant B. Stark entered into an agreement whereby the plaintiff agreed to sell, transfer and deliver, and the defendant agreed to buy and take possession of, all stock and fixtures, and bakery fixtures and machinery exclusive of fixtures attached to the building then located and on the premises at the said place of business, and defendant B. Stark promised to pay the sum of ten thousand dollars (\$10,000) therefor, in the manner as follows, to wit: Five hundred dollars (\$500) down and nine thousand five hundred dollars (\$9,500) at defendant B. Stark's place of business at No. 114 North Spring street, in the said city and county, on Monday, November 24, 1919."

It is conceded by all parties to the action that the ovens mentioned in this case were built into the walls of the building and were attached thereto, and in view of the foregoing receipt and finding of the trial court it

would be a useless waste of time to discuss that subject further, as the matter has already been heretofore determined in favor of respondent on conflicting evidence; for, as it has hereinbefore been held, the finding that the contract set out in the complaint was made, by implication, was a finding that the one set out in the answer was not made.

[9] Appellant maintains that there was a rescission of the contract: Because of mistake about the ovens which he claims were included in the contract. Appellant himself testifies that the ovens were built right into the building, and were a part of the building, yet the receipt dictated by him said: "* * * And anything attached to building not included." In view of the above, we think he should not be allowed to claim a mistake even if pleaded as a defense, which it was not.

Again, appellant insists that no possession of the property was ever taken by him. The court found that possession was taken by him, and said finding is supported by the evidence.

[10] The next point made by appellant is that respondent accepted the return of \$5.20 taken in for sales while appellant was in possession of the stock. The evidence shows that the money was given to an employee of respondent without respondent's knowledge, and, upon his informing respondent about it, he immediately asked him why he took it, and took the money and placed it in the cash register with other money there, and it was kept as a part of the receipts of the sale, and not as respondent's property.

As to the effect of respondent's retaking possession of the property, the Supreme Court said:

"As to the retaking of possession, if the plaintiff had done so under such circumstances as to show an acquiescence on his part in the position taken by the defendants that the sale was off, there would at once have been a rescission by mutual consent. * * * But when the defendants not only refused to pay, but repudiated the contract and abandoned the property, the plaintiff's act in retaking possession of it certainly cannot be said to indicate any acquiescence on his part in the repudiation or any intent to end the sale. Whether he intended to insist upon the contract or not, the only sensible thing for him to do was to retake possession. He either had to do so for the protection of the property or allow it to be lost or destroyed for want of protection. He could, of course, have left it to its fate, but he was not required to follow any such hazardous and unreasonable course. The defendants thrust the necessity of taking possession upon him, and very plainly against his will, and without any thought on his part of acquiescing in their repudiation or himself terminating the contract of sale. Under these circumstances, there was no rescission." *Phillips v. Stark*, 186 Cal. 369, at page 372, 199 Pac. 509, 511.

And finally, as to the effect of the resale of the property by respondent after he had re-

taken possession, the Supreme Court said in the same case:

"For much the same reasons, the second act of the plaintiff, that of reselling the property, did not amount to a rescission. The defendants had repudiated the contract and abandoned the property. The plaintiff had it on his hands. Was he, in spite of the defendants' absolute and unequivocal repudiation of the contract, to be required to hold it for them indefinitely under penalty of otherwise acquiescing in their repudiation and losing any right of recovery against them? That question has been answered in this state in cases exactly similar, except for the fact that title to the property had not passed to the vendee. It has been held a number of times that a resale by a vendor whose vendee has repudiated the contract does not work a rescission. See *Tomboy Gold, etc., Co. v. Marks*, 185 Cal. 336, 197 Pac. 94, and cases there cited. Upon this point we can see no difference between them and such a case as the present, where the title has passed before the repudiation, but the vendee by the repudiation has left the property upon the vendor's hands. The actual situation of the parties is exactly the same. The vendees wrongfully refuse to consummate the sale, and the vendor has the property on his hands. In fact, we see no reason why the plaintiff may not insist that the defendants, by thrusting the property back upon him and thereby undoing the delivery by reason of which title passed, have in effect estopped themselves from claiming that their rights are any different than they would have been if the delivery had not been made." *Phillips v. Stark*, 186 Cal. 369, at page 373, 199 Pac. 509, 511.

From the foregoing, it appears that there was no rescission.

We think that, because of the conclusions already reached in the foregoing opinion, the question regarding the supplemental findings becomes immaterial.

For the reasons herein given, we think that the order denying the new trial and the judgment should be affirmed; and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, J.

65 Cal. App. 175

PEOPLE v. MIDDLETON. (Cr. 1132.)

(District Court of Appeal, First District, Division 2, California. Jan. 7, 1924.)

1. Criminal law $\S$ 785(16)—Not error to instruct witness false in one part of testimony is to be distrusted in other.

There was no error in charging that a witness false in one part of his or her testimony is to be distrusted in other, especially where the court further instructed that "If you believe any witness examined before you during the trial of this case has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence."

2. Criminal law $\S$ 781(6)—Refusal of instruction as to admissions or confessions held not error.

The court did not err in refusing to instruct at defendant's request, "If you believe from the evidence of this case that the defendant has at any time made any admissions or confessions concerning the offense he is charged with, then I instruct you that evidence of confessions or admissions should be carefully scrutinized by the jury and received with great caution; though a witness is perfectly honest, it is impossible for such witness in most cases to give the exact words in which the admissions were made, and sometimes in the transposition of the words of a party may find a meaning entirely different from that which was intended to be conveyed by the witness," especially where the court instructed, "You are instructed that it is your duty to view with caution evidence of parol admissions of the defendant."

3. Criminal law $\S$ 519(9)—Conclusion that confession voluntary sustained.

Where there was testimony that the defendant stated when asked about the crime that he did not want to talk "unless he had a hearing," but that, after making that remark, and being told that his companions in the crime had confessed, he told the story without any more persuasion, and without either threats or inducements being used by the officer, it cannot be said that the confession was not voluntarily made, and that the trial judge erred in admitting evidence of it.

4. Homicide $\S$ 166(4)—Commission of robbery held admissible to show motive.

In prosecution for murder, evidence of a robbery before the killing of the deceased, a police officer, was admissible as showing a motive for the killing.

5. Homicide $\S$ 169(1)—Police blotter held properly admitted in evidence.

In prosecution for murder of police officer, the trial court did not err in admitting in evidence the police blotter which the deceased had read before leaving the police station on the night upon which he was killed, the document containing information regarding a robbery at another place and the description of an automobile which had been stolen, and of men who had participated in the robbery; such blotter indicating that the officer had reasonable grounds for believing that a felony had been committed by the occupants of the automobile in which defendant was riding when he killed the police officer.

6. Witnesses $\S$ 277(4)—Permission of inquiry held not error as against objection that it was not proper cross-examination of accused.

Where defendant upon his direct examination denied that he had shot deceased, or that he was present at the time the crime was committed, or that he had any connection with the crime whatsoever, the court did not err in permitting the prosecution to inquire into his whereabouts and wanderings after the commission of the crime, as against the objection that it was not proper cross-examination, in that defendant had been asked nothing concerning such matters on his direct examination.

7. Criminal law **§730(1)**—Remarks of district attorney cured by instruction to disregard.

Improper remarks of district attorney in argument held cured by instruction to the jury to disregard them.

8. Homicide **§253(1)**—Evidence held to sustain conviction for first degree murder.

In prosecution for homicide, evidence held to sustain a conviction for first degree murder.

Appeal from Superior Court, Fresno County; J. E. Wooley, Judge.

Richard Middleton was convicted of murder, and appeals. Affirmed.

Frank A. Henning, of Lodi, for appellant.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. Defendant appeals from a judgment of conviction of the crime of murder.

[1] The first objection urged is that the trial court erred in instructing the jury that "a witness false in one part of his or her testimony is to be distrusted in others." It is true that a similar instruction was criticized in the case of *People v. Plyler*, 121 Cal. 160, 53 Pac. 553. However, in a later decision, our Supreme Court, after discussing the *Plyler* Case, said:

"But nowhere has it been decided, nor indeed could it with reason be held, that it is error for the court to instruct in the language of our written law. This is substantially what the court here did, and so, while the instruction cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court in giving the law to have conformed to the language of the Code, and to have omitted what that Code itself omits." *People v. Dobbins*, 138 Cal. 694, 698, 72 Pac. 339, 341.

See, also, *People v. Treadwell*, 69 Cal. 226, 238, 10 Pac. 502.

The objection urged by the appellant to the instruction above set forth is that the jury would be compelled under its language to construe a false statement regarding some minor or unimportant matter as a reflection upon the truth of all the testimony given by the same witness. In the instant case such a possibility was lessened by the fact that the trial court, at the request of the defendant, also gave the following instruction to the jury:

"You are instructed that if you believe any witness examined before you during the trial of this case has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence."

[2] Complaint is made of the refusal of the trial court to give the following instruction at the request of the defendant:

"If you believe from the evidence in this case that the defendant has at any time made any admissions or confessions concerning the offense he is charged with, then I instruct you that evidence of confessions or admissions should be carefully scrutinized by the jury and received with great caution; though a witness is perfectly honest, it is impossible for such witness in most cases to give the exact words in which admissions were made, and sometimes in the transposition of the words of a party may find a meaning entirely different from that which was intended to be conveyed by the witness."

In the case of *People v. Buckley*, 143 Cal. 375, 391, 77 Pac. 169, the court held that the refusal to give an instruction substantially the same as the one we are now considering was not error, as such instruction went far beyond the language of subdivision 4 of section 2061 of the Code of Civil Procedure. Upon this point it is also to be noted that the court gave the following instruction:

"You are instructed that it is your duty to view with caution evidence of parol admissions of the defendant."

[3] It is contended that the trial court erred in admitting in evidence the testimony of certain police officers concerning the alleged confessions of the defendant. The asserted basis of this contention is that the confessions of the defendant were not made voluntarily, and this position is predicated upon testimony that the defendant stated, when asked about the crime, that he didn't want to talk "unless he had a hearing." But it also appears from the testimony in the record that, after making that remark and being told that his companions in the crime had confessed, he told the story without any more persuasion, and without either threats or inducements being used by the officers. Upon these facts we do not think it can be said that the confession was not voluntarily made, and the following language from *People v. Grafft* (Cal. App.) 214 Pac. 273, seems appropriate:

"The question whether the confession was 'free and voluntary,' or the result of inducement, coercion, intimidation, or duress exerted by the officer, was one peculiarly within the province of the trial judge to decide upon the facts. His conclusion thereon has substantial support in the evidence, and we are of the opinion that we should not interfere with it."

[4] It is contended that error was committed in admitting evidence of a robbery committed by the defendant prior to the murder of the police officer, the crime for which he was being tried. The objection is without merit. The evidence of the prior crime was admitted because the commission of the other crime was directly connected with the murder of the police officer, and clearly showed a motive for the latter deed. According to testi-

mony appearing in the record, on July 30, 1922, the defendant met two boys who had escaped from the Preston School of Industry, and the trio took possession of a Ford automobile that was standing upon one of the streets of Lodi, Cal., and drove to the city of Stockton. While there they stopped the driver of a Buick automobile, robbed him, and took his automobile, in which they drove to Fresno. Early the next morning, upon entering Fresno, they were pursued by police officers in an automobile, and forced to stop. One of the police officers got out of his automobile and approached the automobile in which the defendant was riding. The defendant ordered him to put up his hands, and when the officer reached for his revolver the defendant fired several shots which resulted in the death of the police officer. The robbery was closely connected with the killing of the officer. Fear of arrest for this crime furnished a powerful motive to the defendant to kill the police officer, who was pursuing him. To establish a motive for the crime with which the defendant was charged, the evidence complained of was admissible. *People v. Pool*, 27 Cal. 572; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *People v. Argentos*, 156 Cal. 720, 106 Pac. 65.

[5] Appellant urges that the trial court erred in admitting in evidence the "blotter" or daily police record, which the deceased officer had read before leaving the police station on the night upon which he was killed. This document contained information regarding the robbery at Stockton and a description of the automobile which had been stolen and of two of the men who had participated in the robbery. The paper was admitted for the limited purpose of showing what the deceased had read before starting on duty on the day of his death, and not for the purpose of proving the truth of the facts therein stated. For such limited purpose, we think it was properly admitted in evidence. It indicated that the officers had reasonable grounds for believing that a felony had been committed by the occupants of the Buick automobile and were therefore justified in stopping them upon the highway.

[6, 7] Complaint is made of the rulings of the trial court by which the prosecution was permitted to inquire into the whereabouts and wanderings of the defendant after the commission of the crime of which he was charged. It is contended by the appellant that these questions, to which objection was

made, were not proper cross-examination, as the defendant had been asked nothing concerning these matters upon his direct examination. The defendant, upon his direct examination, denied that he had shot the police officer, denied that he was present at the time the crime was committed, or that he had any connection with the crime whatever. We think that under these circumstances a broad latitude was properly permitted upon cross-examination. *People v. Teshara*, 141 Cal. 633, 638, 75 Pac. 338. In the case of *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016, the prosecution was permitted to ask the defendant as to his whereabouts at the time the crime was committed, although the defendant had not testified upon his direct examination as to where he was at that time, but had merely testified to the fact that he was not present at the scene of the crime. True, the cross-examination in the instant case goes beyond that discussed by the opinions in the cases cited; nevertheless, if we should concede to the appellant that the record in the present case discloses a broader range of questions upon the cross-examination of the defendant than is warranted by legal precedents, we should not be warranted in reversing the judgment for this reason, because the facts disclosed by the record in this case show clearly that justice has been done by the verdict and judgment rendered, and this decisive remark applies also to the other assignments of error urged by the appellant concerning alleged misconduct of the district attorney in his argument to the jury. It is also to be added, in response to the objections of the appellant to certain remarks of the district attorney which were assigned as error, that with respect to some of these matters, at least, the trial court instructed the jury to disregard the remarks, and this, in contemplation of law, cured the error.

[8] The contention that the record does not support the verdict of guilty of murder in the first degree is without merit. There is testimony from which the jury was justified in believing that the defendant shot the police officer through the heart when he approached the automobile in which defendant was riding. There was no evidence of any circumstances which would constitute the crime of murder in the second degree.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

193 Cal. 142

HIRSHFELD v. DANA. (L. A. 7386.)

(Supreme Court of California. Feb. 2, 1924.)

1. Trial ⚡74—Person asking question only one that can object that answer is not responsive.

Though opposing party may move to strike out testimony that is for any reason improper to be admitted, or may move to strike out an irresponsible answer in order that an objection, though not well taken, may be saved, the only person who can make the objection that the answer is not responsive is the person who asks the question.

2. Depositions ⚡75—Objection to certificate properly overruled.

The objection that certificate of notary certified that the deponent had read the deposition instead of certifying that it had been read to him was properly overruled, being highly technical.

3. Appeal and error ⚡1056(4)—Province of court in determining whether exclusion of evidence reversible.

While it is not the province of the Supreme Court, in appraising error under the constitutional rule of decision on appeal, to weigh the evidence, as would the triers of the facts, to determine whether exclusion of evidence was reversible, still such court is required to some extent to weigh the evidence and form conclusions upon its weight.

4. Appeal and error ⚡1056(1)—Exclusion of evidence held reversible.

In action on notes which defendant claimed he did not execute, and where estoppel was involved on account of an alleged initialing in consideration of an extension of time, it was reversible error to exclude evidence of holder of other notes that defendant had stated that she had been granted an extension of time on the notes in suit.

5. Bills and notes ⚡502—Evidence tending to contradict execution held admissible.

In an action on notes claimed by defendant to be forged, court properly permitted person having knowledge of defendant's handwriting to testify under Code Civ. Proc. § 1870, subd. 9, and section 1943, as against plaintiff's objection that an estoppel on the part of defendant to assert that the notes were forged had been proved; plaintiff having introduced evidence tending to prove the notes were executed by the defendant, and the issue of execution having been raised by the pleadings and plaintiff not having offered a stipulation conceding that the notes were not executed by defendant.

6. Evidence ⚡368(1)—Searches and seizures ⚡7—Party held improperly required to produce letters.

In action on notes claimed by defendant to be forged, held, that the court erred in compelling the plaintiff to produce all letters in his possession signed or purporting to have been signed by the defendant or by plaintiff's transferor, no foundation having been laid for the production of the letters, in view of Const. art. 1, § 19, and Code Civ. Proc. § 1000.

7. Trial ⚡194(5)—Instruction as to expert testimony held erroneous.

An instruction "that the opinions of the witnesses as experts are merely advisory, and not binding on the jury," is erroneous as detracting from the effect of expert evidence.

8. Trial ⚡235(7)—Instructions as to evidence held erroneous.

The phrases "You are at liberty to reject it," and "If the testimony of experts is opposed to the jury's conviction, it is their duty to disregard it," and "They are presumed to have special or unusual knowledge," held erroneous in instructions as to expert testimony.

9. Evidence ⚡570—Duty of jury to weigh expert testimony with other evidence and then determine where truth lies.

It is the duty of the jury to consider and weigh the opinions of the experts with the other evidence in the case, and then determine upon all the evidence where the truth lies.

10. Appeal and error ⚡1064(2)—Trial ⚡183—Statute as to instruction unconstitutional but instruction thereon not prejudicial.

Code Civ. Proc. § 2061, subd. 4, providing that the jury should be instructed that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution, is unconstitutional, and in violation of Const. art. 6, § 19, providing judges shall not charge the jury with respect to matters of fact; but an instruction framed under such statute is not prejudicial, since it states merely commonplace matter within the general knowledge of the jury.

11. Trial ⚡194(5)—Instruction as to value or manner of determining expert testimony erroneous as on matters of fact.

An instruction to the jury as to the value of or manner of determining expert testimony is in violation of the constitutional provision (art. 6, § 19) as to instructing on matters of fact.

12. Trial ⚡206—Statutes held not to authorize instruction as to expert testimony.

Code Civ. Proc. § 2061, does not, in terms, at least, authorize the court to charge the jury as to expert testimony.

13. Witnesses ⚡388(3)—Evidence concerning conversation with party held admissible as against objection to impeaching questions as having no proper foundation.

In an action on notes which defendant claimed were forged, where plaintiff had given evidence of statements by defendant in the nature of admissions of execution of the notes, the defendant could testify to such conversations as against plaintiff's objections to "impeaching questions" as having no proper foundation laid under Code Civ. Proc. § 2052; no foundation being necessary, as the testimony went to the merits of the question of defendant's responsibility for the notes.

14. Evidence ⚡151(2)—Testimony of intent in initialing notes claimed to be forged held admissible.

In an action on notes which defendant claimed were forged, but which she initialed,

the court did not err in overruling plaintiff's objection to questions put to defendant covering her intent at the time she initialed the notes; the inquiry apparently calling for evidence of a fact of which the witness had primary knowledge.

15. Evidence — 567—Interrogation of handwriting expert on cross-examination should be permitted.

Where a handwriting witness testified under Code Civ. Proc. § 1870, subd. 9, and section 1943, the court should permit him on cross-examination to be interrogated as to his opinion, though the matter rests largely in the discretion of the trial court.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. J. Norton, Judge.

Action by Emil Hirshfeld against Rosé Dana, also called Rosalia Dana. Judgment for defendant, and plaintiff appeals. Reversed.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, for appellant.

Paul M. Gregg, of San Luis Obispo, Charles N. Douglas, of San Francisco, and Albert Nelson, of San Luis Obispo, for respondent.

LAWLOR, J. Plaintiff sued to recover from defendant the amount of four promissory notes in varying sums. The complaint is in four counts, each setting out as a cause of action a promissory note. The first note was for \$500, dated January 19, 1918; the second for \$600, dated February 4, 1918; the third for \$1,000, dated February 4, 1918; and the fourth for \$700, dated June 20, 1918. Each count alleges that defendant made, executed, and delivered for a valuable consideration the said note to the payee thereof, William J. Murphy; that it was by the payee indorsed, assigned, and transferred before maturity to the plaintiff. The prayer asks for judgment for the total amount due on each and all of the said four notes. Defendant filed a verified answer, and denied that she made, signed, executed, or delivered any of the said notes, or that they were made for a valuable consideration, that they were genuine, or that she authorized any person to sign her name, or to make, or to execute the said notes or to deliver them to William J. Murphy. It is also denied that William J. Murphy indorsed, assigned, transferred, or set over to plaintiff any promissory note executed by defendant.

The case was tried by jury. The verdict and judgment were in favor of defendant. A motion for a new trial based on the insufficiency of the evidence to justify the verdict, that the verdict is against law, and errors in law occurring at the trial and excepted to by the plaintiff, was interposed by

plaintiff and denied. Plaintiff appeals under the alternative method, and relies for reversal on asserted errors in the rulings on evidence and in the instructions given at the request of respondent.

Appellant's position on the trial was that by respondent initialing the notes on the face thereof after they passed into his possession, and by declarations and conduct, she was estopped to deny their execution and her liability. Estoppel was not pleaded, but it was litigated on the trial, and in addition to the evidence of the notes and the acts and declarations of the parties expert testimony as to the signatures was received pro and con. Respondent also offered evidence tending to show the absence of intention to admit the genuineness of the notes or to acknowledge her liability when she initialed them. The evidence will be sufficiently described in the discussion of the points presented on appeal.

1. Appellant contends:

"The court erred in excluding portions of the deposition of the witness Isaac C. Scharff."

The point to the contention is that the excluded evidence tended to contradict respondent's testimony to the effect that she did not execute the notes in controversy, nor initial them in consideration of the extension of the time of payment thereof. Scharff had testified he held certain notes of respondent which were overdue and upon which he was demanding payment. We quote from the record:

"Q. Did you have any conversation with her at any one of these interviews with reference to any other notes than those notes you have just mentioned? A. Yes, sir; the second time when she called at my office I demanded payment. She stated that she had come from Mr. Hirshfeld's office in the Claus Spreckels Building, and stated that he had extended her some time on the payment of the notes he held, and wanted to know if I couldn't do the same thing, and I told her the notes were past due, and we desired to have our notes paid.

"Mr. Nelson (interjecting): Now, we move to strike out as not responsive to the question all after the words 'Yes, sir' in that answer.
* * *

"The Court: Strike it out.

"Mr. Nelson: I would like the court to instruct the jury that anything stricken out is not for their consideration.

"The Court: Yes. When any testimony is ordered stricken out by the court, the evidence is not before the jury, and it is to be entirely disregarded by them, and it is not to be considered by them as evidence in the case.

"Mr. Peterson (continuing to read the deposition): Q. Did she say anything further in that interview on the subject of Mr. Hirshfeld and the notes that he had extended payments on, other than you have just mentioned?

"Mr. Nelson (interjecting): We object to that as assuming to be in evidence that which

is not, incompetent, irrelevant and immaterial.

* * *

"Mr. Nelson: The only thing in the record is 'Yes, sir' in answer to this other question, and it assumes that to be in evidence which is not. There is nothing in here about Mr. Hirshfeld.

* * *

"Mr. Nelson (supplementing objection): And no proper foundation.

"The Court: Overruled.

"A. No.

"Q. Did you ever have any other conversation with her on the subject of Mr. Hirshfeld? A. No; not that I can recollect. Yes; in the month of December, when she came up and again stated that Mr. Hirshfeld was going to extend the time, and wanted me to do it also, because she had so many notes she had to take care of. I told her again I couldn't help what Mr. Hirshfeld or anybody else had done in the matter, the party I represented wanted the money paid, which was done in January, 1919.

"Mr. Nelson (interjecting): We move to strike out all of the answer after the word 'December' as not responsive to the question. The question is, 'Did you ever have any other conversation with her on the subject of Mr. Hirshfeld?' Answer, 'No; not that I can recollect. Yes; in the month of December; I think it was December.' Now, we ask that all of that answer after that word 'December' appearing for the second time be stricken out as not responsive to the question.

"Mr. Peterson: Here is a case, if the court please, where counsel was present, where he had a right to make that sort of an objection if he desired, and it could have been cured at the taking of the deposition by a further question, and we submit that the question of not responsive cannot be raised in that manner.

"The Court: Well, I don't understand it is waived; strike it out.

"Mr. Nelson: All after the word 'December' goes out. * * *

Section 2032, Code of Civil Procedure, provides that a deposition is "subject to all legal exceptions." The appellant complains of the striking out of this testimony, and states:

"It is a fundamental rule of evidence that the only one who can make the objection that an answer is not responsive is the person who asks the question."

Appellant's contention is supported by the decision of the Supreme Court of Michigan in *Merkle v. Bennington*, 58 Mich. 156, 163, 24 N. W. 776, 779 (55 Am. Rep. 666). The opinion was written by Mr. Justice Cooley, and upon that subject he states the rule as follows:

"The defense, in attempting to meet the case of the plaintiff as to the bridge being out of repair, called Conrad Dench as a witness and proved by him that he crossed the bridge within the 30 days preceding the time of injury. He was then asked, 'Did you notice the planking?' and replied, 'When I went across, it was all right.' The answer on motion was stricken out. The ruling is now supported in argument on the grounds, first, that the answer was not responsive to the question, and, second, it was an expression of opinion, and for that reason

not proper. The objection that an answer is not responsive is one to be made by the party who puts the question; not by his antagonist. If the answer is in itself proper evidence, the party who is examining the witness has a right to take and retain it if he chooses to do so. His doing this merely saves him the trouble of putting another question to draw it out. But in this case it is only on a technical construction that the answer could be held not responsive. The witness was fairly notified by the question put that the purpose was to prove by him the condition of the planking as he found it, and he answered at once that the planking was all right. * * *

The rule is similarly stated by the Supreme Court of Iowa, in *re Will of Dunahugh*, 130 Iowa, 692, 694, 695, 107 N. W. 925, 926, as follows:

"III. During the examination in chief of a witness for contestant, counsel for proponent repeatedly interrupted with an objection that the answer of the witness was not responsive to the question, and such objections were sustained. It is insisted that herein was error, and this for the reason that no one but the party conducting the examination of a witness can be heard to object to an answer on the ground that it is not responsive. We agree that the rule is as contended for by counsel. If the evidence given by a witness is competent and material, the examining party may adopt it even though not strictly in response to the question propounded. 'The objection that an answer is not responsive is one to be made by the party who does the questioning and not by his antagonist; if the answer is proper evidence, the party who is examining the witness has the right to take and retain it if he desires so to do.' *Merkle v. Bennington* Tp., 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666."

See also, *Zenor v. Smith*, 150 Iowa, 424, 428, 130 N. W. 382, 384, where it is said:

"The answer was not responsive but that was not a ground for striking it out on defendant's motion, unless it was in itself improper."

It was declared in *Hamilton v. People*, 29 Mich. 173:

"The objection that the answer was not responsive was one which did not concern the prosecution, if it was relevant. The party examining a witness may sometimes object to volunteered and irresponsible statements made by a witness aside from his questions. But if he is willing to accept the answer, and if it was one he would have had a right to elicit, the opposite party cannot complain. There are cases, as in *Greenman v. O'Connor*, 25 Mich. 30, where the deposition of a witness is taken on settled written interrogatories, when an answer not called for may be objected to by either party for surprise, inasmuch as, if the question had been so put in writing as to call for it, other interrogatories might have been framed accordingly, which might have led to explanation. But no such difficulty can arise, where the witness is examined openly and orally, and where a question calling for such an answer would have been competent."

The Greenman Case is cited in Week's Law of Depositions, § 404. See 9 Cal. Jur. § 33, p. 432.

[1] It is true that the opposing party may move to strike out testimony that is for any reason improper to be admitted, or may move to strike out an irresponsible answer in order that an objection, though not well taken, may be saved; but no such situation is presented by the record in this case. The second question above quoted, referring back, as it did, to the answer previously given, coupled with the answer thereto, in a sense restored to the record the part ordered stricken out. The court should have ordered the part of the answer restored, in view of the fact it was embodied in the question and answer that followed. It was therefore error for the court to instruct the jury to disregard the evidence thus stricken out when it appeared from the deposition that the witness had adopted the answer to the previous question as a part of his answer to the question which was permitted. A somewhat similar situation was considered by the Supreme Court of Massachusetts in the case of *Conner v. Standard Publishing Co.*, 183 Mass. 474, 478, 67 N. E. 596, 597, which the court disposed of in the following manner:

"The jury had before them Roger's testimony that he gave orders not to take any more insurance for the plaintiff. We mention this because his counsel seem to assume the contrary in their brief. The answer was first stricken out as not responsive, but in answer to a subsequent question the witness testified that the explanation that he had made covered his answer better than either yes or no. That put the previous answer in evidence."

[2] The respondent does not attempt to justify the action of the trial court in striking out parts of the foregoing answers, but contends that the whole deposition should have been excluded because of a defective certificate. The point made by the respondent is that the certificate of the notary certified that the deponent had read the deposition instead of certifying that it had been read to him. The trial court properly overruled this highly technical objection. *Higgins v. Wortell*, 18 Cal. 331; *Short v. Frink*, 151 Cal. 90, 90 Pac. 200.

[3] It is necessary to consider whether the exclusion of the foregoing evidence calls for a reversal of the judgment. The constitutional provision includes "the improper admission or rejection of evidence." While it is not our province in appraising error under the constitutional rule of decision on appeal to weigh the evidence as would the triers of the fact, still we are required "to some extent, to weigh the evidence, and form conclusions upon its weight." *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042.

[4] The principal questions of fact were, first, whether respondent executed the notes in controversy, and, second, whether she in-

itiated them in consideration of an extension of time. It is to be noted that Murphy, who transferred the notes to appellant, did not testify, so that the excluded testimony might have had a vital effect in determining the question of veracity between the parties to the action. In this state of the matter it is readily conceivable that the exclusion of respondent's statements to Scharff that appellant granted her time on the notes he held might have been directly responsible for the verdict. This being so, we are of the opinion that the error resulted in a miscarriage of justice, for which the judgment must be reversed.

We will now consider with reference to a new trial several other points presented on the appeal.

[5] 2. The next ground urged for reversal is that the court erred in admitting any evidence on behalf of the respondent except on the claim of estoppel. We quote from the reply brief of appellant:

"We repeat, there was but one issue to be submitted to the jury. Under the evidence as introduced by the plaintiff that question is, 'Was the respondent estopped to plead a forgery in this case?' The evidence on the subject of the original execution was irrelevant, incompetent, and immaterial on that issue and should have been excluded."

Appellant testified that he received each note from the payee, William J. Murphy, before maturity, and for a valuable consideration; that in September, 1918, respondent called upon him in his office, and said "she couldn't pay the amount due on those notes at the present time; she wanted a little time for it; and she told me she would be able to pay it on the 15th of January, as at that time she expected some money coming in from the crop." The witness further stated that he agreed to the extension of time but "to avoid any further trouble in the future she should acknowledge the signature by signing 'OK' and 'RD' on each note." According to the evidence, a Mr. Franklin was at his desk in the office at the same time, but did not see respondent initial the notes—"he was sitting back of me and didn't pay any attention to what was going on." The witness also stated that one morning in October, 1918, he met respondent on Market street, and she said: "I am going up to see Mr. Scharff. * * * I am not going to pay your notes, neither; you better collect it from Mr. Murphy." He answered: "Mrs. Dana, how can you ask anything like that when you acknowledged the signatures, and wrote the 'OK' and 'RD'?" Respondent answered: "I don't care; you forced me to do that." It appears that a few minutes later respondent came to his office, and as to this interview appellant testified:

"Mrs. Dana said, 'Why do you leave me standing on the street so abruptly?' I said,

"Mrs. Dana, you made remarks which were very, very uncalled for." She says, "You mustn't take it—I am so nervous, I don't know what I am doing; you don't need to be afraid; I signed those notes and I will pay them."

This conversation occurred in the presence of Sidney H. Abrams, who had desk room in the same office. His deposition was introduced in evidence, in which he stated he overheard respondent say:

"You seem to be very anxious; is my name not attached to the notes; ain't I good for it; have you any doubts?" Mr. Hirshfeld answered that "If I had any doubts I would not take them; but I need my money."

We have already referred to the deposition of Isaac C. Scharff. The appellant then rested.

The first witness called for respondent was Samuel Dana, her brother-in-law, who testified as one having personal knowledge of her handwriting under subdivision 9, § 1870, and section 1943, Code of Civil Procedure. Appellant objected to the witness testifying as to respondent's handwriting upon the ground "we have proven an estoppel on the part of Mrs. Dana to assert that these notes are forgeries under the Negotiable Instrument Law," and cites a number of authorities as to the effect of an estoppel when established. The objection was overruled, and the witness testified. Respondent admitted having initialed the notes, but offered the explanation that it was done at the instance of appellant, in order, as he represented to her, to facilitate the prosecution of Murphy. It appeared that Murphy had borrowed \$500 from respondent and \$300 from appellant. Respondent testified she had not in the conversations with appellant said Murphy had forged her signatures to the notes, and added: "I believed he had signed these notes." She admitted to appellant the signatures looked like her own. She also stated she wrote the "RD" and appellant the "OK" appearing therewith on each note, but denied she ever admitted their execution or that she ever promised to pay them. Estoppel was only presented by the evidence—to the introduction of which respondent did not object. She claims, however, that as the due execution of the notes was put in issue by the pleadings it was properly submitted to the jury. Her answer to appellant's contentions that the estoppel was established, and that no evidence except on that issue should have been admitted, is that estoppel was not, but the execution of the notes was, pleaded, and therefore the evidence on the execution of the notes was properly received. If appellant failed to establish an estoppel, in order to recover he would be required to prove the due execution of the notes. He had in fact already introduced evidence relevant to that issue. The statements of respondent, above quoted, were in the nature of admissions on

her part that she had in fact executed the notes. It was therefore evidence in behalf of appellant tending to prove the allegation of the complaint that the notes were executed by respondent. The circumstances that this evidence was also relevant to the issue of estoppel did not deprive it of its relevance to the issue of execution. The issue of execution having been raised by the pleadings, and appellant having introduced evidence tending to prove it, respondent was entitled to introduce evidence to disprove it. If appellant desired to exclude this evidence, he could have offered a stipulation at the trial conceding that the notes were not executed by respondent. This he was apparently not willing to do, and the evidence was therefore properly received.

[6] 3. A further ground of error is thus stated:

"The court erred in compelling the plaintiff to produce all letters in his possession signed or purported to have been signed by the defendant or by one William J. Murphy."

On the cross-examination of appellant he was asked if he had seen any letters that purported to have been written by respondent to Murphy. It was represented by respondent that such letters were to be used on the cross-examination of appellant. Appellant answered that he had seen such letters and had given them to his attorney. Appellant's attorney was then called, and asked if he had the letters in his possession. He replied he had seen such letters, and that they were among the papers in the case. A demand was then made that he produce them, and, notwithstanding the objection of counsel for appellant on the ground that until their relevancy or character is specified the court has not power to order them produced, the court directed their production. When the letters were produced they were marked for identification. Respondent did not offer them in evidence, and her counsel stated:

"The only letters we have we are going to use by way of exemplars possibly, if we go into that question."

Appellant claims the order for production was a mere fishing expedition, and that respondent "used the opportunity thus afforded her by the order of the court directing the marking of these documents as exhibits and the fact that the papers were then in the custody of the clerk to determine in her own mind those of the instruments which she would admit as having written and those of the instruments which she would deny as having written." It is clear there was no foundation laid for the production of these letters and the order was therefore in violation of the provisions of article 1, § 19, of the Constitution, and section 1000 of the Code of Civil Procedure.

4. Appellant contends that portions of the following instructions, proposed by respondent and given to the jury as modified, are erroneous in several particulars, and constitute a charge with respect to matters of fact:

(1) "(a) The opinions of expert witnesses are entitled to such weight as you deem proper to give them. You may accept or reject such opinions as you may accept as true or reject as false any other facts in the case."

"(b) The jury are instructed that the opinions of the witnesses as experts are merely advisory, and not binding on the jury, and the jury should accord to them such weight as they believe, from all the facts and circumstances in evidence, the same are entitled to receive."

(2) "The opinion of experts who have testified in this cause is testimony which the jury should consider and examine in connection with all the other testimony in this case, subject to the same rules of credit and disbelief as the testimony of other witnesses."

(3) "In regard to the weight to be given by you to the testimony of experts called to testify in regard to the signatures of the promissory notes set out in the complaint, I instruct you as follows: The law permits, in certain cases, a skilled person to give his opinion in testimony in regard to matters in which he is specially skilled; but *such testimony should be received by you and you should award to it such value as in your judgment it deserves (with great caution)*, and you are at liberty to reject it, the same as the testimony of any other witness, if after due consideration you deem it not well founded in fact. And in regard to said signatures, you are at liberty to use your own judgment and knowledge in matters of handwriting, and are not legally compelled to follow the opinion of either of said witnesses. In other words, you should consider their testimony precisely the same as you do any other witness. You are not legally bound to adopt their theory unless you are satisfied that it is correct. If you are satisfied their theory is correct, then it should be adopted, and you should act upon it accordingly."

(4) "I also instruct you in regard to expert testimony that you are to exercise an independent judgment in this case, giving to such expert testimony such weight only as you deem it is entitled to; such expert testimony does not preclude you from exercising your own judgment upon the subject, and, furthermore, such expert testimony, like all opinion evidence, ought to be received by you with scrutiny and (much) caution."

(5) "Expert testimony is the opinions of witnesses on special subjects in which they are presumed to have special or unusual knowledge. In general, testimony is to facts only, but one exception to the general rule is expert testimony, which is as to the opinions of the experts. *Such testimony must receive just so much weight and credit as the jury deem it entitled to when viewed in connection with all the evidence, and no more.* Upon a jury rests the responsibility of rendering a correct verdict, and if the testimony of experts is opposed to the jury's conviction, it is their duty to disregard it. Such evidence, as all evidence of opinions, ought to be considered with careful scrutiny and with (much) caution."

(5) "Witnesses have testified as to certain oral statements they claim that the defendant in this case made in their presence. In considering such testimony I specifically charge you that you must receive such evidence with caution."

[7-9] It is conceded paragraph (a) of instruction 1 is correct. The phrase in instruction 1 (b) "that the opinions of the witnesses as experts are merely advisory, and not binding on the jury," is claimed to be erroneous. The expression "merely advisory" is not a correct description of the respective functions of the jury and the expert. Their respective functions are entirely independent. When the instruction is analyzed and considered, apart from other instructions, it is open to the objection that it may detract from the effect of expert evidence, in that it might lead the jury to believe it was optional with them whether to weigh such testimony as they would that of any other class of witnesses. It is true the jury were told that the opinion of the expert must be weighed with the other evidence in the case, and, if found satisfactory, to follow it, but the statement "is not binding on the jury" may have had a misleading effect. If the statement that the opinion of an expert is not binding on the jury is not considered with the other instructions, the phrase could well be misunderstood. Instruction 2 is not questioned. The phrases "you are at liberty to reject it" in instruction 3, and "if the testimony of experts is opposed to the jury's conviction, it is their duty to *disregard it*," in instruction 5, are lacking in accuracy. The words we have italicized inject a false quantity into the instruction. The jury is to keep such evidence, as it would any other, before them until the facts are determined. For the italicized words, "*they are presumed to have special or unusual knowledge*," in instruction 5, "may have" would meet appellant's criticism. It is the duty of the jury to consider and weigh the opinions of the experts with the other evidence in the case and then determine upon all the evidence where the truth lies. This is not the same as declaring that the jury may disregard the evidence of the expert. All the evidence, including the opinions of the experts, should remain in a state of solution, so to speak, until the facts of the case are finally determined. Moreover, it is only in criminal cases that the jury is to be satisfied to a "conviction." In civil cases a preponderance of evidence will suffice.

We will later state our views on such cautionary phrases as those contained in instructions 3, 4, 5, and 6.

Appellant cites, in support of his contentions that the court charged the jury as to matters of fact, article 6, § 19, of the Constitution, sections 2061 (subdivision 4) and 2101 of the Code of Civil Procedure; Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am.

St. Rep. 135; Estate of Hess, 183 Cal. 589, 192 Pac. 35; Quint v. Dimond, 147 Cal. 707, 714, 82 Pac. 310; People v. Wilkins, 153 Cal. 530, 111 Pac. 612; People v. Hadley, 175 Cal. 118, 123, 165 Pac. 442.

The Constitution provides:

"Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Article 6, § 19.

In connection with the claim that the court invaded the province of the jury in its charge on expert testimony, the question is discussed in the briefs whether subdivision 4, § 2061, Code of Civil Procedure, is in violation of said constitutional provision. That section reads in part as follows:

"The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed * * * on all proper occasions: * * * 4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution."

Subdivision 4 has been considered in a number of cases with reference to the constitutional provision. In Kauffman v. Maier, 94 Cal. 269, 282, 29 Pac. 481, 484 (18 L. R. A. 124) the court instructed the jury that—

"The statements of the witnesses as to the verbal admissions of a party should be received by the jury with great caution."

It was held the instruction was violative of the constitutional provision, and that the error was not obviated by the closing sentence therein, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled. The word "great," characterizing "caution," it will be observed, is no part of the statutory provision. People v. Sanders, 114 Cal. 216, 237, 46 Pac. 153, however, decided in department that the phrase "great caution" is correct, and should be given on all proper occasions. But see reference to that case in People v. Wardrip, 141 Cal. 229, 232, 74 Pac. 744. It was held in People v. O'Brien, 96 Cal. 171, 179, 31 Pac. 45, that the giving of an instruction proposed by the people in the language of subdivision 4 constituted a charge on a question of fact by in effect telling the jury to discredit the accomplice who was called on behalf of the defendant.

The instruction proposed by the defendant and refused by the court in People v. Bonney, 98 Cal. 278, 33 Pac. 98, was in the language of subdivision 4, and it was held that, as the only evidence which would justify a conviction was the testimony of an accomplice of the defendant, the court erred in refusing the instruction. After calling attention to the fact that in People v. O'Brien, supra, the instruction condemned was given at the request of the prosecution, the court said:

"For the court, however, to discredit one of defendant's witnesses before the jury is very different from giving them an instruction in his favor."

An instruction given under subdivisions 6 and 7 of section 2061 was held to be erroneous in People v. Cuff, 122 Cal. 589, 591, 55 Pac. 407, citing Kauffman v. Maier, supra, and People v. O'Brien, supra.

The court, in People v. Rodley, 131 Cal. 240, 258, 63 Pac. 351, refused to give an instruction proposed by the defendant as to his oral admissions and referring to two of his witnesses by name. Instead, the whole of section 200, 1 Greenleaf on Evidence, was given to the jury. The decision approved Kauffman v. Maier, supra, but held the defendant would not be heard to complain, since the instruction given was proposed by him.

In People v. Wardrip, 141 Cal. 229, 231, 74 Pac. 744, the defendant proposed and the court refused to give an instruction:

"The jury is instructed that, in considering the testimony in this case, they will receive with caution all evidence of the oral admissions of the defendant against himself."

It was said that as the former decisions of the court stand, the weight of authority is to the point that the instruction is in violation of the constitutional provision, citing Kauffman v. Maier, supra, but holding it was not necessary to decide the question, saying:

"The proposed instruction states a mere commonplace within the general knowledge of jurors; and we do not think that either the giving or the refusing of such an instruction would warrant a reversal."

In denying the petition for a rehearing it was stated:

"That, so far as the statute requires such an instruction ever to be given, it is unconstitutional, for the reason that such an instruction would be in violation of the constitutional injunction against judges charging as to matters of fact. It has frequently been said by this court that the giving of such an instruction will not be held reversible error where by it the jury are instructed as to mere commonplace matters within their general knowledge (People v. Wong Bin, 139 Cal. 60, 65; People v. Farrington, 140 Cal. 656), but we are satisfied that a judgment should never be reversed for the refusal on the part of the court to instruct upon matters of fact."

The instruction proposed by the defendant and refused in People v. Buckley, 143 Cal. 375, 391, 77 Pac. 169, was held to be objectionable on the grounds that the phrase "great caution" was in excess of the language of the statute, and that it was otherwise argumentative. Kauffman v. Maier, supra, was approved in the opinion, and People v. Rodley, supra, cited. It was pointed out that the authorities relied upon by appellant were

all cases where the proposed instruction was limited to the language of the statute. Five justices joined in the above conclusion. Lorigan, J., announced he was not disposed to hold that the giving of an instruction as to verbal admissions is violative of the Constitution, and that he is in accord with *People v. Wardrip*, supra—

"that such an instruction 'states a mere commonplace within the general knowledge of juries; and we do not think that either the giving or the refusing of such an instruction would warrant a reversal.'"

Beatty, C. J., retracted his concurrence in what was said in response to the petition for a rehearing in *People v. Wardrip*, supra. He placed his concurrence in *People v. Buckley*, supra, upon the defects in the proposed instruction already indicated, and expressed the view that section 2061 is not unconstitutional, for the reason that the power of the Legislature to determine what is or is not competent in civil or criminal cases is unquestionable; that to require the court to instruct the jury on all proper occasions to view the testimony of an accomplice with distrust, or the evidence of the oral admissions of a party with caution, is not to charge the jury as to matters of fact, "but merely to state the condition upon which the jury is permitted to hear that class of evidence"; that the allowance of such instructions is obligatory in every proper case, and that it is prejudicial error to refuse them when requested by a party against whom such evidence has been given.

The instructions proposed by the defendant and refused in *People v. Moran*, 144 Cal. 48, 63, 77 Pac. 777, were not in conformity with the language of subdivision 4, and for that reason Beatty, C. J., who wrote the main opinion, justified the refusal. He again declared that section 2061 is constitutional, and that the refusal to give an instruction within the language of subdivision 4 is reversible error. Henshaw, J., concurred with the Chief Justice, but four of the justices, in concurring in the judgment, adhered to the views expressed in denying the petition for rehearing in *People v. Wardrip*, supra. Lorigan, J., who did not act on the petition for rehearing in that case, stated, in concurring in *People v. Moran*, supra, that, as far as the constitutional point is concerned he did not wish to go farther than is stated in *People v. Wardrip*, supra, that such an instruction "states a mere commonplace within the general knowledge of jurors; and we do not think that either the giving or refusing such an instruction would warrant a reversal."

In *People v. Ruiz*, 144 Cal. 251, 253, 77 Pac. 907, 908, the defendant proposed and the court refused to give an instruction in the language of subdivision 4. It was said:

"The instruction offered is in the language of subdivision 4 of section 2061 of the Code of Civil Procedure, but it was definitely held in *People v. Wardrip*, 141 Cal. 229, that a refusal to give such an instruction is not error."

Five of the justices concurred in the decision. Beatty, C. J., in a dissenting opinion, reiterated his former views as to the constitutionality of the section and the necessity of giving an instruction when proposed within the terms of subdivision 4, and that it was a proper occasion for the giving of such an instruction and error to refuse it. In that case the instruction could only have applied to an accomplice of the defendant. We quote from the dissenting opinion:

"The trial judge, however refused the instruction, and the ruling is sustained on the authority of *People v. Wardrip*, 141 Cal. 229. I concurred in that decision, but have since become convinced that it was erroneous, and in subsequent cases have so stated. *People v. Buckley*, 143 Cal. 375; *People v. Moran*, ante, p. 48. The *Wardrip* Case and the cases in which it has been followed upon this point leave it uncertain whether the refusal of this instruction is sustained upon the ground that section 2061 of the Code of Civil Procedure is unconstitutional or being constitutional the injunction it lays upon the court may be observed or disregarded at its pleasure."

Henshaw, J., did not participate in the decision.

We cite other cases which follow the decisions holding that the giving or refusal of an instruction in the language of subdivision 4 is violative of the Constitution, but that the giving or refusal to give such an instruction would not warrant reversal, as it states mere commonplace matter within the general knowledge of the jury. *Goss v. Steiger Terra Cotta*, etc., Works, 148 Cal. 155, 82 Pac. 681; *People v. Raber*, 168 Cal. 316, 320, 143 Pac. 317; *People v. Hill*, 1 Cal. App. 414, 417, 82 Pac. 398; *People v. Davenport*, 13 Cal. App. 632, 636, 110 Pac. 318; *People v. Maljan*, 34 Cal. App. 384, 389, 167 Pac. 547; *People v. Middleton* (Cal. App.) 223 Pac. 448.

[10] It is clear from the later decisions that subdivision 4 is unconstitutional; but that where an instruction is proposed in the language of that subdivision, the giving or the refusal to give it will not be held to be prejudicial error; and this upon the reasoning that it states mere commonplace matter within the general knowledge of the jury. However, as it is settled law that subdivision 4 is unconstitutional it should never be made the basis of an instruction. In view of the decisions under the constitutional provision (article 6, § 19), the giving of such an instruction is a charge with respect to matters of fact. There is, therefore, ground for concluding that, where it is resorted to, it must be for the purpose of influencing the jury as to the evidence. Appellate courts should be spared the labor of condemning or

palliating departures from the settled law of the state, and litigants from the liability of reversal.

We will now review the authorities cited, as well as others which deal with instructions addressed to expert evidence.

It was stipulated that the expression "with great caution," as it appears in parenthesis in instruction 3, was not given to the jury, notwithstanding the indorsement thereon indicates it was. It is shown by the indorsements that the word "much" in instructions 4 and 5 was omitted. The only cautionary matter left are the words "with scrutiny and caution" in instruction 4, "with careful scrutiny and caution" in instruction 5, and "received with caution" in instruction 6.

The instruction in *McLean v. Crow*, 88 Cal. 644, 648, 26 Pac. 596, 597, containing the phrase "with scrutiny and caution" in relation to medical experts, was rejected. The court said:

"We see no objection to the instruction asked, and the court might well have given it, but it does not necessarily follow that the judgment should be reversed for the refusal."

Haight v. Vallet, 89 Cal. 245, 250, 26 Pac. 897, held it was not error to instruct the jury that the testimony of an expert on handwriting should be received with great caution. The case appears in 23 Am. St. Rep. 465, and was referred to in notes to *Hull v. St. Louis*, 42 L. R. A. 760n, and *State v. Ryno*, 64 L. R. A. 318n. The note to *Louisville, New Orleans & Texas Railway Co. v. Whitehead*, 42 Am. St. Rep. 472, quotes from *Haight v. Vallet*, supra:

"Expert evidence should be received with great caution, and rejected by the jurors the same as the testimony of any other witness if, after due consideration, they deem it not well founded in fact."

But the note also cites *Atchison, Topeka & Santa Fé Railroad Company v. Thul*, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484, to the effect that in an ordinary case it is error to instruct the jury that medical testimony should be received and weighed with caution. We quote from the syllabus of *Louisville, New Orleans & Texas Railway Co. v. Whitehead*, supra:

"An instruction that the evidence of expert witnesses is 'to be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous,' is fatally erroneous, for the reason that expert evidence is to be received and treated by the jury precisely as other testimony."

The dissenting opinion (the subject was discussed in the department but not in the main opinion) in *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188, a condemnation proceeding wherein substantially all the proof of values was the testimony of experts,

cites the case there in support of an instruction to the effect that in weighing the evidence the jurors may exercise their individual judgment as to the values in the light of their own general knowledge.

The action of the trial court was upheld in *People v. Smith*, 106 Cal. 73, 79, 39 Pac. 40, 42) in eliminating from two instructions the respective phrases, "caution should be exercised by the jury in accepting the opinion of an expert as a fact proven in the case," and "such evidence should therefore be received with great caution by the jury," and the following given in lieu thereof, approved:

"After considering all these things, and any other circumstances in evidence, you are to give to such testimony (such weight) as you in your judgment think it entitled to. * * * If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

In *People v. Barthleman*, 120 Cal. 7, 13, 52 Pac. 112, 114, instructions 5 and 6 related to the testimony of certain medical experts. The instructions contained such phrases as "the testimony was to be viewed with scrutiny" and "received with great caution." The court held:

"* * * The judgment should not be reversed for the giving of these instructions, without reference to the question whether or not it was strictly proper to give them. They merely told the jury to do what they should have done without any instruction on the subject; and therefore the giving of the instructions was not, at least, prejudicial error."

In *Estate of Blake*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, an order admitting a will to probate was reversed upon the ground that the following instruction so discredited the testimony of the medical experts as to practically destroy it:

"You are instructed, therefore, that while we receive and you will take into consideration the opinion of experts, such opinions are not entitled to as much weight as facts, especially where there is a conflict between an opinion and a fact; when a fact is established, it is a fact, and cannot be overcome; while an opinion is but an opinion, and it may be true and it may be untrue. Opinions of different experts are often diametrically opposed to each other, even when based upon the same supposed conditions."

The instruction in *Quint v. Dimond*, 147 Cal. 707, 714, 82 Pac. 310, was held to be substantially an argument to the jury in favor of plaintiff upon questions of fact, but it was not addressed to expert testimony.

It was held in *People v. Wilkins*, 158 Cal. 530, 537, 111 Pac. 612, 615, that the trial court did not err in refusing to give an instruction admonishing the jury "to scrutinize opinion evidence or expert evidence with the utmost care."

It was declared in *Rolland v. Porterfield*, 183 Cal. 466, 469, 191 Pac. 913, 914:

"Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character, and that, when there is a conflict between scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence. Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; Watson v. Watson, 58 Mich. 507, 25 N. W. 497."

The instruction condemned in Estate of Blake, supra, was given in Estate of Hess, 183 Cal. 589, 593, 192 Pac. 35, 40, where it was held to invade the province of the jury. The case, however, did not pass on the contention "that Estate of Blake having been decided prior to the adoption of section 4½, article 6, of the Constitution, is not authority for the reversal of the judgment herein because of the giving of instruction 23." The case was reversed upon the ground that the evidence was insufficient to show the decedent was mentally unsound.

In Estate of Nelson (Cal. Sup.) 216 Pac. 368, it was declared:

"Appellant contends that the trial court erred in refusing an instruction to the effect that the testimony of expert witnesses should be received with great caution. This instruction was properly refused Quint v. Dimond, 147 Cal. 707, 714, 82 Pac. 310; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; Rolland v. Porterfield, 183 Cal. 466, 191 Pac. 913; Estate of Hess, 183 Cal. 589, 192 Pac. 35."

In Wood v. Los Angeles Co., 1 Cal. App. 474, 82 Pac. 547, it was held not to be error to refuse to give a cautionary instruction proposed by the defendant which used the phrase "great caution" with reference to opinion evidence of medical experts. The rule followed in Haight v. Vallet, supra, was considered in connection with the later decisions on the question.

[11] It is clear from what is said on this subject in the later cases an instruction to the jury as to the value of or the manner of determining expert testimony is in violation of the constitutional provision as to instructing on matters of fact (article 6, § 19).

[12] Section 2061 does not, in terms, at least, authorize the court to charge the jury as to expert testimony. Subdivision 4 contains the only provision warranting an instruction as to particular classes of witnesses. There is, therefore, neither constitutional nor statutory warrant for the giving of cautionary instructions. Respondent seeks to excuse the giving of these instructions with the explanation that using the word "statements" instead of "admissions," so as to bring the instruction within the language of subdivision 4, was a typographical error. But this explanation does not meet the point that subdivision 4 is unconstitutional.

It may be remarked in mitigation of the error in the instructions that they did not refer specifically to the different classes of expert witnesses. Appellant called only one expert witness, and he qualified and testified under subdivision 9, § 1870, and section 1944, Code of Civil Procedure. Eight expert witnesses testified for respondent—three of them qualifying and giving their opinions under the same rule as appellant's witness, and five under subdivision 9, § 1870, and section 1943, as having knowledge of the handwriting of respondent. Appellant's expert was shown to be accomplished in the art of handwriting, and of the five who testified from knowledge of respondent's signature four were her relatives and one a friend. Of the three who based their opinion on a comparison of the writings with the signatures on the notes two of them qualified on their experience in the banking business and the other as an instructor in handwriting in a high school. Keeping these features of the case in mind, respondent's suggestion that it is more likely the cautionary instructions were considered by the jury with reference to respondent's witnesses rather than to appellant's expert may be true. However that may be, the trial courts should refrain from giving any instructions that infringe the constitutional provision (article 6, § 19). Since the law authorizes the admission of expert testimony, like all other matters of fact, it should be left strictly to the jury to weigh and determine its effect and value unaided by the court, either by disquisitions on that character of evidence or by directing the mental processes of the jurors as to how they should resolve it into facts. "The court has no right to dictate or suggest the process of reasoning by which the evidence shall be judged." Estate of Carpenter, 94 Cal. 406, 417, 29 Pac. 1101, 1104. It is no part of the function of the court to either extol or disparage the testimony of experts. It is proper in the instructions to the jury to call attention, for instance, to the distinction between expert testimony and the evidence of facts, to explain the office of exemplars in handwriting cases, to charge that the opinion of experts is to be considered with the other evidence in the case in determining the facts. But it is never proper to instruct the jury that expert testimony is or is not reliable or as to how the jury should appraise it.

5. Under point III appellant enumerates numerous rulings in the admission and rejection of evidence which it is claimed were erroneous.

[13] (A) It is contended a proper foundation had not been laid for impeaching questions put to Elisha Dana to elicit a conversation he had with appellant as to certain letters addressed by respondent to Murphy and by Murphy given to appellant, which it was claimed reflected on her character. The wit-

ness quoted appellant as saying the best thing respondent could do would be to pay the notes, and that if she did not do so he would expose her. There would seem to be no merit to the objection as to lack of foundation for impeachment. Respondent was entitled in the state of the inquiry to have the conversation established as an independent proposition without regard to impeachment and to prove what appellant did say even though he denied making the statements.

It is also claimed, on the ground no proper foundation was laid within the meaning of section 2052, Code of Civil Procedure, the court erred in overruling appellant's objections to "impeaching questions" put to respondent concerning conversations between them, including one in the lobby of the Palace Hotel in September, 1918. In appellant's testimony he had not given the latter conversation when respondent was examined. But prior thereto he had testified to this and to other conversations, and gave his version of them. The "impeaching questions" followed respondent's examination in chief and related to the above conversations, embracing the statements imputed to her by appellant, including her purported admission of the execution of the notes, her promise to pay them, her request for an extension of time, and other matters. As these conversations, as well as others, went to the merits of the question of the responsibility of respondent for the promissory notes, we do not perceive that a foundation was necessary.

In view of the reversal of the judgment, it will not be necessary to consider appellant's objections as to the type of questions complained of.

[14] (B) It is contended the court erred in overruling appellant's objections to the questions put to respondent covering her intent at the time she initialed the notes. Appellant's repeated objection was that the inquiry was incompetent, irrelevant, and immaterial, calling for the opinion and conclusion of the witness, and being the very question the jury has to determine. The court sustained an objection to each of such questions—that is to say, questions as to whether the witness intended by her initials to ratify the notes—and finally overruled an objection to the question:

"Q. Why was it you put the RD on these promissory notes? A. To help Mr. Hirshfeld lock Mr. Murphy up and put him in jail."

It is not altogether clear whether, if Murphy were to be prosecuted, it was to be for the making and uttering of the notes or obtaining the \$800 from the parties. Respondent did not state upon what it was proposed to prosecute Murphy, but when appellant was asked why respondent was angry at him he answered:

"Because he took advantage of her getting her notes and discounting them and using the money, I suppose."

The inquiry apparently called for substantive evidence of a fact of which the witness had primary knowledge—namely, why she initialed the notes.

(C) It will serve no purpose to consider these objections.

(D) We think this proposed evidence was too remote to prove appellant was relying on respondent and not on Murphy to meet the obligations.

(E) On the retrial the question whether respondent should have been allowed, over appellant's objection, to testify she had not engaged Murphy to manage her ranch, which testimony was merely in response to appellant's extrajudicial statement to her that Murphy had so told him, will probably not arise.

[15] (F) Appellant contends the court erred in limiting the cross-examination of Elisha Dana as to respondent's handwriting, by not allowing the witness to make a comparison between the signatures on the notes, which he testified were not in respondent's handwriting, and appellant's exhibit No. 6, an admitted handwriting of respondent. The witness was testifying under subdivision 9, § 1870, and section 1943, and the court sustained the objection on the ground it was not cross-examination. While this is a matter resting largely in the discretion of the trial court, the witness should be sufficiently interrogated as to his opinion.

(G) This specification does not call for comment.

(H) The witness, Samuel Dana, apparently based his opinion in part on his personal knowledge of the controversy, and to an extent on his knowledge of respondent's handwriting. However, he finally placed his opinion on the latter. If he is again called as a witness, his examination may more clearly show the foundation for his opinion.

(I) We have already discussed this point.

(J) It is contended by appellant that the court erred in excluding testimony of a purported conversation between appellant and respondent in 1917 in which it is claimed the latter admitted the execution of certain notes of that year; the extinguishment of which was the consideration for two of the notes in suit—those dated February 4, 1918. The objection to the proffered testimony was that it was "incompetent, irrelevant, and immaterial, not proper redirect examination, and going into collateral matters, and vague, indefinite, and uncertain." The court finally said:

"Well, I will sustain the objection to the question. Of course, I think probably upon rebuttal you would be entitled to bring out the

conversation but relating to this transaction here."

The inquiry was not resumed, and in all probability this objection will be obviated on the retrial.

Judgment reversed.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; KERRIGAN, J.; WASTE, J.; SEAWELL, J.

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NORTH PAC. S. S. CO. v. SOLEY.
(S. F. 10435.)

(Supreme Court of California. Feb. 1, 1924.)

1. Admiralty ⚓20—Injury held without jurisdiction of Industrial Accident Commission.

Injuries to a stevedore while loading a cargo on board a ship lying in navigable waters of the United States and engaged in interstate commerce held within the general maritime law, and not within the jurisdiction of the State Industrial Accident Commission.

2. Master and servant ⚓417(5)—Reviewing court may annul compensation award for want of jurisdiction of Commission.

On review under Workmen's Compensation Act, § 67, of an award of the Industrial Accident Commission, the court may determine whether the Commission acted in excess of its powers and, if it has, may annul the award.

3. Master and servant ⚓417(5)—Review of compensation proceedings controlled by statute.

The method of review of an award of the Industrial Accident Commission being statutory, the courts can only review questions raised by the record of proceedings before the Commission by the method prescribed by statute.

4. Constitutional law ⚓312—Refusal of injunction not denial of due process.

Denial of an injunction restraining an injured employee from enforcing an award of the Industrial Accident Commission which was concededly in excess of its jurisdiction, but from which no timely appeal had been taken or review had, held not the deprivation of the employer of its property without due process of law.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the North Pacific Steamship Company against William T. Soley and the Industrial Accident Commission of the State of California. From a decree for the last-named defendant, plaintiff appeals. Affirmed.

Glensor, Clewe & Van Dine, of San Francisco, for appellant.

Heidelberg & Murasky, of San Francisco, and Herbert N. Ellis, of Los Angeles, for respondent.

WASTE, J. Plaintiff brought this action to secure an injunction perpetually restraining the Industrial Accident Commission of the state of California and William T. Soley from enforcing an award made by the Commission to Soley for injuries alleged to have been sustained by the latter in the course of his employment by this plaintiff. The action was dismissed as to the Commission. The demurrer of defendant Soley to the first amended complaint was sustained without leave to amend, and from the judgment that plaintiff take nothing by its action, it has appealed.

From the allegations of the complaint it appears that plaintiff was engaged in the business of transporting freight and passengers in interstate commerce between various points on the Pacific Coast in the state of California and the states of Oregon and Washington. While so engaged it owned and operated the ocean-going steamer Breakwater. On a day in June, 1916, while the Breakwater was lying in navigable waters of the United States, in the harbor of San Diego, loading a cargo, and at said time actually engaged in interstate commerce, defendant William T. Soley, employed on the vessel as a stevedore, sustained severe injuries by falling down a hatchway. In due course Soley filed an application for compensation for his injuries with the Industrial Accident Commission of the State of California. Throughout the proceedings which followed plaintiff protested against any award being made. It denied the jurisdiction of the Commission to entertain the application and alleged that the accident causing the injury arose out of and in connection with, and was exclusively within, the admiralty and maritime jurisdiction of the United States courts. Notwithstanding the objection of the plaintiff, and over its protest, the Commission made, entered, and filed its findings in favor of the applicant, and awarded him substantial compensation for his injuries. The order of the Commission making said award is now in full force and effect. A certified copy of the findings and award of the commission has been filed with the clerk of the superior court, and it is alleged that Soley, unless restrained, will cause execution to be issued against the plaintiff for the amount of the award, or as much thereof as may be due and unpaid. Other allegations of the complaint are to the effect that the plaintiff has no plain, speedy, or adequate remedy at law. The prayer of the complaint is for an injunction restraining the defendant from seeking to enforce the award of the Commission.

[1-3] Under the facts alleged in the complaint, the liability of plaintiff to Soley for the injuries sustained by him presented a case arising under the general maritime law. Consequently the Industrial Accident Com-

mission of the State of California was without jurisdiction in the matter. *Alaska Packers' Ass'n v. I. A. C.* (Cal. Sup.) 218 Pac. 561; *Zurich, etc., Ins. Co. v. I. A. C.* (Cal. Sup.) 218 Pac. 563; *Rolph Co. v. I. A. C.* (Cal. Sup.) 220 Pac. 669; *Sudden & Christenson v. I. A. C.*, 182 Cal. 437, 188 Pac. 803; *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. Not having jurisdiction to make an award for the injury complained of, its adjudication was invalid. *Tallac Co. v. Pillsbury*, 176 Cal. 236, 168 Pac. 17. The Workmen's Compensation Act provided in 1917 (St. 1917, p. 831), as now, that within 30 days after an application for a rehearing before the Industrial Accident Commission is denied, or, if the application is granted, within 30 days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of this state, or to the District Court of Appeal of the appellate district in which said person resides, for a writ of review for the purpose of having the lawfulness of the order, decision, or award inquired into and determined. In such review the court may determine whether the Commission acted in excess of its powers. Workmen's Compensation Act, § 67. It follows, therefore, that if timely application for a writ of review had been made to this court, or to the District Court of Appeal, the award would have been annulled. *Tallac Co. v. Pillsbury*, supra. But no such proceeding was perfected. Although it does not appear from the complaint that such is the fact, it was admitted at the oral argument that appellant instituted a belated proceeding in certiorari for the purpose of having the lawfulness of this award inquired into and determined. The District Court of Appeal held that notwithstanding the fact that the award showed on its face that it was beyond and in excess of the jurisdiction of the commission, the writ must be dismissed; application therefor not having been made to the court within 30 days, as prescribed by the statute. *North Pac. S. S. Co. v. I. A. C.*, 34 Cal. App. 488, 168 Pac. 30. A petition to have the cause heard in this court after judgment in the District Court of Appeal was denied. *North Pac. S. S. Co. v. I. A. C.*, S. F. No. 8571, December 15, 1917. Appellant was therefore confronted at the outset of this action with the circumstance that although materially affected by the award made by the Commission it failed to avail itself of the only method provided by statute whereby the lawfulness of the action of the Commission might be inquired into. The Workmen's Compensation Act provides that

no court of the state, except the Supreme Court and the District Courts of Appeal, by writ of certiorari or review, as in the act specified, "shall have jurisdiction to review, reverse, correct or annul any order, rule, regulation, decision or award of the Commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin or interfere with the Commission in the performance of its duties." Section 67, supra. It was accordingly held in *Thaxter v. Finn*, 178 Cal. 270, 273, 173 Pac. 163, a case involving a lack of jurisdiction in the Industrial Accident Commission, which is the exact question presented on this appeal, that the sole judicial review contemplated by the Workmen's Compensation Act can be had only where a proceeding therefor is instituted in the proper court within the time specified in the act, and the court granted a writ of mandamus to compel the sheriff to enforce a judgment on an award admittedly made in excess of the jurisdiction of the Commission. The cogent reasons for the conclusion reached by the court in that case need not be repeated here. They dispose of the real point in the case, which is that the method of review of an award of the Industrial Accident Commission being statutory, the courts can only review the questions raised by the record of the proceeding before the Commission by the method pointed out in the statute. *Smith-Lohr Coal Mng. Co. v. Ind. Board*, 279 Ill. 88, 116 N. E. 656, 658. All other forms of review are excluded. *People v. McGoorty*, 270 Ill. 610, 110 N. E. 791.

[4] Appellant frankly admits that the purpose of this appeal is: First, to urge this court to recede from the decision announced in *Thaxter v. Finn*, supra; and, second, to secure a decision of the United States Supreme Court on the question involved if this court should decide to allow its former decision to stand. In order to lay the foundation for a writ of error to the federal court, it advances the contention that as the award of the Industrial Accident Commission in this case was made without jurisdiction it will be a violation of the United States Constitution to permit its enforcement, in that it will be depriving plaintiff of its property without due process of law, and of its right to settle a maritime dispute according to the law maritime. We have given due consideration to appellant's contentions and to the argument and briefs offered in its support.

We are not convinced that the decision in *Thaxter v. Finn* was erroneous, and the judgment of the lower court is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.

193 Cal. 122

SARGENT v. SHUMAKER. (L. A. 7174.)

(Supreme Court of California. Jan. 30, 1924.)

1. Mortgages ☞356—Notice of trustee's sale in city where property is situated required to be posted only in three public places thereof; "also."

Where sale is in the same city in which the property is situated, notice of time and place of sale under trust deed of land, which Civ. Code, § 2924, provides shall be given in the manner required for sale of real property on execution, need be posted only in three public places of the city; Code Civ. Proc. § 692, as to notice of execution sale, providing by subdivision 1 that, in case of perishable property, it shall be by posting notice of time and place of sale in three public places of the city where the sale is to take place, and by subdivision 3, in case of real property, by posting a similar notice, for 20 days, in three public places of the city where the property is situated, "and also" where the property is to be sold; the quoted word "also" having the meaning of "in like manner," and referring for antecedent to "for 20 days" and "in three public places in the city," and being used as a brief substitute for those two phrases, applying only to a sale in a city other than that where the property is situated, under the rule of construction, expressed by the phrase "reddendo singula singulis," that general words in a statute may, where the sense requires, and in furtherance of the intention, be taken distributively (citing Words and Phrases, First and Second Series, "Also").

2. Mortgages ☞369(3)—Sale by trustee not set aside for mere inadequacy of price.

Mere inadequacy of price is not ground for setting aside a sale under power in trust deed, but there must in addition be shown some element of fraud, unfairness or oppression, though, when the price is greatly disproportionate to the value, very slight evidence of unfairness or irregularity will suffice.

3. Mortgages ☞369(2)—Owner's want of knowledge of sale, made on statutory notice, no ground for setting it aside.

That the owner of land did not know of pending sale under trust deed, standing alone, is no ground for setting aside the sale, no notice other than provided by the statute being necessary.

4. Appeal and error ☞996—Ultimate facts, not necessarily following from facts found, not inferred.

It is not in the province of the appellate court to infer from the findings ultimate facts which would support the judgment when such facts do not necessarily follow from the facts actually found.

5. Mortgages ☞369(3)—Irregularity, which, in connection with inadequacy of price will authorize setting aside sale, must have contributed to inadequacy.

Irregularity which, in connection with great inadequacy of price, will warrant setting aside sale under trust deed, must affirmatively appear to have contributed to such inadequacy;

so the fact that the sale was made in an inaudible tone and a hurried manner would not avail without showing that the purchaser was thereby prevented from making the bids that he desired, or that any other person was ready, able, and willing to bid, or was present.

6. Mortgages ☞369(3)—Inexcusable lack of knowledge of sale coupled with "mere inadequacy of price" not ground for setting aside sale.

Where the amount secured by trust deed had been delinquent for seven months, and no good reason is apparent why the administrator of the deceased landowner should not have expected and anticipated that the beneficiary bank would enforce the trust deed, he not having been led to believe that it would not do so by letter of its attorney, that it would take such necessary action against the estate on the secured notes "as may be desirable," and he not having asked the bank for an extension of time or made effort to procure a loan elsewhere with which to make payment, his ignorance of the sale, though statutory notice had been given, coupled with "mere inadequacy of price," meaning simply an inequality between the value of the property and the price, as distinguished from a price so insignificant as to amount to nothing, is insufficient to warrant setting aside the sale, which was for a price amounting to a third of the value of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inadequate Price.]

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by L. P. Sargent, administrator of E. W. Myers, against S. F. Shumaker. From a judgment for plaintiff, defendant appeals. Reversed.

Ault & Anderson, of Calexico, for appellant.

James W. Glassford, of El Centro, for respondent.

MYERS, J. The defendant appeals herein from a judgment in favor of plaintiff in an action to quiet title and to set aside a trustee's sale under power of sale in a trust deed, and to cancel the deed executed pursuant thereto, or to compel a reconveyance of the property. The essential facts may be stated as follows: On February 15, 1918, one E. W. Myers, who was then the owner of the property involved herein, executed a trust deed conveying the same to Frank D. Hevener, trustee for the International Bank as beneficiary, to secure the payment of principal sums aggregating \$5,000, together with interest thereon upon promissory notes executed by said Myers to said bank as payee. Myers died September 12, 1919, and letters of administration upon his estate were duly issued to the plaintiff herein. The promissory notes became due February 15, 1920, and

remained unpaid as to the principal thereof, as well as certain installments of interest. April 24, 1920, the bank, as beneficiary, executed and served upon the trustee its declaration of default and its demand that the trustee proceed to sell the property as provided in the trust deed. April 27, 1920, the bank, as beneficiary, executed its written notice of intended sale under the deed of trust, which was duly recorded in the office of the county recorder May 7, 1920. Thereafter in the following August the trustee caused to be posted and published notices of sale under the deed of trust, which was noticed for September 7, 1920, at 10 o'clock a. m. At the time and place specified in the notice the trustee offered the property for sale and sold the same to defendant Shumaker, who was the only bidder therefor at said sale, for the sum of \$5,654.69. The purchase price was thereupon paid to the trustee, who executed and delivered a deed of conveyance to said purchaser. Thereafter, in November, 1920, the plaintiff commenced this action by filing a complaint in an ordinary action to quiet title. After the trial of this action he filed a second amended complaint, which was in two counts or causes of action. The first count pleaded the conventional action to quiet title, and the second count set up the facts with respect to the execution of the trust deed and the trustee's sale thereunder; alleged that said sale was void by reason of the alleged failure to post or publish notice thereof in the manner required by law and by the provisions of the trust deed therefor, and in addition thereto alleged certain irregularities in the conduct of the sale, which will be hereafter noted more in detail, and prayed for a cancellation of the trustee's deed, a reconveyance from the purchaser, and a decree quieting plaintiff's title. The trial court found most of the controverted facts in favor of plaintiff and made its interlocutory decree wherein it adjudged the plaintiff, as administrator, to be the owner in fee simple of the described premises, subject to the payment by him to defendant Shumaker of the sum of \$5,769.15, and decreed that upon such payment said defendant should execute and deliver to plaintiff a good and sufficient deed of conveyance of said premises, and that in default of the execution of such deed upon the payment of said sum that the same be executed by the county clerk, who was appointed a commissioner for that purpose. The sum of \$5,769.15 was the balance arrived at by crediting defendant with the amount paid by him as the purchase price, together with additional sums paid by him in discharging delinquent taxes against the property and an attorney fee allowed him by the court, and charging him with all moneys which he had collected as rentals from the property.

[1] It was the theory of the plaintiff, evi-

dently concurred in by the learned trial judge, that the trustee's sale was utterly void because of the failure to post notice thereof as required by law and by the provisions of the trust deed. It is conceded that the notice of sale was duly published and for the required length of time. It is conceded also that the notices thereof were duly posted and for the required length of time in three public places within the city of Cal-exico, within which the property was situated and was to be sold and was sold. But it is respondent's contention that the trustee was required in addition thereto to post a fourth notice at the precise place where the property was to be and was sold. This contention presents the most important question involved upon this appeal.

The statute required (Civ. Code, § 2924; and the trust deed provided, that notice of the proposed sale should be posted "in the manner and for a time not less than that required by law for sales of real property upon execution." We are thus directed to section 692, Code of Civil Procedure, which prescribes the manner of giving notice of sale under execution. As that section existed at the time with which we are here concerned, it provided that notice thereof must be given as follows:

"1. In case of perishable property: By posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place. * * *

"2. In case of other personal property: By posting a similar notice in three public places in the township or city where the sale is to take place. * * *

"3. In case of real property: By posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof. * * *

It is obvious that the provisions of subdivision 3 of the section must have been intended to provide for and apply to two different situations, one where the property is situated in the same township or city where in it is to be sold, and the other where the property is situated in one township or city and is to be sold in some other township or city. It is respondent's contention that the section makes the same requirement as to posting applicable to both situations, and that it should be construed as requiring in either case the posting of four notices, three of which must be posted in three public places within the township or city where the property is situated, and the fourth at the place (meaning the very place) where the property is to be sold. Appellants, on the other hand, contend that the section is to be construed as if it read as follows:

"* * * By posting * * * twenty days in three public places of the township or city where the property is situated, and in three

public places of the township or city where the property is to be sold,"

and that the effect thereof, where the property is situated in one township or city and is to be sold in another, is to require the posting of six notices in three public places in each such township or city, and that the effect thereof, where the property is to be sold in the same township or city, is to require the posting of but three notices in three public places within such township or city. Respondent replies that the adoption of such a construction would be judicial legislation, in that it necessitates adding to the section words which were not placed therein by the Legislature. This criticism, however, is equally applicable to the construction contended for by respondent. It is obvious that the phraseology used in subdivision 3 is in condensed form when compared with that used in subdivisions 1 and 2, each of which is complete upon its face. The same conclusion is compelled when we consider that subdivision 3 must have been intended to apply to each of the two different situations above referred to. Our object, then, must be to ascertain the legislative intent, and in this endeavor we may consider not alone the text, but also the context, and these in the light of the purpose to be subserved by the provisions under consideration.

It is an elementary rule in the construction of statutes that some effect must be given to every word thereof if reasonably possible so to do, and the word "also" is of evident importance in this connection. The primary meaning thereof and that in which it is most commonly used is "in like manner" or "in the same manner." See 1 Words and Phrases, Second Series, p. 196; 1 Words and Phrases, p. 359, and cases there cited. It is thus a word of reference, directing our attention to that which antecedes. As used herein it has to do with the posting of notices, and the only specifications of the manner of such posting to be found in the antecedent phraseology which could be adopted by such reference are "for twenty days" and "in three public places of the township or city." It thus seems reasonable to suppose that the word "also" was here used as a brief substitute for the repetition of those two phrases. This conclusion appears the more probable when we consider that the provisions of subdivisions 1 and 2 above quoted may be regarded as evidencing a legislative determination that in so far as notice by posting is concerned the posting in three public places within a township or city is sufficient for the giving of notice to the inhabitants thereof.

It is true that, when we consider this subdivision as requiring the posting of but three notices in cases where the sale is to be made in the township or city wherein the property

is situated, the words "and also" seem wholly inappropriate thereto, but this consideration becomes unimportant when we recall that the section is designed to apply to the two different situations above referred to, and that it evidences an attempt at condensed composition.

"General words in a legislative act are often, where the sense requires it, and in furtherance of the intention, to be taken distributively, reddendo singula singulis. They are thus applied to the subject-matter to which they appear by the context most properly to relate, and to which they are really most applicable." Lewis' Sutherland on Stat. Const. [2d Ed.] § 442.

"Such interpretation subjects general expressions of words plainly susceptible of definition or obviously lacking it, because obscure, to the controlling influence of the context, a process or method of analysis widely recognized and adopted by the courts." Hope Natural Gas Co. v. Shriver, 75 W. Va. 401, 83 S. E. 1011.

In the same case it is said:

"A rule of construction sanctions reference of words general in their terms, such as those of the exception, to their places, subjects or connections as shown by other words or provisions in the context. It is briefly and tersely expressed by the Latin phrase, 'reddendo singula singulis,' literally translated, 'by referring each to each,' or 'referring each phrase or expression to its appropriate object.' 34 Cyc. 765. * * * A command or direction to go to London by rail and steamer would not be understood as requiring the use of both railroad and steamer at the same time and on the same portions of the route. The order would be interpreted and acted upon, reddendo singula singulis. In execution thereof, the railroad would be employed to New York, the steamer from New York to Liverpool, and the railroad again from Liverpool to London."

See, also, Building & Loan Ass'n v. Sohn, 54 W. Va. 101, 46 S. E. 222; Wells Fargo & Co. v. Board of Equalization, 56 Cal. 194, 198; Coffin v. Hussey, 12 Pick. (Mass.) 289; Commonwealth v. Jordan, 18 Pick. (Mass.) 228; Commonwealth v. Cooke, 50 Pa. 201; Ludlow v. Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277, 289; Hayes v. King, 37 N. J. Eq. 1; Thornton v. Thornton, L. R. 20 Eq. 599, 604.

Applying this process to the section under consideration and reading its general words distributively, we are led to the construction contended for by appellant as the most reasonable and probable expression of the legislative intent. This conclusion is strongly confirmed by the circumstance that the four leading compilations of legal forms in use in this state have adopted without question the same construction. Cowdery's Legal Forms, p. 623; Church's Forms of Law and Business, p. 1126; 1 Jury's Adjudicated Forms of Pleading and Practice, p. 723; 2 Sutherland's Forms, p. 1423. The fact that the correctness of this construction has never been hitherto questioned, so far as we are

advised, strongly suggests that the members of the bar throughout this state have concurred therein with practical unanimity. This circumstance, while in no way conclusive, is most persuasive that the construction so concurred in is correct. We conclude, therefore, that in a case such as this, wherein the property was to be sold in the same city in which it was situated, the law required the posting of but three notices in three public places thereof.

[2] We come now to the question whether, under the facts alleged, proved, and found, the plaintiff was entitled to have the sale set aside on the ground of irregularities in the conduct thereof, coupled with inadequacy of the purchase price. As above stated, it was the evident view of the plaintiff and of the trial judge that the sale was void for insufficient notice, but certain facts were alleged and found by the court which would be relevant to an action to avoid the sale on the ground of constructive fraud, and respondent contends that they are sufficient to sustain the judgment herein, even though it be conceded that the notice of sale was duly given. It was alleged in the second amended complaint and found by the court upon sufficient evidence that the property was of the value of \$25,000. It was sold for \$5,654.69, to which should be added perhaps an amount equal to the aggregate liens against it for delinquent taxes and tax sales amounting to some \$1,300, together with an additional sum for taxes then unpaid, but not yet delinquent. But adding all of these sums to the price actually paid it still represented less than one-third of the actual value of the property, and must, therefore, be said to have been clearly inadequate. There is neither allegation nor finding herein of any actual fraud or fraudulent intent upon the part of either of the defendants. That this omission was intentional is evidenced, as we are told by counsel, by the further fact that the trial judge in his written opinion filed herein expressly stated: "The court finds that both purchaser and trustee acted in good faith. * * *" We are thus relegated to a consideration of the single question of constructive fraud. It is well settled in this state that mere inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a sale legally made. There must in addition be proof of some element of fraud, unfairness or oppression before the court will be justified in depriving the purchaser of his legal advantage. Where, however, the price obtained is greatly disproportionate to the actual value, very slight evidence of unfairness or irregularity will suffice to authorize the granting of the relief. *Rauer v. Hertweck*, 175 Cal. 278, 165 Pac. 946; *Winbigler v. Sherman*, 175 Cal. 270, 165 Pac. 943; *Bock v. Losekamp*, 179 Cal. 674, 179 Pac. 516; *Odell v. Cox*, 151 Cal. 70, 90 Pac. 194; *Baldwin v.*

Brown, 42 Cal. App. Dec. 368.¹ The rule is stated in *Odell v. Cox*, *supra*, in the following language:

"Where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage' *resulting in such gross inadequacy* and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner *who is himself without fault.*" (Italics added.)

The circumstances of claimed unfairness or irregularity relied upon by the respondent herein, in addition to the inadequacy of consideration, are: (1) That the plaintiff did not know of the proposed sale and was given no notice thereof by either of the defendants; (2) that the trustee did not announce said sale or call for bids in an audible tone of voice sufficient to enable persons in the immediate vicinity to know that the trustee was selling the property; (3) that said sale was conducted in a hurried manner to an extent which made it impossible for persons present to bid on said property; and (4) that the defendant bank by a letter to plaintiff had caused plaintiff to believe that the said bank would not proceed to sell the property.

[3] The circumstance that the plaintiff did not know of the pending sale and was not notified thereof by either of the defendants is not, standing alone, of any importance herein. As this court said in *Rauer v. Hertweck*, *supra*:

"There was no obligation upon them to give him any such notice. The statute defines how notice of an execution sale must be given. To say that a sale may be set aside because some other notice was not given would be to amend the statute, and this we cannot, of course, do. When the officer conducting the sale has done the acts prescribed by the Code, he has done his full duty. He is not required to search for the debtor and give him any further notice than that which the law exacts. Nor is any such duty imposed upon the judgment creditor. Much less is one who may contemplate bidding at an execution sale called upon to concern himself with the question whether the debtor has actual knowledge of the proceeding."

[4, 5] Plaintiff alleged and the court found:

"That said sale was not made at public auction, as provided by said trust deed, in that the trustee did not announce said sale, or call for bids, in an audible tone of voice, sufficient to enable persons in the immediate vicinity of the place where said sale was held, to ascertain or know that the trustee was selling the property herein described, and that said sale was conducted in a hurried manner, to an extent which made it impossible for persons present at the place of sale to bid on said property, either en masse, or in parcels."

¹ Rehearing granted.

It is not alleged in the complaint or found by the court that any other person actually was present at the place of sale to bid on said property or that any person was prevented from so doing either by the inaudible tone of voice or the hurried manner in which the sale was conducted. It is neither alleged nor found that there was any other person in existence who was ready, able, and willing to bid on said property. These omissions become the more significant when we reflect that the second amended complaint was not filed until the trial had been had and concluded. Respondent now asserts that it appears from the evidence that one Brown was present at the sale for the purpose of bidding thereat, and would have bid the sum of \$8,000 for one of the properties included in the sale, but was prevented from so doing by reason of the circumstances above mentioned. Appellants reply that it conclusively appears from the evidence that Brown was neither ready, able, nor willing to bid upon this property for the reason that it appears without conflict that he was unable to make payment therefor, and that under the terms of the trust deed the trustee was empowered to sell only "for cash in gold coin of the United States." Appellants confidently assert that, if the trial court had found that any bidder was prevented from bidding at this sale by reason of the irregularities complained of, such finding would have been contrary to and wholly unsupported by the evidence. It is unnecessary for us to so determine. It is sufficient to say for the purposes hereof that such a finding would be in no way compelled or required by the evidence herein, and "it is not within the province of this court to infer from the findings ultimate facts which would support the judgment when such facts do not necessarily follow from the facts actually found." *Rossini v. St. Paul, etc., Ins. Co.*, 182 Cal. 415, 421, 188 Pac. 564.

While it is true that, where the inadequacy of price is palpable and great, slight irregularities in conjunction therewith will authorize a court to set aside the sale, we are of the opinion that such irregularities, to have this effect, must have conduced to the inadequacy of the price, or in some other way have contributed to the injury of the plaintiff. This conclusion is indicated by the language commonly used in the statement of the rule. Thus in the rule as stated in *Odell v. Cox*, supra, we find the phrase "'any unfairness or * * * undue advantage' *resulting in such gross inadequacy.* * * *" (Italics added.) The same phraseology is found in the statement of the rule in *Wingbiger v. Sherman*, supra. The same thought is indicated in the statement of the conclusion in *Rauer v. Hertweck*, supra, that—

"The resulting loss can more properly be attributed to his [plaintiff's] neglect of his own interests than to any unfairness on the part of the judgment creditor or the purchasers."

The rule is thus stated in *Freeman on Executions*, § 309:

"If the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud or irregularity, the sale will generally be vacated, *unless the complainant was himself in fault*, or the rights of innocent third parties have become dependent upon the sale." (Italics added.)

The sale en masse of several known lots or parcels, in the absence of special circumstances to justify it, is clearly an irregularity; but this court has frequently held that such an irregularity will not justify vacating the sale, in the absence of an affirmative showing that it operated to the actual injury of the owner. *Hudepohl v. Liberty Hill, etc., Co.*, 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; *Meux v. Trezevant*, 132 Cal. 487, 489, 64 Pac. 848; *Summerville v. March*, 142 Cal. 554, 558, 76 Pac. 388, 100 Am. St. Rep. 145. These cases are not conclusive upon the question at bar for the reason that in neither of them was the purchase price inadequate. But the language used in discussing the question is significant. *Meux v. Trezevant*, supra, involved a foreclosure sale wherein the premises were sold en masse, although the decree of foreclosure required that they be sold in separate parcels. This court said:

"Unless it is made to appear that a larger sum would have been realized from the sale of the property if it had been sold in separate lots or parcels, or that the sale of less than the whole tract would have brought sufficient to satisfy the writ, the sale will not be set aside. *Hudepohl v. Liberty Hill, etc., Co.*, 94 Cal. 591, 28 Am. St. Rep. 149. In this case there is no statement in defendant's affidavits tending to show that the property would have brought more if sold separately, or that the sale of less than the whole would have satisfied the writ. On the contrary, the affidavits on the part of defendant show without contradiction that the property sold for its full cash value, and that it would not have brought as much as it sold for if it had been sold in separate lots. The only pretense of injury set forth in defendant's affidavit is that he was injured by said sale in one lot, because it 'tended to reduce the number of bidders,' and because 'it deprived affiant of the right to redeem either of said colony lots separately.'

"This is clearly insufficient. Defendant does not show that he could redeem, or that he ever desired to or now desires to redeem, any part of said property. Courts will not set aside a sale under foreclosure for light or trivial reasons. It must appear that there has been a material departure from the mandates of the decree, or the law governing such sales, to the injury of the party applying to have the same set aside. Nor can injury be presumed from mere irregularities."

Assuming in the instant case that no bidder other than the defendant Shumaker attended the sale for the purpose of bidding thereat, or would have attended it under

any circumstances, then plaintiff could not conceivably have been injured by the low tone of voice or hurried manner in which the sale was conducted, if it was sufficiently audible and sufficiently deliberate to enable Shumaker to make the bids he desired. If such was the case, as we must assume under the findings, plaintiff could not have been injured by these claimed irregularities. We are of the opinion that under these circumstances they afforded no ground for relief. Appellants contend that the findings to the effect that the sale was made in an inaudible tone of voice and in a hurried manner are wholly contrary to and unsupported by the evidence. In view of the conclusion just announced it is unnecessary to consider this contention.

[6] As to the fourth claimed irregularity the plaintiff alleged and the court found:

"That on July 28, 1920, the International Bank through and by its attorney informed the plaintiff in writing, that it, the said bank, would take such necessary action against the estate on the notes secured by said trust deed 'as may be desirable,' and which notice was in reply to a letter written by the plaintiff to the International Bank on the 20th day of July, 1920, in which the plaintiff asked the said defendant bank for an additional length of time to pay the notes secured by said trust deed."

Appellants assert that the concluding phrase of said finding, "in which the plaintiff asked the said defendant bank for an additional length of time to pay the notes secured by said deed of trust" is wholly unsupported by the evidence, and to this we agree. The above-quoted allegation in plaintiff's complaint was immediately followed by the allegation:

"And which letter of July 28, 1920, written by the said bank to plaintiff, caused the plaintiff to believe that the said bank would not proceed to sell the property described in said Exhibit A. * * *"

This allegation was denied by the defendants, and the court made no finding thereon. A consideration of the evidence upon this point makes it apparent that if a finding had been made responsive to this issue it would have been adverse to plaintiff's contention. This leaves the situation wholly inadequate to bring the case within the rule of *Winbigler v. Sherman*, supra, relied upon by respondent, wherein it was said that by means of a somewhat similar letter written by the holder of the note to the owner of the property the latter had been "lulled into a false security." There is not the slightest evidence herein that the letter here in question had any effect of lulling the plaintiff into a false security. On the contrary, he testified that he couldn't say whether he had ever received the letter or not. He was then shown a copy of the letter and asked to state whether or not he had received the original, and he

replied: "No; I don't remember receiving that letter."

Respondent insists that the present case is substantially identical with *Odell v. Cox* and *Winbigler v. Sherman*, supra, and must therefore be ruled by those decisions, in each of which a judgment setting aside the sale was affirmed by this court. Appellants assert that those decisions have been rendered inapplicable by the amendment in 1917 of section 2924, Civil Code (St. 1917, p. 300), so as to require as a condition precedent to such a sale that the beneficiary shall first record in the office of the county recorder a notice of his intention to sell the property, which notice shall be recorded at least three months prior to the sale. They argue that, such record being created for the special benefit of the debtor, he is charged in law with notice of its contents, whether he has actual knowledge thereof or not. We are not prepared to go thus far, nor do we deem it necessary to do so in the disposition of the instant case. There are important elements in each of the cited cases which serve to distinguish it from the case at bar.

Odell v. Cox was not a case of "mere inadequacy of price" coupled with irregularities in the conduct of the sale. There were no such "irregularities." Every requirement of the law with respect to the conduct of the sale was fully complied with. Neither was it a case of "mere inadequacy of price," which means "simply an inequality in value between the subject-matter and the price." The price there bid was so insignificant as to amount in practical effect to nothing at all. In the language of the court:

"The amount bid, \$26.50, when considered in connection with property having a cash value of \$2,000 in the market, was a mere nominal sum, and the purchaser acquired this valuable property for practically nothing."

This fact, which is iterated and reiterated throughout that opinion, was evidently regarded as a controlling factor in that decision. That case may be taken as authority for the conclusion that, where the purchase price at such a sale is so small as to amount to practically nothing, the transaction may be regarded in equity as no sale at all, but rather a device for obtaining the debtor's property without compensation, and may be relieved against at the instance of an owner who was himself entirely without fault or negligence and whose lack of knowledge was "entirely excusable." In the case at bar the purchase price can by no means be regarded as merely nominal, however disproportionate it may have been to the real value of the property.

In *Winbigler v. Sherman* the purchase price of \$500 for property worth \$5,000, though much more disproportionate than in the instant case, could not be regarded as merely nominal. But there were circum-

stances of unfairness and oppression in that case which are absent from the case at bar. It is true that one of the notes secured by the trust deed there in question was past due and unpaid, but it was for only \$100, and those notes had been given in payment for certain pumping machinery which was defective, and was not in accordance with the contract and was not properly installed, so that the maker had a good and valid defense to an action upon the notes. Negotiations between the maker of the notes and the holder thereof for a correction of these defects were in progress right up to the time of the trustee's sale. The maker learned of the proposed sale only a half hour before it was to take place. He then went to the trustee and the holder of the notes and pleaded with them to postpone the sale for a reasonable time to enable him to get the money to pay them, which was refused. The sale having taken place, he promptly procured the money and tendered to the purchaser, who was the holder of the notes, the entire amount due upon all of the notes, together with all the costs of making the sale. The court justly concluded that the refusal to grant even a brief postponement of the sale, under the circumstances, could have had but one object and purpose, namely, to obtain the debtor's property for "a mere pittance." This was an act of such evident unfairness and oppression as to amount to a constructive fraud upon the debtor, who was himself without fault.

In each of the two cases last under consideration emphasis is placed upon the circumstance that the debtor's lack of knowledge that the sale was about to take place was not due to his own fault or negligence. In *Odell v. Cox*, which involved a sale under execution, the fact that the judgment debtor was amply solvent was well known to the creditor, and the former had taken an appeal from the judgment and filed a good and sufficient stay bond. But an execution had been issued, without the debtor's knowledge, between the time of the entry of the judgment and the filing of the stay bond. The court said:

"This lack of knowledge on his part was entirely excusable. Probably neither he nor his attorneys had any reason to anticipate, in view of his solvency and the appeal about to be taken, that an execution would be obtained to enforce the judgment."

In the case at bar no good reason is apparent, either in the findings or in the evidence, why the plaintiff should not have expected and anticipated that the bank would proceed with the enforcement of the trust deed according to its terms. The amount due was in excess of \$5,000. It had been delinquent at the time of the sale nearly seven months. In the meantime the taxes

had been unpaid, the property had been sold for taxes, and other taxes thereon were delinquent. The plaintiff was collecting the rents, but was making no payments on account of either the indebtedness or the taxes. It is true that the estate was involved in litigation in the sense that a contest was pending therein over an alleged will of the deceased, but it does not appear that the plaintiff as administrator was a party thereto or in any way interested therein or affected thereby. It appears that there were not sufficient funds in the assets of the estate to enable him to pay these notes. But it does not appear that he ever made an effort to procure a loan elsewhere to enable him to make the payment, or even that he ever asked the defendant bank for an extension of time for the payment. These circumstances serve to bring this case fairly within the rule of *Rauer v. Hertweck*, supra, which was summed up in the following language:

"The attempt to show unfairness in the sale comes down simply to this: That the execution sale was regularly made upon due statutory notice, but that the judgment debtor did not, in fact, know of the sale, and no one gave him notice of it. He did, however, know that a judgment had been entered against him, and must be deemed to have known that his property might be levied on at any time. He failed to pay the judgment, and took no steps to protect his property until many months after the entry of judgment. He then found that a sale had been had, and that the time for redemption had expired. The resulting loss can more properly be attributed to his neglect of his own interests than to any unfairness on the part of the judgment creditor or the purchasers."

The judgment is reversed.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.

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POPE v. HALPERN. (S. F. 10187.)

(Supreme Court of California. Feb. 2, 1924.)

1. Municipal corporations — 705(1)—Obligation to carry lights on motor vehicles partly contingent and partly absolute.

The obligation to carry lighted lamps mentioned in Motor Vehicle Act, § 13 (a), as amended by St. 1919, p. 206, is partly contingent and partly absolute, depending on the hour of the day; during the period comprised within a half hour after sunset to a half hour before sunrise, the obligation is absolute, and at any other time within the 24-hour day it is contingent on condition of light existing within the lateral boundaries of the highway.

2. Highways — 166—Requirement of lights on "motor vehicles" held to apply to motorcycles.

In view of Motor Vehicle Act, § 13 (c), as amended by St. 1919, p. 207, the requirement of lighted lamps on certain "vehicles" was intended to apply to motorcycles and require them

at certain times and under certain conditions to carry one lighted lamp showing a white light visible at least 200 feet in the direction toward which they face.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motor Vehicle.]

3. Appeal and error ⇨930(1)—Assumed on appeal that automobile driver's negligence in cutting corner at street intersection was principal cause of accident.

In action for injury causing death to a passenger on a motorcycle from collision with an automobile at a street intersection, where jury found in plaintiff's favor, it must be assumed on appeal that it accepted testimony of plaintiff's witnesses tending to show that defendant in operating his automobile at time of the collision was cutting the corner of the street, notwithstanding defendant's testimony to the contrary.

4. Municipal corporations ⇨705(1)—Cutting corner at street intersection negligence per se.

If, at the time of collision between defendant's automobile and the motorcycle on which plaintiff's deceased son was a passenger, defendant in fact cut the corner of the street, he was guilty of negligence per se.

5. Negligence ⇨93(1)—Contributory negligence of vehicle driver imputable to passenger only where engaged in common enterprise.

Contributory negligence of the driver of a vehicle is not ordinarily imputable to his passenger or guest; but, where the parties are engaged in a common or joint enterprise, contributory negligence of one bars recovery by the other.

6. Negligence ⇨93(1)—Community of interest rendering contributory negligence of driver imputable to passenger on vehicle.

To show community of interest between the driver of a motor vehicle and his passenger, so as to make them mutually chargeable with the other's contributory negligence, in order that there be a joint enterprise, it is not sufficient merely that the passenger indicate the route or that both parties have certain plans in common, but the community of interest must be such that the passenger is entitled to be heard in control and management of the vehicle.

7. Negligence ⇨93(1)—Passenger and motorcycle driver held not engaged in joint enterprise within imputed negligence rule.

Where the passenger on a motorcycle did not participate in selection of the route or regulation of the speed, but was riding thereon as a guest and not as one entitled as of right to be heard as to route or speed, he was not engaged in a joint enterprise with the driver so as to bring him within the rule of imputed negligence.

8. Municipal corporations ⇨705(10)—Passenger on vehicle must exercise ordinary care.

A passenger in a motor vehicle must at all times use ordinary care for his own safety.

9. Municipal corporations ⇨706(7)—Negligence of motorcycle passenger held for jury.

In action for death of a boy of 14 years while a passenger on a motorcycle which collided with defendant's automobile at a street intersection at 9:30 p. m., when the driver of the motorcycle was carrying a flashlight in his hand which gave one-half the light of an ordinary motorcycle headlight, whether decedent was negligent in riding on the motorcycle under the circumstances was question for trial court or jury.

10. Municipal corporations ⇨705(10)—Passenger on motorcycle operating without headlight not violator of law.

Where a passenger on a motorcycle which collided with defendant's automobile at a street intersection was killed, as affecting the question of whether deceased was negligent in riding on a motorcycle not equipped with adequate lights at 9:30 p. m., the driver of the motorcycle was the violator of the Motor Vehicle Act, and not decedent.

11. Appeal and error ⇨1067—Municipal corporations ⇨706(8)—Refusal of instruction applicable to facts as to motorcycle driver's negligence in driving without proper lights held erroneous and prejudicial.

In action for fatal injury to a passenger on a motorcycle which collided with defendant's automobile at a street intersection at 9:30 p. m., in view of the obligation of the driver to carry a proper headlight not being dependent on conditions of light on the street, refusing defendant's instruction that, if the accident occurred during the period from a half hour after sunset to a half hour before sunrise, the motorcycle was required to be equipped with a headlight visible 200 feet, and giving in its place an instruction to the effect that a motorcycle while on the public highway was required to carry a headlight where the streets were not sufficiently lighted to discern objects for a distance of 200 feet, was erroneous and prejudicial.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Otis Pope against Jacob Halpern. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant. Stella Donovan, of San Francisco, and J. W. Henderson, of Eureka, for respondent.

KERRIGAN, J. This is an appeal under section 953a of the Code of Civil Procedure from a judgment following a verdict in favor of plaintiff for \$2,044.50 as damages for the death of his minor son, which resulted from a collision between an automobile driven by defendant and a motorcycle driven by one Clarence Garns, upon which the decedent was riding as a guest.

In arriving at their verdict for the plaintiff the jury thereby resolved in his favor any conflict in the evidence, so that the facts

disclosed by the record may, for the purposes of the appeal, be stated as follows: The plaintiff's son, Miles, 14 years and 4 months old, was riding on the rear fender of a motorcycle which was driven by his friend, Clarence Garns, westerly along the northerly side of East Twelfth street, in the city of Oakland, at about 9:45 o'clock p. m. on the 23d day of June, 1920. Clarence, who was the owner of the motorcycle, had had some trouble with the light which had been attached to the motorcycle, and a few days before the accident he removed it. On this night, while driving the motorcycle, he was carrying an electric flashlight in his hand at the left handlebar, which flashlight gave one-half the light of an ordinary motorcycle headlight. The deceased was seated on the rear fender, immediately behind the driver's seat, his legs on the left side, his left foot holding on to the rod which supports the seat, his left hand resting in his lap. While thus proceeding, and attempting to cross Fourteenth avenue, the motorcycle and defendant's automobile collided. The defendant, driving easterly along the southerly side of East Twelfth street, had reached the intersection of Fourteenth avenue, and at the time of the collision was attempting to, or had completed, a left turn so as to go in a northerly direction on Fourteenth avenue. When the vehicles came to a stop the motorcycle was lying under the front left wheel of the automobile at a point about 12 or 15 feet west of the middle line of Fourteenth avenue and slightly north of the north curb line of East Twelfth street. As a result of the collision, Miles Pope received injuries causing his death and Clarence Garns' left leg was broken.

The theory upon which plaintiff's case was tried is that the defendant carelessly and negligently operated his automobile by cutting the corner of the intersection of these two streets, in disregard of the express provisions of the Motor Vehicle Act (St. 1915, p. 397). The defendant's contention is that he did not cut the corner, but that he carefully went out and across the middle line of Fourteenth avenue before turning to his left and north into Fourteenth avenue; that the motorcycle was not equipped with a sufficient headlight; that it was driven at an excessive rate of speed; and that the decedent's position upon the motorcycle interfered with the driver in its operation.

[1] The Motor Vehicle Act, in section 13a, as amended in 1919, provides:

"Where there is not sufficient light within the lateral boundaries of the public highway to reveal all persons, vehicles or other substantial objects within said boundaries for a distance of at least 200 feet, and at all times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps. * * *

Stats. 1919, pp. 191, 206.

The dual character of this provision is to be noted. The obligation to carry the lighted lamps mentioned is partly contingent and partly absolute, depending upon the hour of the day. During the period comprised within "a half hour after sunset to a half hour before sunrise," the obligation is absolute; at any other time within the 24-hour day it is contingent upon the condition of light existing within the lateral boundaries of the highway. We call attention to this in passing for the bearing it has upon the instructions given to the jury.

Subdivision (c) of this same section of the Motor Vehicle Act reads as follows:

"At the time and under the conditions in this section hereinbefore specified, every motorcycle while on the public highway shall carry at the front at least one lighted lamp. * * *

The times and conditions before specified were those contained in the opening sentence of section 13 (a), above referred to, so, reading these two subdivisions together, we find that from a half hour after sunset to a half hour before sunrise, every motorcycle while on the public highway must carry a certain kind of headlight, regardless of the condition of the highway with respect to illumination. In passing it is well to note that in subdivision (f) of section 13 an exception is made of a vehicle not in operation on a lighted highway.

The Motor Vehicle Act of 1915, as amended in 1919, specifies the character of headlight which a motor vehicle must carry. The Motor Vehicle Act as enacted in 1915 provided:

"At the times and under the conditions hereinbefore specified in this section, every motorcycle or bicycle while on the public highway, whether in operation or otherwise, shall carry one lighted lamp, showing a white light visible under normal atmospheric conditions at least two hundred feet in the direction toward which such motorcycle or bicycle is faced. * * *

Section 13 (b), Stats. 1915, pp. 397, 405.

In 1919 this subdivision was amended, and as amended it referred to lights on bicycles only, and the distance at which the light on such bicycles must be visible was increased to 300 feet. Stats. 1919, pp. 191, 207. In subdivision (c) of section 13, as amended, it was provided:

"At the time and under the conditions in this section hereinbefore specified, every motorcycle while on the public highway shall carry at the front at least one lighted lamp which shall give a light of sufficient power and so distributed as provided in subdivision (f) and shall also carry at the rear of such motorcycles a lighted lamp, exhibiting a red light plainly visible under normal atmospheric conditions for a distance of at least two hundred feet towards the rear. * * *

Subdivision (f), to which we are referred by subdivision (c), reads as follows:

"At the times and under the conditions in this section hereinbefore specified the headlights of all automobiles upon the highways shall give a light of sufficient power and so distributed as provided herein in addition to and irrespective of any other requirements concerning headlights in this section contained. The term 'headlight' as used herein, shall denote any light, located upon any portion of the said motor vehicle other than on the windshield, the windshield supports or top thereof, the rays of which are projected forward, except side lights of not to exceed four candle power. * * *"

[2] Subdivision (f), just quoted, appears to be a prefatory section to the sections which follow, in which are described the tests to be applied to lights on motor vehicles. It is true that in subdivision (f) the word "automobile" is used and that in subdivisions (g) and (h) the tests refer to a "pair of lamps"; but we feel that the conclusion is inescapable that the Legislature intended that motorcycles should carry at least one lighted lamp giving a light of the same power and so distributed as in the case of automobile lamps. It is certain that the Legislature did not intend to provide that a motorcycle, a heavier and speedier vehicle than a bicycle, could be operated at night with any kind of light, while in the same act it is provided that a bicycle must carry a light visible 300 feet. To the contrary, in subdivision (c), just quoted, the Legislature, showing that it has in mind motorcycles, enacts that they shall carry a certain kind of light, to be described in later sections, and we feel justified in holding that these sections (being subdivision [f] and the subsequent sections which are indirectly referred to in subdivision [f]) apply to a motorcycle. In passing it may not be amiss to say that whatever ambiguity existed on this question has been dispelled by the enactment of the Motor Vehicle Act of 1923, which provides that—

"Every motorcycle at the times and under the conditions specified in section ninety-nine shall be equipped with at least one lighted headlight and not more than two, which shall conform to the provisions of sections one hundred and hundred one, relating to headlights for automobiles." Section 103, Stats. 1923, p. 550.

And section 99 of the same act requires that—

"Every vehicle when upon any public highway within this state during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible a person, vehicle or other substantial object on the highway at a distance of two hundred feet ahead, shall be equipped with lighted lamps and lighted headlights as herein respectively provided for different classes of vehicles and subject to such exceptions as are set forth in this act."

[3, 4] As we have already pointed out, the jury having found in plaintiff's favor, we

must assume that it accepted the testimony of plaintiff's witnesses tending to show that the defendant in operating his automobile immediately before and at the time of the collision was cutting the corner of the street. While this was contrary to the direct testimony of defendant's witnesses, there is evidence in the record upon which such an inference could well be based. If the defendant in fact cut the corner, he was guilty of negligence per se, and from the record we must assume that the jury found that the defendant did cut the corner and that this negligence was the principal cause of the accident.

[5] The defendant also contends upon this appeal that Garns' negligence, assuming that he was negligent, was imputable to the decedent, and that the decedent was himself guilty of independent negligence in riding upon the rear fender of a motorcycle which was being operated without a headlight and being driven at an excessive rate of speed.

The rule is well established that the contributory negligence of the driver of a vehicle is not ordinarily imputable to his passenger or guest. *Bryant v. Pac. Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385; *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059. But an exception to this rule is made in those cases where the parties are engaged in a common or joint enterprise, and in such cases it is held that the contributory negligence of one will bar recovery by either. The decisions are not in accord as to what constitutes a joint or common enterprise, but it has been held in this state that the passenger must exercise some control over the driver thereof, or, in law, may be said to possess the right of such control, before it will be held that they are engaged in a joint enterprise. *Bryant v. Pac. Elec. Ry. Co.*, supra. In *St. Louis, etc., Ry. Co. v. Bell*, 58 Okl. 84, 159 Pac. 336, L. R. A. 1917A, 543, the court said:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

[6] It will be seen from these two decisions that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a "joy ride," but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle. In *Bryant v. Pac. Elec. Ry. Co.*, supra, the court, after referring to the case of *Wentworth v. Town of Waterbury*, 90 Vt. 60, 96 Atl. 334, where

apparently the only basis for the imputation of negligence of the driver of an automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake, said:

"In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378 [122 Am. St. Rep. 114, 83 N. E. 924]: 'There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies.' Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care 'except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.'" (Italics ours.)

[7] Tested by these principles, we are of the opinion that the decedent and Garns were not engaged in such a joint enterprise as to bring the decedent within the rule of imputable negligence. The circumstances of this case do not show that the decedent and Garns together had such control and direction over the motorcycle as to be practically in the joint or common possession of it. If the decedent did participate in the selection of the route, or the regulation of the speed of the motorcycle, he did so apparently as a guest, and not as one entitled as of right to be heard in such matters.

These views are fully supported by the case of *Masterson v. Leonard*, 116 Wash. 551, 200 Pac. 320. In that case two boys riding on a bicycle collided with an automobile. Frank, whose father owned the bicycle, was riding on the handlebars, and Edward was sitting in the seat of the bicycle, controlling its movement. Edward was a newsboy, and at the time of the accident he was on his way to get his papers. Frank, who frequently helped Edward on his paper route, was going along to substitute for Edward in case he became ill. The court held that Edward's negligence was imputable to Frank, but the following quotation clearly shows that its decision was based squarely upon the peculiar facts of the case before it, facts which do not appear in the present case. The court said:

"We are of the opinion, in view of the ownership of the bicycle, the general possession of and control over it by Frank, the acquiescing by him in the temporary control over it by Edward for the purpose of conveying them both on this hazardous journey, which we think was their common enterprise or adventure, that the trial court did not err in telling the jury, in effect, that whatever negligence Edward was

guilty of, in carrying out this their joint enterprise or adventure, was attributable to Frank and became in law his negligence. * *"

There can be no doubt that the court attached great importance to the fact that Frank had the possession and control of the bicycle, and still had the right to be heard in its control and management even though he had temporarily relinquished control over it.

In the present case the decedent, as already mentioned, did not have such a proprietary interest in the motorcycle as would give him a right to be heard in its management and control, and as there is no evidence that he actually exercised such control, it cannot be said that he and Garns were in the joint or common possession of it. Assuming, therefore, that Garns was guilty of contributory negligence, his negligence was not imputable to the decedent.

[8, 9] Defendant's second contention, that decedent was guilty of independent negligence in riding upon this motorcycle, is worthy of consideration. It is claimed that since Clarence was operating his machine in a negligent manner, the plaintiff was guilty of independent negligence in riding on the motorcycle while it was being so operated. To support this contention defendant relies upon *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915E, 588, and *Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B, 953. These decisions are based on the theory that a passenger is negligent if he remains in a dangerous position after having knowledge of the danger. Thus, in *Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, supra, it was held that the plaintiff was guilty of contributory negligence in riding in an automobile without lights over a trail with which none of the occupants of the machine were familiar. In *Lynn v. Goodwin*, supra, it was decided that the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated, established negligence upon his part independent of that of the driver, barring the right of recovery. These cases merely express in another way the general rule that a passenger must at all times use ordinary care for his own safety. In the present case, the decedent being a minor, the question of whether or not he was negligent in riding on this motorcycle under the circumstances of this case was a question for the trial court or jury. *Sanders v. Toberman* (Cal. Sup.) 218 Pac. 394; *Mayne v. San Diego Electric Ry. Co.*, 179 Cal. 173, 175 Pac. 690, and cases therein cited; *Charves v. S. F.-Oakland Terminal Rys.*, 44 Cal. App. 221, 186 Pac. 154; *Carlson v. Leonard*, 53 Cal. App. 300, 200 Pac. 40. Here, under instructions as to the degree of care required of a minor, the question of decedent's alleged negligence was left to the jury, who im-

pliedly found that he was not negligent, and that he had exercised the same degree of care as children of his own age and intelligence ordinarily exercise.

[10] In this connection it must be kept in mind that it was the driver, Garns, and not the decedent, who was violating the provisions of the Motor Vehicle Act, in failing to carry a regulation headlight. The decedent in no wise subjected himself to a penal liability. Section 32 of the act (St. 1917, p. 410) as amended (Stats. 1919, p. 225) provides that any person violating any of its provisions shall be guilty of a misdemeanor. And one of the provisions of the act is that a motorcycle shall be equipped with a headlight. We are of the opinion that if a motorcycle is operated without a headlight, the person violating the law is the driver or operator of such motorcycle. Throughout the Motor Vehicle Act, in discussing various penalties, reference is made to the "driver or operator," or "person in charge or having control" or the "owner"; but nowhere is any language used which would show an intent upon the part of the Legislature to fasten a criminal liability upon a passenger or guest for an infraction of any of its provisions.

[11] The defendant requested an instruction to the effect that if the accident occurred during the period from a half hour after sunset to a half hour before sunrise, the motorcycle was required to be equipped with a headlight showing a light visible 200 feet. This instruction was correct in form and in terms, in that it expressly declared that it was the duty of the driver of the motorcycle to have a lighted headlight during this period. The court refused this instruction, and gave in place thereof one to the effect that a motorcycle while on the public highway was required to carry a headlight where the streets were not sufficiently lighted to discern objects for a distance of 200 feet.

This instruction was inapplicable to the case herein, as it is an undisputed fact that the collision occurred about 9:30 o'clock p. m., and we have already pointed out that the obligation of the driver of a motorcycle operated at that hour to carry a headlight of a certain designated power is absolute and is not dependent upon the conditions of light in the street. By this instruction the jury were given a basis for an inference that Garns was not negligent by reason of not carrying said headlight notwithstanding that the statute expressly makes that requirement. Under proper instructions the negligence of Garns would have been plainly apparent to the jury, which would then have been confronted with the question whether the deceased, in riding with Garns under the conceded conditions, was himself guilty of such negligence as to bar a recovery in the present case. The refusal of the trial court,

therefore, of the instruction applicable to the facts of the case in favor of one inapplicable thereto, constituted error which, under the circumstances of this case, must be held to be prejudicial.

The judgment should therefore be reversed, and it is so ordered.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.

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GARNS v. HALPERN. (S. F. 10204.)(Supreme Court of California. Feb. 14, 1924.
Rehearing Denied March 10, 1924.)**1. Municipal corporations $\Rightarrow$ 706(5)—Evidence held to establish contributory negligence of motorcycle driver.**

Evidence held to establish contributory negligence of motorcycle driver in the operation of his machine at an unreasonable speed, in view of the character of illumination used by him on his machine.

2. Municipal corporations $\Rightarrow$ 705(10)—Insufficient headlight on motorcycle may require driver to keep below maximum rate of speed.

Under Motor Vehicle Act, §§ 20a, 22a, as amended by St. 1919, pp. 215, 220, prescribing maximum legal speed and requiring that drivers of motor vehicles shall at all times operate in a careful and prudent manner with due regard to the safety of others, the driver of a vehicle unequipped with the amount or character of illumination required by law may not safely proceed at the same rate of speed as he might otherwise.

3. Municipal corporations $\Rightarrow$ 705(10)—Operation of motorcycle without proper headlight negligence.

Failure of plaintiff, the driver of a motorcycle, to comply with Motor Vehicle Act, § 13 subds. (a), (c), and (f), as amended by St. 1919, pp. 206, 207, requiring equipment with a headlight, constitutes negligence.

4. New trial $\Rightarrow$ 74—Error in plaintiff's favor no ground for granting his motion for new trial.

In an action for personal injuries, the error of the jury in finding for plaintiff, who has been guilty of contributory negligence, in the sum of \$1, is not one of which plaintiff can complain and furnishes no ground for granting a motion for new trial.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Clarence Garns, by C. D. Garns, his guardian ad litem, against Jacob Halpern. From order granting plaintiff's motion for new trial after verdict for him for nominal sum, defendant appeals. Reversed.

Wm. M. Abbott, K. W. Cannon, J. S. Reardon, and Enid Childs, all of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

The following opinion, prepared by Mr. Justice KERRIGAN prior to his retirement, is hereby adopted as the opinion of the court:

This is an appeal by defendant from an order granting the plaintiff's motion for a new trial based upon the ground of insufficiency of the evidence to support the verdict.

The action was one to recover the sum of

\$20,000 as compensation for personal injuries, loss of earnings, and damage to property resulting from a collision between the motorcycle of the plaintiff, upon which he was riding, and the automobile of the defendant. Trial was had by jury, which returned a verdict for \$1. Being dissatisfied with the verdict, the plaintiff moved for a new trial, which was granted, as above mentioned, and the defendant appeals.

In support thereof the appellant urges: First, that there is no substantial evidence of any negligence on the part of the defendant in connection with the collision; and, second, assuming that the evidence might support a finding of such negligence, it also shows beyond question and as a matter of law that the plaintiff's own negligence proximately contributed to his injury; that the verdict of the jury in plaintiff's favor, although only for \$1, was erroneous, but that it is not an error of which the plaintiff can complain, and afforded no ground for the granting of a new trial at his instance.

[1] We are of the opinion that appellant's contention with respect to the contributory negligence of the plaintiff must be sustained.

The evidence in the record shows that on the night of June 23, 1920, at about the hour of 9:40 p. m., the defendant in his automobile was driving on East Twelfth street, Oakland, and was engaged in making a left turn to bring him into Fourteenth avenue, an intersecting street, and that the plaintiff, driving a motorcycle in an opposite direction on East Twelfth street, ran into defendant's automobile before it had succeeded in clearing East Twelfth street and entering the avenue. There is some evidence in the record from which the jury might have inferred that the defendant undertook to make this turn before passing the medial line of the intersection. Assuming that the jury took this view, the evidence further shows without contradiction that before commencing to turn the defendant brought his machine to a complete standstill; that he gave the proper signal that he was about to turn; that he looked in the direction from which the plaintiff's motorcycle was approaching and did not see it, it not being equipped with the headlight required by law; that his automobile was struck by the motorcycle of plaintiff almost immediately after starting up and while making the turn and before his automobile had acquired a speed greater than 8 miles an hour; that his two headlights (which complied with legal requirements) were lighted and visible to the plaintiff had he looked, which in duty he was bound to do; that, on the other hand, the plaintiff's motorcycle was not equipped with the headlight required by law, which would have aided the plaintiff to discover the presence of defendant's automobile, and the defendant to have perceived the plaintiff's ap-

proach, but in lieu thereof the plaintiff held in his hand a small flashlight, not capable of revealing objects more than 25 feet distant even if its beams had been directed ahead of the motorcycle; that the plaintiff drove his motorcycle thus unequipped with the legal headlight at a rapid rate of speed across the intersection of the streets in question in the darkness of night; and it is also to be noted (although this circumstance cannot, perhaps, be said to have contributed to the collision with the same certainty as the other negligent acts referred to) that although the motorcycle was constructed for carrying only one person, the plaintiff was carrying a passenger upon it, who was seated upon the rear fender with both legs on the left side of the machine, the testimony showing that his presence in this position interfered with the proper operation of the motorcycle.

As to the speed at which the plaintiff crossed the intersection, the lowest estimate—his own—places it at 14 miles per hour, while one of his witnesses puts it much higher; and he himself, testifying at a previous hearing in which the circumstances of the collision were under investigation, stated, in answer to the question:

"About how fast do you think you were going?" "I can't say positively nowhere near how fast I was going."

[2] While a speed of 14 miles an hour is within the maximum allowed by the Motor Vehicle Act, yet it does not follow that the operator of a motor vehicle may under all circumstances proceed at that rate. On the contrary, the act, both in section 20 (a) and 22 (a) (St. 1915, pp. 406, 409, as amended by Stats. 1919, pp. 215, 220), provides that such driver shall at all times operate his vehicle in a careful and prudent manner and with due regard for the safety of other users of the highway. It follows that a driver, whose vehicle, either through neglect or accident, is unequipped with the amount and character of illumination required by law, may not safely proceed at the same rate of speed as he might otherwise. The amount of illumination of a vehicle has relation not only to the driver's own safety but to that of others, and it is intimately involved with the question of speed.

In *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316, the driver of a motorcycle on a city street was held guilty of negligence in crossing a city street at the rate of 15 miles an hour where his vision of persons traveling thereon was obstructed; the court saying:

"The ordinance fixing the maximum speed at 20 miles an hour is not a license to go at that speed at all times and places. *Irwin v. Judge*, 81 Conn. 492 (71 Atl. 572). The care required at any place on a public street is always that of a reasonably prudent person under the circumstances. *Scott v. San Bernardino, etc.,*

Co., 152 Cal. 610 (93 Pac. 677). There are occasions when a speed far below the maximum would constitute negligence."

[3, 4] The Motor Vehicle Act, §§ 13a, 13c, and 13f, as amended requires motorcycles, when being driven upon a public highway during the period from half an hour after sunset to half an hour before sunrise, to be equipped with a headlight of the character specified in said act. *Pope v. Halpern* (Cal. Sup.) 223 Pac. 470. The plaintiff's neglect to comply with this provision of the law, designed expressly for the avoidance of collisions, constituted negligence. That plaintiff's operation of his motorcycle at the time in question in this and the other respects noted contributed to the happening of the accident there can be no doubt, and the defendant was accordingly entitled to a verdict in his favor. The jury's error in finding against him is not one of which the plaintiff can complain, and furnishes no ground for the trial court's order granting his motion for a new trial.

The order is reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; MYERS, J.; SEAWELL, J.

193 Cal. 192

Ex Parte HEATH. (Cr. 2661.)

(Supreme Court of California. Feb. 11, 1924.)

Criminal law — 1202(6)—Sentence and judgment for robbery after prior conviction for felony held sufficient, though not fixing term.

Since, under Pen. Code, §§ 213, 667, the punishment fixed by law for robbery after a prior conviction of a felony is life imprisonment, the court, under section 13, providing that the sentence shall be fixed by the court whenever the punishment is left undetermined between certain limits, is not required to fix the term of imprisonment; a sentence to confinement according to law being sufficient notwithstanding section 12, declaring it the duty of the court to pass sentence and to determine and impose the punishment prescribed.

In Bank.

Application by Henry V. Heath for a writ of habeas corpus, to be directed to J. J. Smith, Warden of the State Prison. Writ denied.

Henry V. Heath, in pro. per.

PER CURIAM. Petitioner is detained in the California state prison at Folsom and seeks a writ of habeas corpus.

The judgment under which he is imprisoned sentenced petitioner to be confined in the California state prison according to law. The petitioner was convicted of the crime of

robbery after a prior conviction of a felony. In re Heath, 49 Cal. App. 657, 194 Pac. 68. The punishment fixed by law is life imprisonment. In re Heath, supra; sections 213 and 667, Pen. Code. The petitioner contends that, inasmuch as the indeterminate sentence law does not apply (In re Heath, supra), it was the duty of the trial court, under section 12 of the Penal Code, to have fixed the term of imprisonment. Section 13 provides that the sentence shall be fixed by the court "whenever in this Code the punishment for a crime is left undetermined between certain limits." In the case at bar in view of the fact that the only sentence possible was one for life imprisonment, the sentence and judgment were sufficiently specific. In re Heath, supra.

The petition is denied.

193 Cal. 184

**LUCKEHE v. FIRST NAT. BANK OF
MARYSVILLE. (Sac. 3445.)**

(Supreme Court of California. Feb. 11, 1924.)

1. Principal and agent §105(9)—Agent for collection cannot bind principal by acceptance of anything but actual money.

An agent authorized merely to collect a demand or to receive payment of a debt cannot bind his principal by any arrangement short of an actual collection and receipt of the money except by agreement with the creditor.

2. Banks and banking §171(7)—Principal and agent §60—Agent liable for collecting anything except cash; bank accepting other than cash for instrument held for collection liable if substituted paper not paid.

An agent for collection accepting anything other than cash in payment is liable to his principal for any loss suffered thereby, which rule is applicable to banks acting as collecting agents, so that a bank surrendering an instrument held for collection in return for a check or other paper of the party upon whom it is drawn does so at its own risk, and is liable if that paper is not paid, irrespective of negligence in collection of the substituted paper.

3. Banks and banking §161(1)—Bank's liability in making collection controlled by instructions of creditor if any exist.

Where an instrument is placed by the obligee in the hands of a bank for collection the terms of a special contract, if any exists, relative to the collection or instructions from the obligee relative thereto, furnish the measure of the bank's duty.

4. Banks and banking §161(2)—Bank making collection in customary manner of banks not negligent.

A bank making a collection following the course usually taken by banks under similar circumstances cannot be held to be negligent.

5. Banks and banking §171(6)—Bank not liable for negligence of suitable subagent employed in good faith.

A bank which in good faith has employed a suitable subagent, for the purpose of making a collection, is not thereafter liable for default or negligence of that subagent.

6. Banks and banking §171(7)—Forwarding bank liable for negligence in acceptance of check from correspondent in payment of certificate of deposit.

Negligence of a correspondent bank to which a certificate of deposit has been forwarded for collection in accepting a check in payment rather than actual cash does not relieve the forwarding bank from any negligence on its part in accepting such check from its correspondent rather than demanding the cash and returning the check for further presentation and collection in cash.

7. Banks and banking §171(8)—Bank may absolve itself from liability for unauthorized course in making collection by securing sanction of owner of claim.

A bank to whom a certificate of deposit has been surrendered for collection may absolve itself from liability for negligence in accepting from its correspondent a check drawn by the bank issuing the certificate by notifying the owner thereof and securing his sanction of its unauthorized acceptance of the check in lieu of the cash.

8. Customs and usages §13—Usage or custom deemed part of commercial contract.

As a general proposition every commercial contract is entered into with the understanding that usage in regard to the particular matter of the contract becomes a part of the transaction itself.

9. Customs and usages §5—Custom or usage must be general to be of binding force in contract.

In order to be of binding force in commercial contracts a custom or usage relied upon must be general as to the place.

10. Banks and banking §161(2)—Rule stated as to when custom will relieve bank from charge of negligence in making collection.

It is incumbent upon a bank, seeking to absolve itself from liability for alleged negligence in the acceptance of a check in payment of a certificate of deposit surrendered to it for collection by showing a usage or custom to clearly establish that such a custom existed that it was general and that it was followed in attempting to make the collection.

11. Customs and usages §5, 7—Must be general; must be reasonable.

In order for a custom or usage to bind the parties to a transaction it must not only be general and well known, but must be reasonable.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by C. J. Luckehe against the First National Bank of Marysville. Judgment for defendant, and plaintiff appeals. Reversed.

Clinton W. Johnson, of Gridley, for appellant.

W. H. Carlin, of Marysville, for respondent.

WASTE, J. Plaintiff brought this action to recover from the defendant the sum of \$1,050, with interest, the amount evidenced by a certain certificate of deposit made and delivered by the defendant to the plaintiff. Judgment was entered for the defendant, and plaintiff has appealed.

On the 11th day of December, 1920, appellant held an interest-bearing certificate of deposit for \$1,050 issued to him by the First National Bank of Gridley. The certificate became due on that date, and appellant, desiring to transfer his account, indorsed the certificate over to the Gridley bank and received for the one surrendered an ordinary certificate of deposit for the same amount, payable on demand. In the afternoon of the same day, which was a Saturday, appellant took the new certificate to the First National Bank of Marysville, indorsed it to the bank, and received in exchange an interest-bearing certificate of deposit of the Marysville bank, in a similar amount, payable six months after date. Respondent mailed the certificate of the Gridley bank to the Rideout Bank, its correspondent in Gridley, for collection. It was received by that bank on Monday, the 13th of December, and, on the same afternoon, was presented to the issuing bank for payment. Instead of demanding and receiving cash, the Rideout Bank surrendered the certificate of deposit, and accepted from the First National Bank of Gridley an exchange draft on the Anglo & London-Paris National Bank of San Francisco, which it indorsed and mailed to the Marysville bank. Respondent did not notify appellant that it had the check of the Gridley bank but, in turn, indorsed and mailed it to its San Francisco correspondent, the Mercantile Trust Company. The draft was presented by the latter bank, through the clearing house, to the Anglo & London-Paris National Bank, where it was dishonored. It was then returned to respondent, without having been paid, and was received by it on December 17. On the same day respondent notified appellant of the dishonor of the draft, and on the same day the First National Bank of Gridley closed its doors and went into the hands of a receiver at the end of the day's business. After six months had elapsed, appellant presented the certificate of deposit issued to him by the Marysville bank to the respondent for payment. Payment being refused, this action was commenced.

The complaint sounds in contract. It states a cause of action based on the certificate of deposit issued by the respondent to appellant, and the refusal of respondent to pay the amount on demand. The allegations of the complaint and the denials of

the answer presented an issue based on the theory that the relation subsisting between appellant and respondent was that of creditor and debtor. *Plumas County Bank v. Bank of Rideout, etc.*, 165 Cal. 126, 138, 131 Pac. 360, 47 L. R. A. (N. S.) 552. But, at the trial, the case was shifted to one for negligence based on the respondent's liability to the appellant for its failure to collect the amount due on the original certificate of deposit issued to appellant by the First National Bank of Gridley. It was conceded by both parties in the court below that the certificate of deposit issued by the Gridley bank, payable to appellant, and by him transferred to the respondent in exchange for the certificate of deposit set out in the complaint, was received by the respondent for collection, and not otherwise. The relation between appellant and the respondent resulting from the contract for the collection of the amount due on the certificate was therefore admitted to be only that of principal and agent. *Henderson v. O'Connor*, 106 Cal. 385, 390, 39 Pac. 786; *Davis v. First Nat. Bank of Fresno*, 118 Cal. 600, 601, 50 Pac. 666.

[1, 2] "It is elementary doctrine that 'an agent authorized merely to collect a demand, or to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection and receipt of the money.' *Ward v. Evans*, 2 Ld. Raym. 928; *Ward v. Smith*, 7 Wall. 451; *Pitkin v. Harris*, 69 Mich. 133; *Hurley v. Watson*, 68 Id. 531. * * * The law requires payment in money, and, as already shown, nothing else answers the purpose, except by agreement with the creditor, or his agent duly authorized to accept something else." *State Bank of Midland v. Byrne*, 97 Mich. 178, 179, 56 N. W. 355, 356 (21 L. R. A. 753, 754, 37 Am. St. Rep. 332). It has been repeatedly held that if an agent for collection does accept anything other than cash in payment he will be liable to his principal for any loss the latter may suffer, and this rule is applicable to banks acting as collecting agents; and if such a bank surrenders the instrument in return for a check or other paper of the party upon whom it was drawn, it does so at its own risk, and is liable, irrespective of negligence in the collection of the substituted paper, if that paper is not paid. 3 R. C. L. § 245, pp. 616, 618, and cases cited in notes 18 and 19.

[3, 4] Having no authority to receive, in payment of commercial paper intrusted to it to collect, anything but money, a bank accepting negotiable paper in lieu of currency, for a draft it was employed to collect, does so upon its own responsibility. *Bradley Lbr. Co. v. Bradley Co. Bank*, 124 C. C. A. 175, 206 Fed. 41; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; 1 *Morse on Banks and Banking* (3d Ed.) § 252; *Albert v. State Bank*, 78 Misc. Rep. 56, 138 N. Y. Supp. 237. If the collecting

bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash (*Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. 596, 2 L. R. A. 493), and it must be held to have immediately become indebted to its depositor in the amount which the paper represents. *Midway Five Oil Co. v. Citizens' Nat. Bank*, 25 Cal. App. 366, 368, 143 Pac. 800. Of course, where there is a special contract between the bank and the holder, or where special instructions are given by the holder, such contract or instructions furnish the measure of the bank's duty. No instructions were given in this case. Therefore, if it were not for another element which enters into the consideration of the case, we would be compelled to say at once that the plaintiff would be entitled to recover. But it seems to be now well established in this, as in other jurisdictions, that if, in making the collection, the bank followed the course usually taken by banks under similar circumstances, it cannot be held to be negligent. The authorities which lay down this rule will be presently discussed.

[5, 6] In reaching a determination of the present controversy between appellant and the First National Bank of Marysville, the connection of the Rideout Bank at Gridley with the transaction may be eliminated. Under the accepted rules of law laid down by the authorities, the latter was negligent in the first instance in surrendering the certificate of deposit to the First National Bank of Gridley and accepting the check or draft of that bank on its San Francisco correspondent. The Rideout Bank should have insisted on, and received, nothing but money in return for the surrender of the certificate. Had it done so, we may assume no loss would have resulted in this particular case, for the evidence is uncontradicted that on the 13th day of December, 1920, and for several days thereafter, the First National Bank of Gridley was paying its obligations in cash when demanded, and that, if the Rideout Bank on that day had demanded cash in return for the certificate of deposit, cash would have been paid. It is not disputed here—in fact, we may safely assume from the record—that respondent in good faith employed a suitable subagent at Gridley for the purpose of making the collection. It is, therefore, not liable for the default or neglect of the Rideout Bank *Nicoletti v. Bank of Los Banos* (Cal. Sup.) 214 Pac. 51. But the negligence of the Rideout Bank does not relieve the respondent from responsibility for the consequent loss, if it was negligent in accepting from its correspondent the check of the First National Bank of Gridley in place of the money which it had engaged to collect. What it did thereafter, it did for itself and not for appellant. *Nat. Bank of*

Commerce v. Am. Exch. Bank, 151 Mo. 320, 330, 52 S. W. 265, 74 Am. St. Rep. 527. It was not required to accept the check in lieu of cash. It could have promptly returned that paper to its correspondent and demanded further presentation and collection in cash. Marysville and Gridley are but 18 miles apart. The evidence shows that the First National Bank of Gridley continued to pay cash until the close of business on December 17.

[7] On the other hand, respondent could have absolved itself from liability by reason of having surrendered appellant's certificate for a check in lieu of the cash, by informing appellant what had been done and securing his sanction of the unauthorized transaction. *Ward v. Smith*, 7 Wall. (74 U. S.) 447, 452, 19 L. Ed. 207. Respondent's position is that the certificate of deposit taken by it from appellant was presented by it for payment without delay, and that the collection was handled by it in the ordinary course of business. It cites the sections of the Uniform Negotiable Instruments Act, which relate to the time within which a check must be presented for payment, and which provide that checks must be presented within a reasonable time, and that in determining what is a reasonable time or an unreasonable time regard is to be had to the nature of the instrument, "the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." Civ. Code, §§ 3265b and 3266b. Respondent's contention that the certificate of deposit was promptly presented for payment is not disputed. Its position is perhaps better understood when it says in its brief:

"Perhaps the majority of the banks in the interior of the state carry only a limited amount of coin or paper money. They have their correspondent in San Francisco and the matter goes through the clearing house in San Francisco and is adjusted."

In other words, respondent is seeking recourse to a customer or usage of the banking business to relieve it from liability in the present case.

[8] As a general proposition of law, it is, of course, true that every commercial contract is entered into with the understanding that usage in regard to the particular matter of the contract becomes a part of the transaction itself. *Nat. Bank v. Burkhardt*, 100 U. S. 686, 691, 25 L. Ed. 766; *Moore v. U. S.*, 196 U. S. 166, 25 Sup. Ct. 202, 49 L. Ed. 428. The rule has many times been applied to banking transactions and banks, and this court has held that if a bank in making a collection followed the course usually taken by banks under similar circumstances, and if such usage was reasonable and did not contravene any principle of law, the fact that the bank followed such usage or custom would tend to show that it exercised reasonable care in seeking to collect the draft.

Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 602, 50 Pac. 666. See, also, *S. F. Nat. Bank v. Am. Nat. Bank*, 5 Cal. App. 408, 90 Pac. 558. In another case in which the contract was for the collection of a draft, the court held that the manner of disposing of the assets was clearly one resting in general usage. It said:

"Proof of such custom is admissible and the general usage, when not in contravention of the law, is of governing force." *Gonyer v. Williams*, 168 Cal. 452, 456, 143 Pac. 736, 737.

The rule prevailing in California has been stated to be that—

"A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special direction, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge of its existence. Knowledge on the part of the customer is implied conclusively. The fact that one deals with a bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. So, where a person hands over a note to a bank for collection without any remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course. The bank not only has the right to assume, but it is positively bound to assume, that the customer's desire is that the ordinary and established course be pursued." 4 Cal. Jur. p. 263, § 145.

The same rule prevails in many other jurisdictions. 7 Cor. Jur. p. 612, § 273.

[9, 10] In order to be of binding force in contracts, the custom or usage must be general as to place and not confined to any particular bank or banks. *S. F. Nat. Bank v. Am. Nat. Bank*, supra. The respondent did not plead, by way of defense to appellant's action, that it had followed any general usage or custom in making the collection, or that any such usage or custom existed in the community where it had its place of business, or where the collection was to be made. There is not a particle of evidence in the record that respondent followed any custom or that one exists. The court below made no finding on the subject. This court does not know, therefore, and cannot assume, that there is any such custom or usage as that relied on by the respondent. It was incumbent on the respondent to clearly establish that one existed, and that it was general (*Smith v. Nat. Bank of D. O. Mills* [O. C.] 191 Fed. 226, 231), and that it followed the usage in attempting to make the collection.

[11] In order to bind the parties to the transaction the usage must not only be so general and well known in the community as to fasten an implied knowledge on the parties, if actual knowledge be denied (*Smith v. Bank of D. O. Mills*, supra), but it must

be reasonable (*Davis v. First Nat. Bank of Fresno*, supra; *Farley Nat. Bank v. Pollock*, 145 Ala. 321, 327, 39 South. 612, 2 L. R. A. (N. S.) 194, 117 Am. St. Rep. 44, 8 Ann. Cas. 370. For instance, and somewhat in point, it has been held that any usage or custom which would tend to relieve a bank from liability in case it surrenders to the maker a draft given it for collection, and accepts in return the check of the maker, would be unreasonable, and could not be invoked as a justification for such course. *Bank v. Bank*, 151 Mo. 320, 332, 52 S. W. 265, 74 Am. St. Rep. 527; *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762. But the effect of these decisions has not been argued on this appeal. Without full proof and a finding of the exact nature and extent of the usage relied on by respondent to defeat appellant's claim, this court cannot say the usage is or is not reasonable.

For the foregoing reasons, the judgment is reversed, and the cause is remanded to the lower court for such further proceedings, in keeping with what is said in this opinion, as the parties may determine.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.

193 Cal. 291

SCHUBERT v. LOWE et al. (Sac. 3416.)

(Supreme Court of California. Feb. 16, 1924.)

1. Appeal and error ⇨1078(1)—Failure to present point in brief may preclude from insisting on its consideration.

A party neglecting to present a point in his brief may be precluded from insisting on its consideration in deciding the case and from asserting that he has been prejudiced should the court refuse to consider it.

2. Appeal and error ⇨763—Point, first briefed after presentation in argument, considered.

Where a point was fully briefed after presentation in oral argument, and its consideration was necessary to a decision and would not be prejudicial to the other party, it could be considered though not briefed before the argument.

3. Forcible entry and detainer ⇨23—Cross-complaint cannot be interposed.

Under Code Civ. Proc. c. 4, pt. 3, tit. 3, c. 4 (sections 1159-1179), superseding in practice matters in other parts of the Code, and providing that defendant in an unlawful detainer may "on or before the day fixed for his appearance * * * appear and answer or demur," a cross-complaint cannot be interposed in such an action.

4. Forcible entry and detainer ⇨12(1)—Part performance of oral agreement to lease held interposable as equitable defense.

In unlawful detainer, though defendant could not interpose a cross-complaint and get

specific performance of an oral agreement to convey under which he took possession in view of Code Civ. Proc. pt. 3, tit. 3, c. 4 (sections 1159-1179), part performance of the agreement could be interposed as an equitable defense.

5. Frauds, statute of §129(2)—Part performance of oral agreement to lease may take case out of statute.

Part performance of oral agreement to execute a lease for a longer period than one year may take the case out of the statute.

6. Appeal and error §1039(5)—Setting up equitable defense by way of cross-complaint held not prejudicial error.

Where, in unlawful detainer, it was proper for the defendant to raise and for the court to consider the effect of part performance of an oral agreement to lease as an equitable defense, the error of defendant in presenting such defense by way of cross-complaint for specific performance of the oral agreement held not prejudicial to plaintiff and not to require a new trial.

7. Appeal and error §907(3)—Particular assumption in support of judgment held proper on appeal on judgment roll alone.

Where, in unlawful detainer, the judgment of the trial court for defendant was based upon his equitable defense of part performance of an oral agreement to lease, on appeal by plaintiff on the judgment roll alone, a finding of the lower court that plaintiff's wife did not agree to execute a lease was treated as immaterial in view of fact that Civ. Code, § 172a, requiring joinder of wife, applies only to community property acquired after the adoption of that section; the appellate court assuming in support of the judgment that the premises in question were acquired before such adoption.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Unlawful detainer by P. M. Schubert against A. A. Lowe, in which Lena M. Schubert was joined as cross-defendant. Judgment for defendant and cross-complainant, and plaintiff and cross-defendant appeal. Judgment so far as it decreed specific performance of agreement to execute lease set aside, and otherwise affirmed.

Barcroft & Barcroft, of Madera, and Lindsay & Conley and Philip Conley, all of Fresno, for appellants.

Fee & Ring, of Madera, for respondent.

LENNON, J. This action in unlawful detainer was instituted by the plaintiff for the purpose of recovering from the defendant the possession of certain real property in the city of Madera. It was alleged that defendant had occupied the premises under a tenancy from month to month; that the tenancy had been terminated and possession of the premises demanded by plaintiff in accord-

ance with the provisions of section 789 of the Civil Code and section 1161 of the Code of Civil Procedure; and that the defendant refused to surrender the premises and was holding the same without plaintiff's permission or consent. The defendant by his answer denied that the property in suit was occupied under a month to month tenancy, and then, by way of cross-complaint, proceeded to allege a cause of action for specific performance of an alleged partially executed parol agreement. In this behalf the cross-complaint alleged, in substance, that plaintiff and defendant had entered into an oral agreement whereby plaintiff had agreed to execute a written lease to the premises in suit containing certain terms, specifically set forth in the cross-complaint, and that the defendant entered into possession of the premises pursuant to and upon the understanding and belief that the plaintiff would execute the lease agreed upon, but that plaintiff refused to do so. The property was alleged to be community property and plaintiff's wife was joined as a cross-defendant. The court overruled a general demurrer to the cross-complaint, found against the plaintiff on the issues raised by the pleadings, and rendered judgment for the defendant and cross-complainant, decreeing specific performance by plaintiff of the agreement to execute the lease and appointing a commissioner to perform in the event of plaintiff's refusal. The appeal is taken upon the judgment roll alone.

[1, 2] The paramount point presented in support of the appeal is that a cross-complaint of any kind is inadmissible in an action of unlawful detainer. Preliminarily, counsel for defendant interposed an objection to a consideration of the point just stated for the reason that it was first raised upon oral argument when the appeal was heard in the first instance before the District Court of Appeal. In response to this objection it will suffice to say that ordinarily, where a party has neglected to present a point in his brief, he may be precluded from insisting that the court consider the point when deciding the case and from asserting that he has been prejudiced should the court refuse to do so. However, we know of no hard and fast rule which prohibits the court from considering and deciding points of law which may not have been urged and argued in the briefs originally filed if it appears to the court that an important legal principle is necessarily involved in the newly discovered point, and that a proper disposition of the case requires a discussion and decision of that point. But, however that may be, it appears in the instant case that after the oral argument the point in controversy was fully briefed, and we are satisfied that the defendant will in no way be prejudiced by a consideration of the point which we deem to be necessary to a decision.

[3] In *Arnold v. Krigbaum*, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370, this court said:

"It appears to be thoroughly established both in this state and in other jurisdictions having substantially similar statutes to our unlawful detainer statutes, that neither a counterclaim nor cross-complaint of any kind is permissible in an action in unlawful detainer. This question was discussed by the District Court of Appeal of the First District in the recent case of *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512, where many authorities [bearing directly upon the point] are cited."

See, also, *Smith v. Whyers* (Cal. App.) 221 Pac. 387.

"There is no distinction in the authorities between cases where the subject-matter of the attempted counterclaim or cross-complaint arises out of a violation of the terms of the lease upon which the action is brought, and other cases."

A cross-complaint is not permissible in an action for unlawful detainer for the reason that the provisions of part 3, tit. 3, c. 4, of the Code of Civil Procedure, are controlling in the summary proceedings, including unlawful detainer, with which the chapter is concerned. In so far as that chapter deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the Code. Sections 1165 and 1177, Code Civ. Proc. The chapter above mentioned prescribes the showing which must be made in a complaint in unlawful detainer and then makes provision for pleadings on the part of the defendant. It provides:

"On or before the day fixed for his appearance, the defendant may appear and answer or demur." Section 1170, Code Civ. Proc.

The section limits the defendant to an answer or demurrer. Obviously, therefore, a cross-complaint is inadmissible in an action in unlawful detainer.

[4] While the defendant was not entitled to a judgment in the present proceedings decreeing specific performance of the agreement to execute the lease, nevertheless the part performance of such an agreement can be interposed as an equitable defense to the plaintiff's attempt to wrest from him the possession of the premises by the summary proceedings in unlawful detainer. In the case of *Gray v. Maier*, etc., 2 Cal. App. 653, 84 Pac. 280, the court, referring to the right to set up defenses of an equitable nature in such actions, had this to say:

"The power of a court of equity is invoked by plaintiff in every action in forcible detainer, when he seeks in his complaint to have a forfeiture declared on account of default in conditions of the lease. * * * If such an equitable power is in a court in cases of this class, of which we have no doubt, no reason is apparent why such equitable power may not be

extended into a full examination of all the equities involved, to the end that exact justice be done."

In the case of *Knight v. Black*, supra, it was held error on the part of the trial court to strike out the equitable defense there pleaded by the defendant in his answer. In other words, the fact that the defendant cannot obtain specific performance of an oral agreement to execute a lease does not deprive him of the right to have the court examine into the equities existing between the parties in determining whether or not the plaintiff is entitled to evict the defendant.

[5] It is a well-recognized rule of equity that part performance of an oral agreement to execute a lease for a longer period than a year may take the case out of the operation of the statute of frauds. *McCarger v. Rood*, 47 Cal. 138; *Manning v. Franklin*, 81 Cal. 205, 22 Pac. 550; *Laughton v. McDonald* (Cal. App.) 215 Pac. 707.

[6] It was therefore proper for the defendant to raise, and for the court to consider, the occupation of the premises under the oral agreement to lease, as an equitable defense to the action to recover possession of the property. While defendant's pleading was called a cross-complaint for specific performance, and as such was perhaps defective in that it failed to state facts showing that the consideration for the lease was adequate, nevertheless it sufficiently presented the agreement to execute the lease as an equitable right in defendant's favor. It set forth defendant's case with more particularity than a simple answer would have been required to do. The issue apparently was considered and carefully tried and the court has made detailed findings thereon. We are therefore of the opinion that plaintiff has not been prejudiced, and, under the circumstances, the mere error in the matter of pleadings has not resulted in a miscarriage of justice, and a new trial is not necessary to determine the rights of the parties.

[7] Plaintiff points to the fact that the court found that plaintiff's wife did not agree to execute a lease to the premises. This finding is immaterial for the reason that section 172a of the Civil Code, requiring a wife to join with her husband in a lease of community property, applies only to community property acquired subsequent to the adoption of that Code section. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Roberts v. Wehmeyer* (Cal. Sup.) 218 Pac. 22. The appeal being before the court upon the judgment roll alone, it must be assumed in support of the judgment that the evidence showed that the property was acquired before section 172a became part of the laws of this state.

We conclude, therefore, that the trial court was not authorized in this action of unlawful detainer to decree specific performance of

the agreement to execute a written lease, but that the court had power to examine into the partial performance of the oral agreement to execute the lease as an equitable defense to the attempt at eviction, and that the court having found in favor of the defendant upon this issue, a new trial is unnecessary.

It is ordered, therefore, that that portion of the judgment decreeing specific performance of the agreement to execute the lease be vacated and set aside, and that the remainder of the judgment stand affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.

(193 Cal. 212)

GREGG v. WESTERN PAC. R. CO. et al.
(S. F. 10271.)

(Supreme Court of California. Feb. 15, 1924.)

1. Appeal and error ⇨927(3)—Evidence viewed most favorably to plaintiff on appeal from judgment of nonsuit.

In determining whether a nonsuit was properly granted, every inference fairly deducible and every presumption fairly arising from the evidence favorable to plaintiff must be considered as facts proved in his favor, and, if one of several inferences may reasonably be made, the court must take the view most favorable to plaintiff and discard contradictory evidence.

2. Negligence ⇨136(9)—Contributory negligence for jury, where reasonable men might disagree.

If the evidence and circumstances are such that the question of plaintiff's negligence is one on which reasonable men might disagree, a motion for nonsuit should not be granted.

3. Railroads ⇨350(28)—Contributory negligence of automobile driver held for jury.

An automobile driver, who had crossed a railroad track at a crossing daily for several months without having ever seen or known of a train passing such point at the hour he was struck by one, and who knew that a signal man was stationed at the crossing, held not negligent, as a matter of law in crossing the track while his view was obstructed by a street car filled with passengers, where the approaching train, which struck him, sounded no warning, and the watchman was absent, and he started to cross from the opposite side, after the conductor, pursuant to a rule of which plaintiff was aware, had looked down the track before the car started across.

4. Negligence ⇨68—Care commensurate with situation required.

It is the duty of every one to exercise such care as is commensurate with the situation.

5. Railroads ⇨330(2)—Adoption of safety devices reduces quantum of care required of traveler.

While a railroad crossing is a place of danger and an effectual warning of danger which

must always be heeded, and the exercise of ordinary care in traveling over it is not excused by the railroad's negligent omission to exercise reasonable care, a railway company encouraging the public to relax its vigil by assurances that the danger has been removed or minimized by adoption of safety devices and measures cannot hold a person to the same quantum of care as if no such safety measures had been provided.

6. Railroads ⇨330(2)—Open gates held invitation to cross, which must be considered, with failure to sound warning, on issue of contributory negligence.

Though crossing gates are operated during certain hours only, open gates during the rest of the day give the same assurance of safety to persons without knowledge of such limitation as if there were none, in the absence of reasonable notice by appropriate signs or otherwise, and are an invitation to cross, which must be considered, with failure to ring the bell or sound the whistle, as required by Civ. Code, § 486, and other facts and circumstances, in determining the question of contributory negligence.

7. Railroads ⇨350(28)—Contributory negligence of traveler relying on assurance of safety from absence of flagman for jury.

The extent to which a traveler may rely on the assurance of safety arising from the absence of the flagman at a crossing, with which he is familiar, is generally a question of fact for the jury, from which it may be withdrawn only where the deduction from the circumstances is inevitably that of negligence.

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by C. J. Gregg against the Western Pacific Railroad Company and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

Ostrander & Carey, of Oakland, for appellant.

Stephen F. Otis, of San Francisco, and Snook & Brown, of Oakland (Thos. J. Ledwich, of Oakland, of counsel), for respondents.

SEAWELL, J. Appeal from a judgment of nonsuit in an action by appellant to recover damages from respondents for injuries sustained by the former while driving an automobile by reason of being struck by an engine drawing a train of cars, which, it is alleged, was operated by respondents in a careless and negligent manner.

A single track of the Western Pacific Railroad Company, a steam railroad, occupies a position on East Twelfth street, a few feet south of the center line of said street, in the city of Oakland. Its course through Oakland is in an easterly direction. Twenty-Third avenue, which extends northerly and southerly, intersects said East Twelfth street at a right angle. The San Francisco-Oakland

Terminal Railways Company, with its terminal in Oakland and Alameda county, operates a double-track electric system over and along said avenue. The place where the accident occurred is within quite a busy suburban business section of said city of Oakland. At the time of the injury the Western Pacific train was moving in a westerly direction and the automobile was traveling southerly.

The east property line of Twenty-Third avenue northerly from East Twelfth street is entirely occupied with business buildings which shut off the easterly view of respondent company's railroad track, except as the line of vision is broadened by moving southerly upon the northerly property line of East Twelfth street. Business houses occupy the northeast corner formed by said intersecting streets and continue easterly along the property line of East Twelfth street for some distance. A station house for the accommodation of a flagman or watchman, whose duty it was to give warning signals to persons and to the traffic moving along East Twelfth street at the point where it is intersected by Twenty-Third avenue of approaching trains moving either easterly or westerly across said East Twelfth street, occupied a position about 6 feet south of the building line along East Twelfth street and 8 feet east of the property line of Twenty-Third avenue if projected southerly, leaving a passageway 6 feet in width between said buildings and station house. Said station house as thus placed served to further obstruct a full easterly view of the railroad track looking easterly from Twenty-Third avenue. This station house was 6 by 8 feet in dimensions and stood 8 feet in height. The steam railroad track runs on a straight line for some distance before reaching the crossing and continues until Twenty-Fourth avenue is reached, at which point it turns to the south. The distance from the north property line of East Twelfth street in a direct line to the north rail of respondent's track is approximately 44 feet. It was stipulated by the parties hereto that—

"From a point 10 feet north of the northerly rail of respondent's track on the west street car track looking east the Western Pacific track can be seen for a distance of 900 feet; from a point 33 feet north 1,000 feet; between 10 feet north and 32 feet north, at the following distances, between 900 feet and 1,000 feet; from a point 40 feet north the track can be observed for a distance of 200 feet; from a point 50 feet north it would be observed for a distance of 116 feet."

It was also stipulated that the flagman's house was 32 feet from the nearest rail of said track and was the nearest fixed obstruction. The overhang of the engine was from $2\frac{1}{2}$ to 3 feet from the nearest rail. East Twelfth street is 38 feet in width from curb to curb, and Twenty-Third avenue is 52 feet.

For about six months prior to the collision,

East Twelfth street had been in a state of repair. The travel was along the northerly side. Trenches 18 inches in depth and 1 foot in width had been dug along the outside of the north rail, and ties were piled near by. These trenches led up to within 18 inches of the rails of the electric tracks, and vehicles in crossing East Twelfth street were compelled to keep within the limits of the street car tracks, thus requiring care and attention of drivers in directing automobiles through a narrow passageway. Very near the moment that the automobile was struck, an electric car operated by the San Francisco-Oakland Terminal Railways Company, and moving northerly, had crossed the rails of the Western Pacific track. This car was 40 feet in length and was crowded with passengers so densely as to entirely obstruct the view of objects on the opposite side of said car. The train of respondent was evidently running at high speed; no whistle was blown or bell rung or alarm given in any manner to warn persons or the traffic of the approach of the train. The flagman or watchman who was accustomed to warn the public of approaching trains from a position near the center of the intersection of said streets was absent from his post. The main physical facts sufficient for an understanding of the situation have been substantially stated. Other facts and circumstances important to a consideration of the case will be developed as the discussion progresses.

[1] It is important to keep in mind from the outset the well-established rules of law which must control this court in determining whether or not the motion of nonsuit was properly granted. In so doing we must view with reasonable favor the evidence offered in support of appellant's case.

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 Pac. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied. Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; In re Daly, 15 Cal. App. 329, 114 Pac. 787; Was-

sermann v. Sloss, 117 Cal. 425, 49 Pac. 566. 38 L. R. A. 176, 59 Am. St. Rep. 209; [Hoff v. Los Angeles Pacific Co., 158 Cal. 597]; Lassen v. S. P. Co., 173 Cal. 71, 159 Pac. 143; Kleist v. Priem [51 Cal. App. 32], 196 Pac. 72." Berger v. Lane (Cal. Sup.) 213 Pac. 45.

In the light of the foregoing rules the evidence must be examined. Learned counsel for respondent have rather assumed a contrary position. To illustrate: Appellant, upon insistent questioning, hazarded an estimate as to the width of an open space which was rapidly closing as the electric car and the automobile approached each other from opposite directions, and through which opening appellant momentarily looked easterly in observation of respondent's track, and through which opening he claimed to have had an unobstructed view of said track for a distance of about 150 feet. It is urged that the lines of vision limited by an open space of but 5½ inches in width, as estimated by appellant, rendered it impossible for him to have observed the track for so great a distance as 150 feet. For the purposes of this motion the extent of the view must be accepted and the space through which it was made must be widened to accommodate itself to the most favorable advantage of appellant, and, if necessary to that end, it must be entirely discarded.

This case falls within the rule controlling guarded crossings, and the evidence must be considered in its relation to those rules and not confined solely to the rules which govern unguarded crossings such as were applied in *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926, and in many subsequent cases dealing with facts analogous to the facts of those cases. That is to say, each must be considered and decided in reference to the facts peculiar to it.

Observing the rules of construction which apply to motions of nonsuit, the facts in the instant case may be thus stated. Appellant, who was employed as a steam fitter by the San Francisco Shipbuilding Corporation, was, on the morning of November 27, 1920, on his way to said shipyards pursuant to his employment, which yards are situate near the foot of said Twenty-Third avenue, in the city of Alameda. His course to and from his work was along said Twenty-Third avenue, which crosses East Twelfth street, the place of the accident. Twice a day, morning and afternoon, appellant had driven his Overland automobile, of the touring car type, over this course for a period of more than six months. He was therefore quite familiar with the location. On the day in question he left his home at the usual hour and arrived at the crossing, where the injury occurred, at about the hour of 7:43 a. m. Earlier on that morning he had overtaken a fellow workman who was on his way to the shipyards, and who, upon appellant's

invitation to ride, took a seat at his right. As he approached the East Twelfth street crossing he reduced the speed of the automobile from a rate of 12 or 14 miles an hour to a rate of 5 or 6 miles an hour. As he continued to move southerly and crossed over the north property line of and into East Twelfth street, an electric car moving northerly was proceeding to cross the track of the Western Pacific Railroad Company. The electric car arrived at the street crossing prior to appellant's arrival but it was stopped within about 10 feet of the track of the Western Pacific, and the conductor, in obedience to the established rule and custom in such cases, went forward to make an observation as to approaching trains. Seeing none, he gave the motorman the signal to cross the track. The entrance into and the exit from the car was located midway from either end of said car. In making the crossing the electric car traveled at the rate of about 2 miles an hour. At a point about 6 feet from the northerly rail of the Western Pacific's track the conductor boarded his car. The rear end of the 40-foot car had not then cleared the steam railroad track. At a point approximately 25 feet north from the north rail of said steam railroad track said conductor again looked in an easterly direction and saw the light thrown forward by the reflector of the engine drawing the passenger train as it was about to make the curve and enter into East Twelfth street. The distance from Twenty-Fourth avenue to Twenty-Third avenue is 350 feet. He estimated the engine by the light he saw, to have been 200 feet beyond this distance, making a total distance of 550 feet. Neither the conductor, who had walked across the track to make observation for approaching trains, or the motorman, while his car was motionless, or appellant, who was traveling very slowly, or the two or three other persons who were on the sidewalk on Twenty-Third avenue near the scene of the accident, and in favorable positions to have heard an alarm, if given, heard a whistle blown or bell rung or any kind of a warning given of the oncoming train. It must be assumed for the purposes of this motion that no warning whatsoever was given. Had a whistle been sounded or a bell rung, the alarm would, according to the testimony, have been heard.

Appellant, upon nearing the track, had checked his speed to 5 or 6 miles an hour, and testified that he listened and also looked, so far as the conditions appeared to him to require it, for trains that might be approaching. His view to the west was full and complete. To the east it was limited by the station house of the watchman and obstructed by the passing street car, which was crowded with standing passengers. The electric car, as it cleared the tracks, missed being struck by the engine drawing said train of cars by but a few feet. Appellant, upon the

next moment after the rear of said electric car had cleared the steam railroad track, was practically upon said track when he observed the engine so closely upon him a distance of 4 feet, as to make, so he claims, his escape impossible. His automobile was hit back of the left front wheel with great force by the engine. No person except the conductor of the electric car and the occupants of the automobile seem to have been aware at any time of an approaching train until the accident occurred. The automobile was carried forward quite a distance by the engine. The train was brought to a stop at a distance variously estimated from 150 to 250 feet from the place of impact. The rate of speed at which the train was traveling is not definitely fixed, but there is testimony to show that it was traveling at a somewhat fast rate of speed. One witness who heard the crash said:

"I could see that the emergency brakes were on—could see the smoke or dust. When I say that the brakes were smoking, it might have been smoke or dust; I don't know if it was either."

From what he then saw he was of the opinion that it had been traveling at a rate exceeding 20 miles an hour. Appellant also testified that it was traveling at a fast rate of speed. Some notion of its speed may be gained by an estimate of its position when first seen by the conductor and the time required to reach the crossing considered in relation to the position of the electric car at the time of the collision and also with reference to the distance required to stop the train. It was evidently an overdue train, as no train had been seen before to pass the point in question at the time this train was passing, by appellant or by any of the persons who were familiar with the situation and whose duty it was to inform themselves on train schedules. At the time appellant got a view of the steam railroad track between the watchman's station and the front end of the electric car, for a distance of 150 feet, the train had evidently not then moved into or passed through that area. If it had passed beyond it, judging by comparative rates of speed, it would have crossed the intersecting track ahead of appellant and passed safely on. Passengers in the car obstructed appellant's view through the car windows.

[2] The question presented is whether appellant, under all the facts and circumstances of the particular case, was, as a matter of law, guilty of contributory negligence in proceeding to cross said railroad track without listening or looking more effectively or intently than is shown, or by stopping, if circumstances required it, before crossing said railroad track.

Conceding respondent railroad company to have been negligent in its omissions, was appellant also guilty of negligence under the exigencies of the situation by a failure to exer-

cise ordinary care and prudence in attempting to cross said track? If the evidence in the record and also the circumstances of this case are such that the question of whether or not appellant was negligent in approaching the crossing is one upon which reasonable men might well disagree, then the motion for a nonsuit should not have been granted. *Hoff v. Los Angeles Pacific Ry. Co.*, 158 Cal. 596, 112 Pac. 53.

[3] The appellant had crossed the steam railroad track at the point in question daily for several months preceding the injury. During all of that time he had never seen or known of a train passing along East Twelfth street at the hour he was struck. He knew that a signal man was stationed at said crossing whose duty it was to warn the traffic of approaching trains by giving signals from a position near the center of the intersecting tracks. He was not aware of the absence of the watchman or flagman from his post of duty and supposed that his absence from the signal point was an invitation, as it usually was, to cross and that it was safe to do so. No whistle was blown or bell rung by the engineer in charge of the train. Coupled with these circumstances, he observed the electric car passing across the track. It is clear from his testimony that he was aware of the rule of electric and street railways requiring motormen to stop their cars and send forward the conductor to make sure that no train is approaching before crossing a steam railroad track. He had worked as a fireman on locomotives. It was testified to by one witness that it was usual for respondent's employees to give warning of trains moving along East Twelfth street by blowing a whistle before arriving at the Twenty-Third avenue crossing notwithstanding the maintenance of a watchman.

We are not prepared to say as a matter of law under the circumstances of the situation that appellant in determining his action had no right to take into consideration or to be influenced in any degree by the movement of the traffic or by the investigation made by the conductor of the electric car as to its being reasonably safe to cross said track a second or two after the car had passed over it upon the invitation that was being extended by the absence of a warning.

[4] Respondent places much reliance upon what is said in the case of *Jones v. Southern Pacific Co.*, 34 Cal. App. 629, 168 Pac. 586, to sustain the judgment of nonsuit. There the rule of *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 Pac. 175, and *Griffin v. San Pedro, L. A. & S. L. R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, to the effect that, "Where the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard, under the circumstances shown, he is not entitled to have his case go to the jury," is restated. It is

true that that case involved as an element the question of an absent flagman. But the facts of that case are not the facts of this case. The elements which make up the case now before us and which have been stated were not present in *Jones v. Southern Pacific Company*, supra. There the view of the plaintiff was unobstructed, and for a distance of 30 feet from the nearest rail of the tract he had a plain view of defendant's train, and his conduct under the simple circumstances of the case was inexcusable. If he had looked at all, he would have seen the peril into which he was blindly driving. Other opportunities of protection were open to plaintiff in that case which are not shown in the present case. We do not here hold that one who blindly attempts to cross a steam railroad track, whether the crossing be guarded or unguarded, and by reason of such negligence is injured by being hit by a passing train, has a cause of action against the railroad company. The law casts upon every one the duty of exercising such care as is commensurate with the situation. The question is as to the quantum of care that was required to be exercised by appellant in the instant case.

[5] It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger which must always be heeded, and the exercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided. In *Koch v. So. Cal. Ry. Co.*, 148 Cal. 680, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, it is said that the adoption of safety gates or any other appliances by a railroad company for the protection of the public does not absolve the public from all duty of taking care of itself.

"A person is still required to exercise due and ordinary care, and while the *quantum of care* which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty *such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions*, as did the plaintiff in this instance." (Italics ours.)

Continuing, it quotes the following from *Ellis v. Boston, etc., R. R. Co.*, 169 Mass. 600, 48 N. E. 839:

"The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that if any engine or

train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But in attempting to cross the railroad he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. * * * While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more as to his own conduct than that he so relied."

[6] The general situation as presented by the instant case is different from the situation stated in the case of *Koch v. Southern Pacific Company*, supra. To the limited elements named in that case may be added the further facts that appellant was traveling at a very slow rate of speed and was listening and looking as herein described, and that he entered upon the track immediately after an electric car crowded with passengers had crossed it after investigation made by the conductor as to approaching trains. Other elements which must be considered are that the train appeared from around a curve and could not have been seen at any point near the crossing until it had approached within 900 or 1,000 feet of said crossing; said train was not running on schedule time, but was a belated or an extra train; that the passageway over which appellant was compelled to travel had been narrowed by repairs that were being made to respondent's track which required extra care to be given by the driver to the way over which he was passing. If a reasonably prudent person situated as appellant was situated, and seeing what he then saw and knew, would have been justified in acting upon appearances as appellant assumed to do, or, if reasonably prudent men would disagree as to whether appellant exercised ordinary care in the premises, then the case should have gone to the jury. The invitation to cross, the failure to ring the bell or sound the whistle, as required by the provisions of section 486, Civil Code, are elements which must be considered with all the other facts and circumstances of the entire case. The case of *Koch v. Southern Pacific Company*, supra, is not inconsistent with anything said in *Wyseur v. Davis*, 58 Cal. App. 598, 209 Pac. 213. The rule is there correctly stated to be:

"In discussing a similar question, the absence of a flagman from a crossing, in the case of *Elias v. Lehigh Valley R. Co.*, 226 N. Y. 154, 123 N. E. 73, it is said: 'The danger is obvious. It is like in kind to that caused by raised

and untended gates. To some extent it is an assurance that the way is safe. That the railroads recognize the danger is seen by the familiar sign at country crossings giving notice that the flagman is absent after 6 p. m.' See, also *Washington v. Birmingham Southern R. Co.*, 203 Ala. 295, 82 So. 545. Where operated during certain hours of the day only, open gates during the remainder of the day give the same assurance of safety to persons without knowledge of the limited operation thereof as if there were no such limitation, in the absence of reasonable notice by appropriate signs or otherwise. 'Whether required by statute or not, the fact that the gate is open is held to be an invitation to cross and an assurance that the track can be crossed in safety.' *Elliott on Railroads* (2d Ed.) § 1157; *State v. Boston, etc., R. R. Co.*, 80 Me. 430, 15 Atl. 36; *Pittsburg, C., C. & St. L. Ry. Co. v. Tatman*, 72 Ind. App. 519, 122 N. E. 357; *Washington v. Birmingham Southern R. Co.*, supra; *Montgomery v. Missouri Pac. Ry. Co.*, 181 Mo. 477, 79 S. W. 930; *Schwarz v. Delaware, L. & W. R. Co.*, 211 Pa. 625, 61 Atl. 255. 'Open, they proclaim safety to the passing public; closed they proclaim danger.' *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. 'By these signals thousands of travelers are governed every day.' *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. 64. An open gate 'is in the nature of an invitation to cross, and a declaration that there are no approaching trains.' *Penn. R. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136. See, also, *Delaware & H. Co. v. Larnard*, 161 Fed. 520, 88 C. C. A. 462; *Louisville & N. R. Co. v. Eckman*, 137 Ky. 331, 125 S. W. 729; *Carlin v. Michigan Central R. Co.*, 189 Ill. App. 23; *Lake Erie & W. R. Co. v. Howarth*, 73 Ind. App. 454, 127 N. E. 804."

[7] The extent to which a traveler may rely upon the assurance of safety arising from the absence of a flagman from his post of duty on the presumption that it is safe for him to cross a railroad track which he is familiar with is generally held to be a question of fact for the jury. 33 Cyc. 1027; *Elliott on Railroads*, § 1651.

"It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury." *Hoff v. Los Angeles Pacific Co.*, supra, quoting from *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 Pac. 1006.

We are of the opinion that the case should have been submitted to the jury under appropriate instructions by the court.

The judgment and order of nonsuit are reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; MYERS, J.; RICHARDS, J.

OLIVER, as Trustee In Bankruptcy of the Estate of Commercial Brass Foundry, a Partnership, v. The SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, et al. (Civ. 4832.)

(District Court of Appeal. First District, Division 1, California. Nov. 26, 1923.)

PER CURIAM. Writ of mandate.

193 Cal. 61

OLIVER v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, et al. (S. F. 10974.)

(Supreme Court of California. Jan. 25, 1924.)

Courts — 212—Transfer to Supreme Court not granted unless error appears upon face of opinion.

A transfer to the Supreme Court is not granted unless an error appears upon the face of the opinion, and the opinion must be in writing under Const. art. 6, § 24, and this applies to mandamus proceedings.

In Bank.

Application by A. J. Oliver for writ of mandate prayed to be directed to the Superior Court, City and County of San Francisco, E. P. Mogan, Judge, requiring respondent to correct judgment nunc pro tunc with reference to names of defendants. Matter transferred to this court and transferred to District Court of Appeal.

McKannay & Hunt, of San Francisco, for petitioner.

David K. Watkins and Leon A. Blum, both of San Francisco, for respondents.

PER CURIAM. This is an application for a writ of mandamus directed to the respondents. An alternative writ was issued by the District Court of Appeal of the First Appellate District, Division 1, and a peremptory writ denied after hearing, without any written opinion.

Under the rule stated in *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440, we do not grant a transfer unless an error appears upon the face of the opinion. The Constitution provides (article 6, § 24) that—

"In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decisions shall be stated."

This provision applies to mandamus proceedings. *People v. District Court of Appeal* (Cal. Sup.) 222 Pac. 353.

The matter is hereby transferred to this court and, in view of the fact that the matter has been considered by the District Court of Appeal of the First Appellate Dis-

trict, Division 1, the matter is ordered transferred to the District Court of Appeal of the First Appellate District, Division 1.

65 Cal. App. 129

WILLIAMS v. GILL. (Civ. 4830.)

(District Court of Appeal, First District, Division 1, California. Jan. 3, 1924.)

Municipal corporations § 159(1)—City clerk may not go behind face of recall petition containing sufficient number of signatures.

Under Const. art. 23, § 1, and Henning's Gen. Laws 1920, p. 2214, referring to recall petitions, "The clerk shall examine and from the records of registration ascertain whether * * * said petition is signed by the requisite number of qualified voters," the city clerk may not go behind the face of the petition and refuse to certify because dates after the signatures were not written by the signers, but can merely determine whether the requisite number of qualified voters had signed, and, if fraud had been committed, a court of equity is the proper forum to determine it.

Application for writ of mandate by Edwin H. Williams against J. J. Gill, individually and as City Clerk of the City of San Leandro, to compel him to certify a recall petition. Writ granted.

Edwin H. Williams and Fred J. Russell, both of San Leandro, for petitioner.

J. Allison Bruner, City Atty., of San Leandro (Wm. J. Locke, of San Francisco, of counsel), for respondent.

TYLER, P. J. Petition for mandate to compel the performance of a public duty. The allegations of the petition show that petitioner is a resident of the city of San Leandro, county of Alameda, and that he is a registered qualified elector, freeholder, and taxpayer therein; that the defendant, Gill, is the qualified and acting city clerk of said city, and charged with the performance of all the duties and obligations pertaining to that office; that in the month of April, 1922, a general election for the office of city trustee was held in said city, and that at said election one Allen E. Pelton was duly elected to such office, and that he subsequently qualified and now is the acting city trustee of said city.

It is further alleged that on October 5, 1923, plaintiff and others circulated a petition to recall said Pelton from office, which petition was signed by the necessary qualified electors; that after every name signed to the petitions appeared the residence of the signer, by street and number, together with his occupation. It is then recited that all the signatures to the petition were secured between October 5, 1923, and October 19, 1923,

and that plaintiff on said last-named date annexed thereto his affidavit, deposing to this fact, and that the affidavit was duly filed with defendant. It is then charged that defendant, after formal demand made upon him, refused to certify that the petition was in legal form and that it had annexed thereto the signatures of more than 253 qualified electors residing in said city, whose names appeared upon the great register of the county, and which number constitutes 25 per cent. of the total number of voters who voted at the last election for such office; that the defendant gave as his reason for refusing to make his certificate that the dates appearing opposite the names of 158 of the signers did not appear to be written in the handwriting of the signers; that such dates appearing after the names of 100 signers were indicated by ditto marks, and that the occupations appearing opposite the names of 24 of the signers did not appear to have been written in the handwriting of such signers, and also that a certain number of signatures were secured by a person who was not registered at the time he circulated the petition.

It is further charged that the only evidence defendant had for concluding that the dates on the petition for recall were not written by the respective signers was by a mere inspection of the petition itself and that said opinion was his arbitrary conclusion, not founded upon any other evidence. In his answer to the application for the writ defendant does not deny this fact, and plaintiff's allegation that the dates appearing opposite the signatures are the correct dates is denied by defendant merely upon lack of information and belief. Plaintiff contends that this showing does not entitle defendant to reject any of the names.

Upon the hearing it was conceded by defendant that the petition for recall was regular on its face and that it contained a sufficient number of genuine signatures. The sole question here presented is whether or not a signer is required to himself place upon the petition the true date of his signing.

To the general provisions of the law controlling recall petitions (Const. art. 23, § 1; Henning's General Laws 1920, p. 2214) the Legislature added a section to the Political Code. Such section reads as follows:

"1083a. *Qualifications for Signing Initiative Petitions, etc.* Wherever by the Constitution or laws of this state, any initiative, referendum, recall or nominating petition or paper, or any petition or paper, is required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition or paper shall be entitled to sign the same, and no elector shall be entitled to sign any such petition or paper on or after the first day of January of an even-numbered year unless he shall, on or since said first day of January, have made an affidavit of registration

as required by law. Such signer shall at the time of so signing such petition or paper affix thereto the date of such signing. Wherever, by the Constitution or laws of this state, the county clerk or registrar of voters is required to determine from the records of registration what number of qualified electors have signed such petition or paper, he shall determine that fact with respect to the purported signature of any person from the affidavit of registration, and records relating thereto, current and in effect at the date of such signing of such petition or paper."

It is the contention of the defendant that this section is mandatory, and failure on the part of the signers to comply with its provisions justified his refusal to affix his certificate. Plaintiff, on the other hand, insists that the provisions requiring the signer to affix the date after his signature is directory merely, and failure to comply therewith does not justify the rejection of the signature. It is argued that the addition of the date after the name of the signer has not the least tendency to prevent fraud, and it is only those provisions of the statute controlling elections relating to the time and place of holding the same, the qualification of voters, and such others as are expressly made essential prerequisites to the validity of an election that are to be held mandatory, and that all others are directory. *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.

We do not deem a discussion or decision upon this subject necessary, for whether the provision be mandatory or directory is a question with which the clerk is not concerned. His duty under the law is to do no more than verify the purported signatures appearing on the petition with the great register and certify the result of that examination. His authority is to be found in the general laws relating to the subject of elections, which is as follows:

"Within ten days from the date of filing such petition the Clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of his examination." *Henning's Gen. Laws 1920*, p. 2214. See, also, *Const. art. 23, § 1*.

The clerk is not clothed with authority to receive extraneous evidence of the contents of a petition. His certificate is only required to show the result of an examination whereby, "from the records of registration," he has ascertained whether or not the petition is signed by the requisite number of qualified voters. *Beecham v. Burns*, 34 Cal. App. 754, 168 Pac. 1058. His duty is to determine whether the names on the petition, which also appear on the records of registration, constitute enough persons to authorize the recall under the statute. *Chester v. Hall*, 55

Cal. App. 615, 204 Pac. 237. In the ascertainment of this fact he has no power to go behind the face of the petition. If fraud has been committed, a court of equity is the proper forum to determine such questions under appropriate proceedings. *Watts v. Superior Court*, 36 Cal. App. 692, 173 Pac. 183.

Let the writ issue as prayed.

I concur: ST. SURE, J.

65 Cal. App. 164

S. L. JONES & CO. v. DAVIS, Agent, et al.
(Civ. 4712.)

(District Court of Appeal, First District, Division 1, California. Jan. 7, 1924.)

1. Carriers ⚡159(3)—Carrier held estopped to assert insufficiency of a letter as a claim of loss required by bill of lading.

Carriers having at all times treated and acted on a letter from shipper as a sufficient notice of claim of loss of the goods, and a full compliance with the requirement of the bill of lading in that respect held estopped from asserting its insufficiency as such.

2. Limitation of actions ⚡175—Statute may be waived.

The statute of limitations may be waived.

3. Limitation of actions ⚡13—Debtor, on whose request creditor forbears to sue, estopped to plead statute.

When a creditor forbears to sue on the written request of the debtor, the debtor is estopped to plead the statute.

4. Limitation of actions ⚡15—Agreement to waive statute not against public policy.

Agreement to waive the statute of limitations is not against public policy.

5. Limitation of actions ⚡175—Point of bar held abandoned at trial.

Statements of defendants' counsel at trial held an abandonment of the point that action was not commenced in time.

6. Railroads ⚡5½, *New*, vol. 6A Key-No. Series—Objection to suit for loss during federal control held waived.

Objection that the railroad company was not a proper party defendant to action for loss, during period of federal control, of goods shipped, not having been raised by it at any time either by answer, demurrer, or by motion to dismiss, was waived. *Code Civ. Proc. §§ 430, 434*.

7. Contracts ⚡73—Carrier's promise, in consideration of shipper's forbearance to press claim, to pay loss if goods not found supports recovery.

The promise of the railroad company and of the United States Railroad Administration, in consideration of shipper of goods during period of federal control forbearing to press claim for their nondelivery, to pay his loss, on conclusion of their search for the goods, if they

were not found, should be sufficient to sustain judgment for him against them; the goods not being found.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by S. L. Jones & Co. against James C. Davis, as Agent, designated by the President of the United States under the Transportation Act of 1920, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ford & Johnson, of San Francisco, for appellants.

Powell & Dow, of San Francisco, for respondent.

SHORT, Justice pro tem. This is an action by a shipper against the carrier to recover for the total loss of a shipment of four bales of goatskins; the goods having disappeared after their delivery to the carrier for carriage from San Francisco to Wilmington, Del. Judgment was given in favor of the plaintiff for the admitted value of the goods. The appeal is by the defendants.

The undisputed facts of the case as shown by the evidence and stipulation of facts, signed by counsel for the respective parties, are as follows:

That on the 5th day of December, 1917, the plaintiff was the owner of four bales of goatskins, each bale consisting of 500 pieces, and that the plaintiff ever since has been and is now, the owner thereof; that on the last-mentioned date the plaintiff delivered the said bales to said defendant Southern Pacific Company at San Francisco, Cal., and the said company then and there accepted the same from the plaintiff for safe carriage by said railroad company for hire on its said railroad, and connecting mail carriers, from San Francisco to Wilmington, state of Delaware, and for delivery to plaintiff's order at the last-named place; that the said railroad company thereupon loaded the said bales in a car furnished by it for that purpose, and proceeded with the said carriage thereof; that upon the said delivery to it of said bales the defendant railroad company issued and delivered to the plaintiff its railroad straight bill of lading No. 13945, consisting of an acknowledgment of the receipt by it of said bales, and a contract to carry and deliver the same as aforesaid, which bill of lading contains the following provisions:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property; or, in case of failure to make de-

livery, then within six months after a reasonable time for delivery has elapsed.

"And suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

That the defendant railroad company did not safely carry or deliver the said bales, but wrongfully and negligently failed so to do, in this, that it failed and refused, and has ever since failed and refused, to deliver to plaintiff, or to plaintiff's order, the said bales, or any part thereof, and that neither the whole nor any part of said bales has ever been delivered to the plaintiff or to plaintiff's order, though frequently demanded by the plaintiff from the said defendants, their agents, and representatives; that owing to the congested condition of the freight traffic then existing between San Francisco and Wilmington on the railroad lines of the defendant railroad company and its connecting carriers, and owing to the fact that the said goods had gone astray during said carriage, ninety days from and after December 5, 1917, was a reasonable time for the delivery of said bales by said carrier to their said destination, and that the reasonable time for the said delivery thereof expired on March 5, 1918; that within six months after the said reasonable time had elapsed for the delivery of said bales by said carrier at destination, to wit, on August 7, 1918, the plaintiff notified said railroad company and said United States Railroad Administration, in writing, of the said failure on the part of said carrier to deliver the said goods at destination, which said notice was as follows:

"San Francisco, Cal., August 7, 1918.

"Southern Pacific Company, S. P. Building, Market Street, San Francisco, California—Gentlemen: Between the fifth and eighth of Dec. 1917, we shipped via Southern Pacific four (4) bales Goat Skins to F. Blumenthal & Company of Wilmington, Delaware. Notify Trans-ocean Products Company, 80 Maiden Lane, New York.

"Our attention has been called to the fact that up to this time the parcel in question has not arrived, and consequently, we ask that you kindly trace same and advise us the outcome of the four (4) bales of goat skins in question.

"Thanking you in advance for your attention in the matter, we are, dear sirs,

"Yours truly, S. L. Jones & Co.

"DRN:GMC

By D. R. Nunez."

That from time to time from the said 7th day of August, 1918, and until the 4th day of February, 1921, the said railroad company notified the plaintiff in writing that it was investigating the whereabouts of said goods, and from time to time during the period of said investigation, to wit, from on or about August 7, 1918, to on or about February 4, 1921, said railroad company request-

ed indulgence and forbearance on plaintiff's part in the matter of pressing plaintiff's claim herein for the nondelivery of said goods, and in consideration of such forbearance said railroad company and said United States Railroad Administration promised the plaintiff to adjust and pay plaintiff's loss upon concluding such investigation, if said goods could not be found; that said investigation was not concluded until April 19, 1921; that on April 19, 1921, the defendants notified the plaintiff for the first time that they had concluded their said investigation, and then, for the first time, informed the plaintiff that said goods had been lost, and that plaintiff's claim of damage for such loss was by them rejected; that in the course of the said carriage of said goods the same were transferred without exception at Chicago, Ill., on January 7, 1918; that from the 26th day of December, 1917, to the 28th day of February, 1920, the railroad of the defendant Southern Pacific Company, and those of its connecting rail carriers were operated under the direction and control of the United States through the United States Railroad Administration, and that ever since the said 28th day of February, 1920, the United States, and the said United States Railroad Administration, have been, and are now, represented by an agent designated by the President of the United States under the Act of Congress known as the "Transportation Act of February 28th, 1920," and that said defendant James C. Davis, Esq., was at the time of the filing of the complaint herein, and ever since has been, and is now, such agent.

The court below found all of the foregoing facts to be true, and in addition thereto, found that said letter of August 7, 1918, was—

"in full compliance with the provisions of said bill of lading relative to the filing of a written claim in case of failure to make delivery, and at all times subsequent to its receipt it was treated and acted upon by the defendants, and each of them, as such a compliance, and at no time prior to the rejection of plaintiff's claim on the 19th day of April, 1921, was any objection made by the defendants, or either of them, to the sufficiency of said notice as a valid and effective claim under the provisions of said bill of lading; * * * that pursuant to said requests, (contained in facts herein set forth) and in reliance upon said promises, the plaintiff deferred the filing of a suit to recover its damage for the loss of said goods until the said investigation was concluded.

"Finding 9.

"That the plaintiff did, within 6 months after the failure of the defendants to make delivery of said skins, make in writing to the originating carrier a claim for the loss of said skins and for the failure to make delivery thereof, and that this action is not barred in consequence of any failure on plaintiff's part, or by any provision of the bill of lading or

otherwise; that the defendants and each of them are estopped by their acquiescence and acts, and by their correspondence with and promises to the plaintiff, from asserting the insufficiency thereof as a claim under its said bill of lading.

"Finding 10.

"That this action was commenced in time, and is not barred by any provision of the bill of lading or otherwise; that the defendants, and each of them, are estopped by their acquiescence and acts, and by their correspondence with and promises to the plaintiff, from asserting that this action was not commenced in time, and are estopped from asserting that the cause is barred by any provision of the bill of lading, or otherwise."

These findings, the appellant contends, are not supported by the evidence, and that the decision is against law; that on the contrary the evidence clearly shows that the claim was not made within six months, and that suit was not instituted within two years and one day as provided in the bill of lading, and that "the parties could not waive" the provisions of such bill of lading, nor could "the carrier, by its conduct, give the shipper the right" to ignore them. *Bronstein v. Payne*, 138 Md. 116, 113 Atl. 648, cited by appellants, sustains their contention that the provisions of the bill of lading cannot be waived, nor disregarded because of the acts of the carrier, and cites *Georgia, Florida & Alabama Rd. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, and *Texas & Pacific R. Co. v. Leatherwood*, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. Ed. 1096, federal decisions, as authority upon said point. The first case of the two last-named sustains the rule as stated, but in the case of *Texas & Pacific R. Co. v. Leatherwood*, supra, a subsequent case, only four justices adhere to that rule, three dissenting, and two concurred in the judgment on grounds not discussed in the opinion, but specially declare that they are not prepared to assent to the broad proposition that the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore them.

The letter in the case of *Bronstein v. Payne*, supra, which was held insufficient as a notice of claim, was in the following words and figures, to wit:

"Please find B/L and paid freight bill for nine compressed bales of rags, of which we only received eight. Kindly trace the bale that's short and acknowledge the receipt of this letter and enclosures."

R. P. Hazzard Co. v. Main Central Rd. Co., 121 Me. 199, 116 Atl. 258, was a similar case to *Bronstein v. Payne*, supra, and followed that decision, and held the letter set out in the decision as insufficient as a notice of claim, and in each of said cases there was only a partial loss of shipment.

Replying to the first point that the notice

of claim of loss was not given to the carrier within the time specified in the bill of lading, respondent makes the following points:

First. That the letter of August 7, 1918, was a claim, and was both timely and sufficient.

That "the purpose of the stipulation [in the bill of lading for a notice or claim of loss] is not to escape liability but to facilitate prompt investigation." *George, Florida & Alabama Rd. Co. v. Blish Milling Co.*, supra.

"Such notice puts in permanent form the evidence of an intention to claim damages and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do." *St. Louis, Iron Mountain and Southern R. R. v. Starbird*, 243 U. S. 605, 37 Sup. Ct. 468, 61 L. Ed. 925.

The letter of August 7th gives the name of the shipper; a reasonably approximate date of shipment; the name of the carrier; the kind of merchandise; the quantity; the name of the party to whom shipped; the destination of the shipment; the name of the party to notify; the address of the party to be notified; the information that there had been a failure to deliver; and that the entire shipment was lost.

In *Georgia, Florida & Alabama Rd. Co. v. Blish Milling Co.*, supra, it was held that the following statement of facts constituted a claim:

Railroad telegram to shipper:

"Flour order notify Draper Garrett Grocery Co. refused account damage. Hold at your risk and expense. Advise disposition."

Milling Company replied:

"Sending our representative there. What is nature of damage?"

Reply:

"Flour transferred en route. Slight damage by water. Apparently rough handling. When will your representative reach Bainbridge?"

The milling company replied that its man would be there the next day. At the conference the milling company sent this telegram:

"We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle."

And that said telegrams complied with bill of lading that it must be in writing.

Respondent further contends that the evidence shows that said letter of August 7, 1918, was treated by the carriers as a claim, as shown by stipulation of facts and the letter of Mr. Fitch of April 19, 1921, and that no objection was raised to it until the final rejection of the claim. In said letter Mr. Fitch wrote:

"It had seemed to me that even if section 3 of the bill of lading requires filing of claim with-

in six months after a reasonable time for delivery of the property, nevertheless the circumstances of this case warranted recognition of the claim. Upon receipt of your letter of August 7, 1918, carriers instituted investigation and developed that the shipment was transferred without exceptions at Chicago on January 7, 1918. I assumed that a reasonable time for delivery, therefore, would be say thirty days after January 7, 1918, and that inasmuch as your letter was mailed to the carriers on August 7, 1918, you had complied with the statute."

And in the stipulation of facts, we have the following: "On August 7, 1918, the plaintiff notified said railroad company and said United States Railroad Administration, in writing, of the said failure on the part of said carrier to deliver the said goods at destination; * * * that from time to time thereafter, and until the 4th day of February, 1921, the said railroad company notified the plaintiff in writing that it was investigating the whereabouts of said goods, and from time to time during the period of said investigation, to wit, from on or about August 7, 1918, to on or about February 4, 1921, said railroad company requested indulgence and forbearance on plaintiff's part in the matter of pressing plaintiff's claim herein for the nondelivery of said goods, and in consideration of such forbearance said railroad company and said United States Railroad Administration promised the plaintiff to adjust and pay plaintiff's loss upon concluding such investigation, if said goods could not be found;" and that these facts fully sustain all the findings of the court below.

Second. Respondent further claims that no notice of claim of loss was necessary because no evidence of what became of the shipment was given, and in the stipulation of facts it was expressly stipulated that said railroad company did not safely carry or deliver said bales, but wrongfully and negligently failed so to do, in this: That it failed and refused, and has ever since failed and refused, to deliver to plaintiff or to plaintiff's order the said bales or any part thereof, and that their loss may have occurred because of damage in transit. See section 7976 Barnes' Federal Code (U. S. Comp. St. § 8604a); also the terms of the bill of lading.

And finally, that from on or about August 7, 1918, to on or about February 4, 1921, said railroad company requested indulgence and forbearance on plaintiff's part in the matter of plaintiff's claim herein for nondelivery of said goods, and in consideration of said forbearance, said railroad company and said United States Railroad Administration promised the plaintiff to adjust and pay plaintiff's loss upon concluding such investigation, if said goods could not be found, and that appellant should be bound thereby.

[1] From the foregoing facts heretofore

set out it appears that said letter of August 7th was at all times treated and acted upon by the defendants as a sufficient notice of claim, and a full compliance with the bill of lading in that respect, and that the defendants and each of them should be and are estopped by their acquiescence and acts from asserting the insufficiency thereof as a claim, and that the finding of the court on that point is fully sustained by the evidence.

[2-5] Respondent claims that the second defense that the action was not filed or commenced in time was expressly abandoned at the trial, and that the defendants are therefore precluded from raising it in this court.

At said trial the following occurred:

"Mr. Dow: Your honor will note that in the correspondence they ask us for our indulgence. We will cite authorities that where a carrier asks the indulgence of a shipper, and such indulgence is granted, the shipper cannot afterwards come into court and say, 'Well, you relied upon our promises to pay, and you gave us indulgence, but you did not file your suit in time and you are out.'

"Mr. Ford: I am satisfied that you are right. I am satisfied we are not in a position to plead the statute of limitations, so we need not waste any time on that.

"The Court: Very well.

"Mr. Ford: The second defense, the one with reference to the action not being brought in time, is expressly waived. I am satisfied that, whether the letters in evidence did in fact cause the plaintiff to defer action beyond the period, I am satisfied they would be sufficient to do that. Anyway, we stipulate that that defense is waived."

The statute of limitations may be waived. *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647.

When the creditor forbears to sue upon the written request of the debtor, the debtor will be estopped to plead the statute, and agreement to waive it is not against public policy. *State Loan and, Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Quanchi v. Ben Lomond Wine Co.*, 17 Cal. App. 565-569, 120 Pac. 427.

The above constituted an abandonment of the point that the suit was not filed in time, and disposes of that point against the appellant, and together with all the other evidence herein set out sustains the finding of the court on that point.

[6] Appellant raises the further point that the Southern Pacific Company is not liable in any event if the cause of action arose during federal control.

The objection that the carrier company is not a proper party defendant is waived by failure to raise it in time. *Wyman v. Atlantic Coast Line R. R. Co.*, 115 S. C. 138, 104 S. E. 542.

The railroad company never raised the point at any time by demurrer or answer, or

by motion to dismiss, and therefore waived said point.

"When any of the matters enumerated in section four hundred thirty [grounds of demurrer] do not appear upon the face of the complaint, the objection may be taken by answer." Section 433, Code Civ. Proc.

"If no objection was taken, either by demurrer or answer, the defendant must be deemed to have waived the same. * * *" Section 434, Code Civ. Proc.

The record in the case at bar shows that the railroad company never raised the point at any time, either by demurrer or answer, or by motion to dismiss on the ground that it was not a proper party.

[7] Furthermore, the appellants have expressly stipulated that, in consideration of the indulgence and forbearance that was given them by respondent, they had promised to pay plaintiff's loss upon concluding such investigation if said goods could not be found, and this promise in itself should be sufficient under the evidence in the case to sustain the judgment.

For the foregoing reasons, the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, J.

65 Cal. App. 206

**HOCHHEIMER & CO. v. SUPERIOR COURT
IN AND FOR KERN COUNTY
et al. (Civ. 4610.)**

(District Court of Appeal, Second District, Division 1, California. Jan. 7, 1924.)

1. Justices of the peace §166(2)—Statute held not to take from superior court power to dismiss appeals for failure to prosecute.

Code Civ. Proc. § 981a, as added by St. 1923, p. 755, providing that no appeal from the justice court shall be further prosecuted unless brought to trial within a year from the filing of such appeal, but that any appeal pending when the statute takes effect shall not be dismissed "under the direction hereof" before January 1, 1924, does not take from the superior court the general powers vested under Code Civ. Proc. § 980, authorizing dismissals for failure to prosecute appeals for unnecessary delay in bringing them to hearing; the further language of the statute that "by existing rule or by rule hereafter to be enacted" the superior court may "provide for dismissal of such appeal within a time less than one year" manifesting a legislative intention to leave undisturbed, the existing law.

2. Statutes §158, 159—Repeals by implication not favored, and exist only when statutes are irreconcilably inconsistent.

The law does not favor repeals by implication; such repeal existing only where two statutes are irreconcilably inconsistent with one another.

3. Justices of the peace §141(2)—Superior court on appeal may determine whether justice's judgment is void for want of jurisdiction.

The superior court has power to determine as a question of law arising on appeal from the justice's court whether the judgment of that court was void for want of jurisdiction.

4. Appeal and error §20—Appeal from superior court not dismissed where that court has rendered affirmative judgment.

The Supreme Court will not dismiss an appeal from a judgment of the superior court upon the ground that that court had no jurisdiction to entertain the proceeding when it has assumed such jurisdiction and rendered an affirmative judgment therein.

5. Certiorari §5(1)—Will not lie where remedy by appeal exists.

Certiorari will not lie where a remedy by appeal exists.

6. Certiorari §6—Will not lie where right of appeal lost by laches.

Certiorari will not lie where the right of appeal has been lost by laches.

Application for writ of certiorari by Hochheimer & Co., directed to the Superior Court in and for the County of Kern, J. W. Mahon, Judge, the Justices' Court of the Sixth Judicial Township, County of Kern, and Edward V. Jones, Justice of the Peace of said Township, to determine jurisdiction of the Superior Court in dismissing an appeal from Justices' Court. Writ discharged.

Kaye & Siemon, of Bakersfield, for petitioner.

Brittan & Brittan, of Bakersfield, for respondents.

HOUSER, J. Certiorari. The purpose of this proceeding is to determine whether or not the superior court exceeded its jurisdiction in dismissing an appeal from the justice's court; also whether or not the justice's court exceeded its jurisdiction in the action pending before it in rendering a judgment on a counterclaim.

It appears that judgment was rendered against the plaintiff on a counterclaim in the justice's court in the month of April, 1919; that shortly thereafter an appeal therefrom to the superior court was perfected by the plaintiff and the cause set for trial in the superior court on November 5, 1919, at which time, neither of the parties appearing in court, the cause went "off calendar." Nothing further was done in the matter by any one connected therewith until on or about October 1, 1923, at which time plaintiff's attorneys served on defendants a notice of motion to set the cause for trial, and on the same day defendants' attorneys served on plaintiff a notice of motion to dismiss the appeal on the ground that it had not been

diligently prosecuted, which latter motion was granted by the court.

Section 980 of the Code of Civil Procedure, which deals with the powers of the superior court on appeal, and which section since its amendment in 1880 has remained unaltered, provides in part that "for a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court * * * may order the appeal to be dismissed."

The Legislature at its session in 1923 (St. 1923, p. 755) passed an act known as section 981a of the Code of Civil Procedure, which also affects appeals from the justice's court. Its provisions, so far as are deemed here applicable in the consideration of that part of the particular matter now before the court, are as follows:

"No action heretofore * * * appealed from the justice court * * * shall be further prosecuted, * * * where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal * * *; provided, however, that in any appeal pending when this section takes effect, judgment or [of] dismissal shall not be entered under the direction hereof sooner than January first, 1924."

Petitioner's contention is that, without reference to the length of time any appeal from the justice's court to the superior court may have been pending, the language of the section of the Code just quoted precludes the superior court from dismissing any such appeal until January 1, 1924—in other words, that, notwithstanding the general powers of the superior court under section 980 of the Code of Civil Procedure, which permits dismissals for failure to prosecute appeals, or for unnecessary delay in bringing an appeal to a hearing, the provisions of section 981a are a limitation upon such powers. Aside from the inherent power of the superior court to order a dismissal of an action which has not been diligently prosecuted, and which dismissal might be ordered, even in the absence of statutory authority as contained in section 980, Code of Civil Procedure, it will be noted that the statute under which petitioner claims immunity for its lack of diligence expressly provides that as to any pending appeal no judgment of dismissal shall be entered "under the direction" of such statute until January 1, 1924; that is to say, that the preceding provisions of such statute shall be no authority for the dismissal of any pending appeal until January 1, 1924.

[1] The statute does not purport to take from the court the general powers therein vested under the provisions of section 980 of the Code of Civil Procedure which authorizes dismissals for failure to prosecute appeals, as well as for unnecessary delays in bringing them to a hearing, much less does the statute under consideration appear to in any

manner trench upon the concededly inherent power of the court to deal with such matters. The greater part of the force of the statute is expended in directing that no dismissal shall be had "under the direction" thereof until a certain fixed time has arrived; that is to say, that no appeal should be dismissed solely by virtue of this section (and having nothing to do with any similar right conferred by any other section, or through the inherent power of the court) before the time fixed by the statute. So far as the provisions of section 980, Code of Civil Procedure, are concerned, or as regards the inherent power of the court, the law relating to the dismissal of justice's court appeals is unaffected by any provision contained in section 981a.

The additional language of the statute under consideration, to the effect that "by existing rule or by rule hereafter to be enacted" the superior court may "provide for dismissal of such appeal within a time less than one year," constitutes further ground for assuming that the intention of the Legislature was to leave undisturbed the existing law with reference to the power of the court to dismiss such appeal. The apparent intention of the Legislature was to shorten the time within which an appellant must procure action to be taken on his appeal, and to give effect to the construction of the statute for which petitioner contends would be to thwart the evident purpose of the Legislature in enacting the statute. If the power given to the superior court by the provisions of section 980, Code of Civil Procedure, were taken away, an appeal which at the time the statute became effective had been pending for 10 years could not be dismissed for an additional period of several months, irrespective of manifestly deliberate failures to prosecute such appeals or unnecessary and intentional delays in bringing them to a hearing. Under section 980, Code of Civil Procedure, what constitutes "a failure to prosecute an appeal," or what length of time amounted to an "unnecessary delay in bringing it to a hearing," was somewhat elastic and indefinite, permitting much diversity of construction of such language; and while in the exercise of a sound discretion the circumstances of each case should be taken into consideration by the court in its determination of such questions, the necessity for greater uniformity with reference to such matters is recognized by the Legislature in its declaration that hereafter one year shall be considered as the outside limit within which (barring stipulations of counsel extending the time) final action on appeals must be taken.

[2] It is also apparent that the inevitable result of sustaining petitioner's contention with reference to the claimed limitation of section 981a, Code of Civil Procedure, upon the powers of the court as set forth in sec-

tion 980, Code of Civil Procedure, would be the virtual repeal of that part of said section which may be in conflict with the provisions of section 981a, but the rule of law is that repeals by implication are not favored. It is only where the two statutes are irreconcilably inconsistent one with the other that such a repeal may be said to exist. *Matter of Petition of Johnson*, 167 Cal. 142, 138 Pac. 740; *Fox v. Townsend*, 2 Cal. App. 193, 83 Pac. 272; *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 18; *People v. Pacific Improvement Co.*, 130 Cal. 442, 62 Pac. 739; *People v. Sands*, 102 Cal. 12, 36 Pac. 404; *Thompson v. Board of Supervisors*, 111 Cal. 553, 44 Pac. 230; *Banks v. Yolo County*, 104 Cal. 258, 37 Pac. 900.

[3] The second point raised by petitioner is that the judgment in the justice's court was void for the reason that such court had no jurisdiction to enter the judgment, but, without directly considering the point itself, it is clear that the superior court to which the appeal was taken had power to determine the matter as a question of law arising on such appeal.

[4] It is said in *Smith v. Westerfield*, 88 Cal. 380, 26 Pac. 206:

"This court will not, however, dismiss an appeal from a judgment of the superior court upon the ground that that court had no jurisdiction to entertain the proceeding when it has assumed such jurisdiction, and rendered an affirmative judgment therein. Our appellate jurisdiction over the judgments of the superior court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained. It is revisory of the action of that court, and it is to be exercised by affirming, correcting, modifying, or setting aside its judgments; whereas, if the appeal therefrom is dismissed, the judgment would remain as originally pronounced."

See, also, *Barnhart v. Fulkerth*, 92 Cal. 155, 28 Pac. 221; *Ritzman v. Burnham*, 114 Cal. 524, 46 Pac. 379.

[5] Certiorari will not lie where a remedy by appeal exists. Section 1068, Code Civ. Proc.; *Bennett v. Wallace*, 43 Cal. 26; *Wittman v. Police Court*, 145 Cal. 474, 78 Pac. 1052; *Anglo-Californian Bank v. Superior Court*, 153 Cal. 753, 96 Pac. 803; *Hildebrand v. Superior Court*, 173 Cal. 89, 159 Pac. 147; *Baird v. Justice's Court*, 11 Cal. App. 442, 105 Pac. 259; *La Due v. Forbes*, 19 Cal. App. 126, 124 Pac. 867.

[6] It is also well settled that certiorari will not lie where the right of appeal has been lost by laches. *Bennett v. Wallace*, 43 Cal. 25; *Faut v. Mason*, 47 Cal. 7; *Valentine v. Police Court*, 141 Cal. 615, 75 Pac. 336; *Green v. Rogers*, 18 Cal. App. 576, 123 Pac. 974.

It therefore follows that petitioner should be denied any relief. The writ is discharged.

We concur: CONREY, P. J.; CURTIS, J.

65 Cal. App. 152

COSTELLO v. SHARP. (Civ. 2622.)

(District Court of Appeal, Third District, California. Jan. 5, 1924.)

1. Pleading ⚡93(2)—In action against adjoining owner to quiet title to right of way, defendant could interpose inconsistent defenses.

In action against adjoining owner to quiet title to a right of way, the defendant could defend on the ground that the plaintiff's use of the way was purely permissive, and could also defend on the ground that the right of way claimed by plaintiff was a public highway, under Pol. Code, § 2619, though defenses were inconsistent, since the defendant was at liberty to interpose, as in impeachment of the claim of the plaintiff to title to the way by prescription, as many defenses as he saw fit, however inconsistent they might be.

2. Appeal and error ⚡842(1)—Whether land used by adjoining owner as right of way was public road or private way question of fact.

In action against adjoining owner to quiet title to right of way, in which the defendant interposed the defense that the plaintiff's use of the way was purely permissive, and also the defense that the way was a public highway under Pol. Code, § 2619, the question of whether the road was a county road or a private way or neither was a question of fact for the trial court to resolve.

3. Appeal and error ⚡1012(1)—Rule stated as to effect of trial court's conclusion on question of fact.

Trial court's finding on question of fact will not be disturbed, unless the testimony from which its conclusion has been derived is palpably unbelievable, or the testimony is intrinsically lacking in the requisite strength to support it.

4. Easements ⚡5—Existence of elements of adverse possession necessary to establishment of easement by prescription.

To establish an easement in the lands of another by prescription, all the elements necessary to acquire title by adverse possession must be shown to exist, and it must therefore be made clearly to appear that the party claiming the easement has been, for the statutory period of 5 years under Code Civ. Proc. § 318, in actual occupation or possession and use of the easement, and has held such possession openly, continuously, and notoriously, not clandestinely; and that it has been held hostile to the title of the owner of the land in which the easement is asserted, and under a claim of title exclusive of any other right as one's own.

5. Easements ⚡36(1)—Rule as to burden of proof in action to establish easement by prescriptive title stated.

The party who claims an easement by prescriptive title has the burden of clearly proving by competent evidence all the elements essential to the establishment of such title, but, when the plaintiff has made a prima facie showing of a prescriptive title, it is incumbent on

the defendant to show by sufficient affirmative proof that the use has been by virtue of a license or permission, or any other defense which would destroy the prima facie showing.

6. Easements ⚡36(3)—Evidence held to sustain finding of acquisition of right of way by prescription.

In action against adjoining owner to quiet title to right of way, in which plaintiff claimed an easement by prescriptive title, evidence held to sustain finding that plaintiff had acquired the right to use such right of way by prescription.

7. Easements ⚡36(3)—Prescriptive title may be established by or implied from circumstances.

A prescriptive title to an easement may be established by or implied from circumstances under which the use of such easement was enjoyed.

8. Estoppel ⚡63—Plaintiff's declarations that road was county road held not to preclude him from asserting easement therein by prescription.

In an action to quiet title to right of way over adjoining owner's land, wherein plaintiff claimed to have acquired an easement by prescription, his declarations that the locus in quo was a county road did not preclude him from obtaining the relief sought in such action, since such declarations constituted merely the statements of a legal conclusion, and the question of whether the road was or was not a county road was one for the court.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by J. W. Costello against W. W. Sharp. Judgment for plaintiff, and defendant appeals. Affirmed.

B. K. Collier and J. P. McNamara, both of Yreka, for appellant.

Chas. E. Johnson, of Yreka, for respondent.

HART, J. This is an action to quiet title to a right of way. The plaintiff and the defendant are the owners of adjoining ranches. The plaintiff's ranch is known and referred to in the testimony as the "Marion ranch," one Joe Marion being the plaintiff's grantor or immediate predecessor in interest. The defendant's ranch is known and likewise referred to as the "Benton ranch," one Col. Benton having, a trifle over 4 years prior to the trial of this action, conveyed the same to the defendant.

The plaintiff claims an easement in a certain portion of the land of the defendant in the nature of a right of way, extending from his ranch to a point on the north side of a public or county road leading from the town of Fort Jones to the town of Gazelle, in Siskiyou county, and which is known and designated in the pleadings, the testimony, and the findings as the "Moffit Creek-Gazelle wagon road." The right of way in question

is alleged in the complaint to be 20 feet wide, the same being 10 feet on each side of a center line specifically described in the complaint. The complaint alleges that the plaintiff "is now and for the past 20 years immediately preceding the filing of this complaint he has been, the owner, and the predecessors in interest of plaintiff were, for the period of 13 years or more immediately preceding the ownership of this plaintiff, the owners in possession, and entitled to the possession of" a private right of way over the lands of the defendant from his (defendant's) ranch to the above-named county road, describing the same. It is alleged that "defendant claims to be the exclusive owner of said way, and has obstructed the said right of way so that plaintiff cannot use the same, which claim, as against plaintiff, is without right."

The prayer is that defendant be required to set forth the nature of his claim, that the same be determined by the court, and that it be decreed that the plaintiff is the owner of the right of way described in the complaint, and for an injunction enjoining the defendant and all others from obstructing or otherwise interfering with said way.

The defendant in his answer, denies the allegations of plaintiff's ownership of a right of way over his (defendant's) lands, and admits that he claims to be owner of "all of his own land and of said purported way," and that he has obstructed the same; denies that "plaintiff cannot use the same, and, in this connection, states the fact to be that he has given plaintiff permission to use said purported way and to pass over his said lands as long as plaintiff will close the gates thereon."

The court's findings are in accord with the averments of the complaint, except in so far as is concerned the width of the right of way, as to which it was found:

"That plaintiff is owner and entitled to a private way over the lands of the defendant, 16 feet wide, being 8 feet on each side of the center line described in paragraph 1 of these findings, the said width of said private right of way being sufficient for the convenience or use by said plaintiff to pass and repass on foot, with teams, wagons, and automobiles."

The conclusions of law and the judgment consist with the findings. The injunctive element of the decree is both mandatory and prohibitory.

The defendant appeals from the said decree or judgment upon a record made up according to the alternative method.

The general contention is that the findings are not supported by the evidence. The specific contentions are that the testimony shows that plaintiff's acts and conduct are incompatible with the claim of the acquisition of a private right of way by prescription; that plaintiff's use of the road or way

in controversy was by the permission of the defendant and his predecessors in interest; that the said road became a public highway by virtue of the terms of section 2619 of the Political Code, and that therefore the plaintiff could not acquire a private right of way over said road by prescription. The section of the Political Code referred to provides:

"Whenever the franchise for any tollbridge, trail, turnpike, plank or common wagon-road has expired by limitation or non-user, such bridge, trail, turnpike, plank or common wagon-road becomes a free public highway; and no claim shall be valid against the public for right of way, or for the land, or material comprising such bridge, trail, turnpike, plank or common wagon-road. All public highways, once established, shall continue to be public highways until abandoned by order of the board of supervisors of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction."

[1] The contention that the plaintiff's use of the way in question was purely permissive and as a neighborly accommodation is inconsistent with the contention that the road in dispute became a highway upon the presumption of its dedication as such from immemorial or the statutory prescriptive use thereof by the general public, or became such in the manner indicated by the above section of the Political Code, since if it is a highway or county road, by whatsoever means it became such, the plaintiff's use thereof was, in common with the public, as a matter of right and not of grace or by the permission of the owner of the lands over and through which it runs. The defendant, though, was at liberty to interpose, as in impeachment of the claim of plaintiff to title to the way by prescription, as many defenses as he saw fit, howsoever inconsistent they might be.

[2, 3] Obviously, whether the road in dispute was or is a county road or a private way, or neither, is a question of fact which it was for the trial court to resolve, and its decision of the question must remain undisturbed, unless the testimony from which its conclusion has been derived is palpably unbelievable, or we are forced to say from the face of the testimony that it is intrinsically lacking in the requisite strength to support it.

[4, 5] It is well understood that it is essential, to establish an easement in the lands of another by prescription, all the elements necessary to acquire title by adverse possession must be shown to exist. It must therefore be made clearly to appear that the party claiming the easement has been, for the statutory period of 5 years (section 318, Code Civ. Proc.), in actual occupation or possession and use of the easement, and held such possession openly, continuously, and notoriously, not clandestinely; that it has been held hostile to the title of the owner of the land in which the easement is asserted,

and under a claim of title, exclusive of any other right, as one's own. *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10; *Pyramid Land, etc., Co. v. Scott*, 51 Cal. App. 634, 646, 197 Pac. 398; *Ricioli v. Lynch et al.* (Cal. App.) 223 Pac. 88. And upon the party claiming the easement by prescriptive title rests the burden to clearly prove by competent evidence all the elements essential to the establishment of such title. *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10, *supra*; *Pyramid Land, etc., Co. v. Scott*, 51 Cal. App. 634, 646, 197 Pac. 398, *supra*; *Ricioli v. Lynch et al.* *supra*. On the other hand, when the plaintiff, claiming the easement by adverse user, has made a *prima facie* showing of a prescriptive title to the easement, then it is incumbent upon the defendant, by sufficient affirmative proof, to show that the use has been by virtue of a license or permission, or any other defense which would destroy the *prima facie* showing of title made by the plaintiff. *Fleming v. Howard*, 150 Cal. 28, 30, 87 Pac. 908; *Washburn on Easements* (4th Ed.) p. 156; 14 Cyc. of L. & P. 1147; *Kripp v. Curtis*, 71 Cal. 66, 11 Pac. 879; *Franz v. Mendonca*, 131 Cal. 209, 63 Pac. 361; *Guernsey v. Antelope Creek, etc., W. Co.*, 6 Cal. App. 387, 92 Pac. 326; *Yuba Cons. Goldfields v. Hilton*, 16 Cal. App. 229, 116 Pac. 712, 715; *Thomas v. England*, 71 Cal. 457, 12 Pac. 491, *supra*; *Ricioli v. Lynch* (Cal. App.) 223 Pac. 88, *supra*. And, upon a *prima facie* showing of title by the plaintiff, it is solely the province of the trial court to determine whether the same has or has not been overcome or dispelled by evidence presented by the defendant.

[6] By the foregoing principles the testimony received in the case must be considered. At the outset it is just as well to say that a careful review of the evidence has convinced us that there is no justification for holding that, as a matter of law, the findings do not derive sufficient support from the evidence.

The plaintiff acquired the land to which the road in dispute leads from the county road mentioned in the month of May, 1901, from one Joe Marion, and from that time down to the trial of this action, in the month of May, 1923, owned and, with the exception of a brief period during which he was engaged in erecting a new home for residential purposes, resided with his family thereon. This covered a period of 20 years. Other than plaintiff and members of his family, there were eight witnesses, residents of the neighborhood of the Costello and Sharp ranches practically all their lives, who testified that the road in question was and had been for upwards of 40 years a well-defined road; that they had themselves traveled over it in going to the Costello ranch, and had often seen the plaintiff passing back and forth over it, sometimes hauling wood and hay on said road. Marion, the predecessor in interest of the plaintiff, testified that, during

the greater part of the 13 years he owned the Costello place, a man named Benton owned the defendant's ranch; that during all those years he (Marion) exclusively used the road in dispute for the purpose of going from and to his (now the Costello) ranch; that Benton, then owner of the Sharp ranch, knew that he (Marion) was using said road; that, while he never had any conversation with Benton on the subject, the latter never at any time made any objection to his (Marion's) use of the road, or denied his right to use it, nor did he ever erect a fence or put any other obstruction on or in the road; that he was still using the road when he transferred his land to the plaintiff, and never knew of any obstruction being put in the road until within a couple of years before the trial of the present action, when, on one or two occasions, he observed that a fence and some gates had been erected thereon. He testified that within a few weeks prior to the trial he saw the road in question, and that it was the same road he had always used when he owned the Costello ranch.

Frank Sharp, a brother of the defendant, testified that he had known the road for upwards of 20 years; that it was a well-defined wagon road; that he never knew of any obstruction being placed in the road until in very recent years, when a controversy arose between plaintiff and defendant upon the question whether the road constituted a private or any way.

The plaintiff testified that the road in dispute was in existence and a well-defined wagon road when he acquired and took possession of the Marion ranch; that he had used said road exclusively, under a claim of right, from the time he acquired his ranch from said Marion until the time of the trial; that for a number of years after he became the owner of said ranch Col. Benton was the owner of and resided on the ranch now owned by the defendant; that Benton knew that he (plaintiff) was using said road and no other in going from and to his ranch; that Benton never made any objection to such use of the road by plaintiff, and, in fact, never discussed the matter of the use of the road with him; that the road was in existence and being used by him (plaintiff) when defendant bought and took possession of the Benton ranch; that his use of the road was for 20 years continuous, and his right to its use was never in all that time questioned until a couple of years after the defendant became the owner of the Benton ranch; that defendant about 4 years prior to the trial, erected a fence across the road, but left an opening therein of sufficient size to admit of the passage through it of a wagon or an automobile; that later and within a year or two of the date of the trial the defendant closed the opening by placing a gate therein; that plaintiff thereupon cut an opening in the fence so that he could pass through; that he

(plaintiff) often did repair work on the road, and kept it in a condition for his usual use of it; that defendant at all times knew that he used the road in going from and to his farm, himself assisted the plaintiff in moving to his ranch immediately after he acquired it, and in so doing passed over said road; that on one occasion the defendant offered to build him (plaintiff) another road connecting with the Moffit Creek-Gazelle county road and leading to his ranch, but that he (defendant) made no reply to the proposition. The plaintiff further testified that, after the defendant erected a fence across the road, he made a complaint to the district attorney about the obstruction of the road, and that he was advised by that official to bring the matter to the attention of the board of supervisors; that the district attorney in an informal way brought the matter before the board, and the defendant was thereupon notified by said board to appear before it and present reasons for his action in closing the road; that a hearing was subsequently had, and the said board thereupon notified the defendant in writing that the road was a public or county highway, and at the same time ordered him to remove the fence from across the road and not to obstruct it so as to prevent its use by the public.

The plaintiff's wife, and also two sons, one of the latter being 19 and the other 20 years of age, corroborated the plaintiff's testimony as to the continuous and uninterrupted use of the road by plaintiff for 20 years (by the wife) and (by the sons) for about 15 years.

The defendant, testifying in his own behalf, admitted that the road was in existence and was being used by plaintiff when, some 4 years previously to the trial, he (defendant) acquired ownership and took possession of the Benton ranch; that there was no fence maintained across said road at the time he located on the Benton ranch, but that he built a fence across it a short time thereafter; that the fence remained across the road for a short time only, when the plaintiff "cut" an opening in it; that plaintiff never complained to him about the fence until the matter was brought before the supervisors by plaintiff. Defendant denied proposing to plaintiff that he (defendant) would build another road for him (plaintiff) to be used in the place of the road in controversy. He testified that, at the hearing before the supervisors, the plaintiff repeatedly stated that the road was a county road. He further testified that some "10 or 12 years ago" the general public traveled over the road in going to and returning from certain copper mines then being worked some distance beyond the Costello place.

The witness Taber, testifying for defendant, stated that at some time prior to the hearing before the board of supervisors and at the house of the witness the plaintiff declared to the witness that the road was a

public or county highway. A number of other persons testified that at the hearing before the board of supervisors they heard the plaintiff declare that the road in question was a county road.

M. F. Barnum, a member of the board of supervisors of Siskiyou county, testified that the board ordered defendant to remove the fence he erected across the road, but later gave him permission to maintain the fence, with gates at the ends of the road. On cross-examination Barnum testified, in effect, that all that the supervisors knew about the road being a county road was what the parties had said relative to the matter when the hearing referred to was had. He testified that the board made no other investigation for the purpose of determining whether the road was a county road than such inquiry as was had at said hearing, which, as the evidence shows, was of an informal character or consisted of the unsworn statements, pro and con, of the parties to this controversy.

In rebuttal the plaintiff testified that he asked the district attorney to take such legal steps as would result in keeping the road open; that he did not testify before the board of supervisors at the hearing referred to; that he always knew that the road was a private and not a county road, and (in effect) that, if any confusion in that regard occurred at the hearing, it was wholly due to a misunderstanding of his position by the district attorney, who presented the matter for him before the board.

The foregoing statement of the evidence embodies a recital in substance of all the salient facts brought out at the trial.

[7] It will not be doubted that a prescriptive title to an easement may be established by or implied from circumstances under which the use of such easement was enjoyed. *Thomas v. England*, 71 Cal. 460, 12 Pac. 493; *Humphreys v. Blasingame*, 104 Cal. 40, 42, 37 Pac. 804, 805. "The question is one for the jury, or for the court sitting as such, to determine as a fact, in the light of the relations between the parties and all the surrounding circumstances." *Id.* That the plaintiff, by the circumstances developed by the testimony presented by him, made out at least a prima facie title in himself to the easement asserted and claimed by him in this action seems to us to be so clear as to leave no ground for legitimate controversy. To confirm this conclusion it is necessary only to refer, by way of recapitulation, to the following facts and circumstances disclosed by the evidence he produced: That the road was in existence and had been continuously used for 13 years by his immediate predecessor in interest, with the knowledge of the predecessor in interest of the defendant, when he (plaintiff) became the owner and took possession of the Marion ranch; that plaintiff from the time he became the own

er of the Marion ranch continued to use the road, as it had been used by his predecessor, with the knowledge of Benton, the defendant's grantor or predecessor in interest, for many years before the defendant acquired the Benton property (the servient estate), and continued to use it as he always had after Sharp bought the Benton property, with the knowledge of Sharp, and without ever asking the latter's permission to use it; that plaintiff kept the road in repair; that Sharp once proposed to him that he would build another road for plaintiff, to be used by the latter for the same purposes as he was required to use the road in dispute; that plaintiff, under a claim of right to the way, cut an opening in the fence erected by the defendant across the road so as to enable him to use the road for the usual purposes to which he had for over 15 years continuously put it. These facts and circumstances, viewed alone according to their face value, seem clearly to reveal or imply all the essential elements of a prescriptive title in the plaintiff in the defendant's land for the purpose claimed by the former. In fact, the circumstances and facts specifically adverted to, in the absence of countervailing proof of such force as to overcome their probative effect, are sufficient to justify the conclusion that plaintiff acquired a prescriptive title to a private way over defendant's land long before the defendant acquired ownership of the Benton ranch.

The case of *Humphreys v. Blasingame*, 104 Cal. 40, 43, 37 Pac. 804, 805, supra, is, as to the facts, strikingly similar to the instant case, and the following discussion of the facts in that case is peculiarly pertinent to the facts of this:

"We think the evidence sufficient to support the finding that the way was used by plaintiff for more than the statutory period under a claim of right, and that the use was not merely permissive. He had used it 5 years or more before defendant acquired the property, and was so using it when defendant acquired it. The use could not, therefore, have originated in defendant's permission, either express or implied, and the fact that defendant made no objection, nor any inquiry as to plaintiff's right, is quite as significant of an admission of such right as it is of a mere permissive use, whilst the fact that plaintiff never asked permission to use the way is at least suggestive of a claim of right to use it."

Thus far the testimony presented by the plaintiff has alone been considered. As to the support which the defendant attempted to give to his several defenses, it is only necessary to repeat that it was wholly the function of the trial court to determine whether he had succeeded in breaking down the prima facie case made by the plaintiff.

Its decision upon that question, as evidenced by its findings, is conclusive upon this court.

As to the claim of the defendant that the evidence shows that the road is a county road, it is to be said that there is no testimony in this record which shows or tends to show that the public authorities of Siskiyou county ever regarded or, until the hearing above referred to, attempted to recognize, the road as a county road. There is no testimony that the supervisors or the supervisor and ex officio road superintendent of the district in which the road is located ever did any repair or other work of improvement on, or attempted to exercise any authority over, the road until the hearing before the board following the controversy between Costello and Sharp as to the legal character or status of the road, and the only supervisor testifying at the trial said that the board did not know that it was a county road. There is no evidence that a considerable number of people had ever had occasion to use the road except for a year or two some 12 years before the commencement of this action, during which the development of some copper mines had been attempted and that those engaged in such development passed back and forth over the road. There is absolutely no evidence in this record showing or tending to show that there had ever existed a franchise for the maintenance of the road as a toll road.

[8] Plaintiff's alleged declarations that the road was a county road amounted to no more than a legal conclusion. While testimony that he had made such statements was perhaps admissible as tending to impeach his testimony that he had always claimed title to a private way over the road, the testimony of such declarations could not perform the office of substantive proof of the legal character of the road. As was said in the case of *Humphreys v. Blasingame*, supra, referring to the testimony of the plaintiff therein that he supposed that the difficulties of reaching his land by any other route were such as gave him a right of way of necessity across defendant's land rather than a right of prescription:

"That he [plaintiff] was mistaken upon a question of law does not affect the fact that he claimed a right to cross defendant's land by a road which he found in existence when he purchased the 160-acre tract."

In other words, the question whether the road was or was not a county road was one for decision by the court and not by the witnesses.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

65 Cal. App. 266

BEVANS v. HUNTINGTON et al. (Civ. 2738.)

(District Court of Appeal, Third District, California. Jan. 14, 1924.)

Contracts ⇨236—New contract for construction of canal held not invalid as an oral modification of former written contract.

Where a written contract for the construction of a canal was not for the construction of any definite section, but only to do excavation work indefinitely at a given price per yard, either party had the right to terminate the contract at any time and, having done so by mutual consent, a new oral agreement for the construction of the remainder of the canal was not invalid as being an oral modification of the written contract without consideration.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by James Bevans against V. E. Gunter and J. A. Huntington, in which both defendants filed cross-complaints. From a judgment for plaintiff against said Huntington, and for defendant Gunter against said Huntington, the latter appeals. Affirmed.

Raymond A. Leonard, of Oroville, W. H. Carlin, of Marysville, and Andrew J. Lloyd, of Oroville, for appellant.

W. E. Davies and R. R. Raish, both of Marysville, for respondent.

FINCH, P. J. This is an appeal from a judgment in favor of plaintiff against defendant Huntington. The parties entered into a written contract containing the following terms:

"Whereas, said J. A. Huntington, party of the first part, has entered into a contract with Cordua Irrigation District to build and construct a main irrigation canal according to plans and specifications attached to said contract; and

"Whereas, the said V. E. Gunter and James Bevans, parties of the second part, are desirous of taking and entering into a subcontract with said J. A. Huntington for the construction of a part of said main canal, according to said plans and specifications:

"Therefore it is hereby agreed by and between the parties hereto that the said V. E. Gunter and James Bevans, the parties of the second part, may and will commence the construction of that part of the main canal, beginning at the west end thereof and working eastward, for the consideration of the sum of 30 cents per cubic yard of excavation and borrowed embankment."

After a certain quantity of work had been done under the subcontract, hardpan was encountered, and Gunter informed Huntington that "it would be impossible * * * to continue with the contract on account of this hard ground," and Huntington replied: "I don't expect you to. * * * I do want you to help me finish this main canal, and I will pay you wages for it." Gunter agreed to the proposition, and so informed

Bevans. The remainder of the work was performed under the oral contract thus entered into, and the suit is based thereon.

Appellant contends that the new contract was invalid as an attempted oral modification of a written contract without consideration. The written contract was not for the construction of any definite section of the canal or for any given quantity of work or for work to be continued for any given time, but only to do excavation work indefinitely at a given price per yard. Either party had the right to terminate the contract at any time. When Gunter informed Huntington that the former would no longer continue the work under the terms of the contract, the agreement came to an end. The rights of the parties to terminate the contract were no different than if the employment had been merely at a given price per day. After the parties had abandoned the written contract by mutual consent, there was nothing to prevent them from entering into a valid oral contract, as the court found that they did. There is no other point raised by the appeal which merits attention.

The judgment is affirmed.

We concur: **PLUMMER, J.; HART, J.**

65 Cal. App. 226

BRADLEY v. THOMPSON. (Civ. 4325.)

(District Court of Appeal, Second District, Division 2. California. Jan. 9, 1924.)

1. Negligence ⇨113(7)—Complaint based on theory of attractive nuisance must negative trespass.

Since the doctrine of the turntable and attractive nuisance cases is an exception to the general rule that a property owner owes no duty to trespassers except not to willfully or intentionally inflict injury upon them, where action is brought for injuries to a child sustained while trespassing on defendant's premises, plaintiff seeking to invoke such doctrine must allege all facts necessary to remove the effect of the trespass as an objection to recovery.

2. Explosives ⇨8—Allegations necessary in complaint based on theory of attractive nuisance where child guilty of more than technical trespass.

Where a complaint alleged that a newsboy 11 years old while delivering newspaper at defendant's farm removed a dynamite cap from a colored tin box placed in shed near the public road, and was later injured by its explosion, his moral turpitude in surreptitiously taking property of another precluded application of the doctrine of the turntable and attractive nuisance cases, in the absence of an allegation showing that he was ignorant of the moral quality of his act, such as that he was deficient in understanding and did not realize the culpa-

bility of his conduct; the presumption that a boy under 14 years of age is incapable of committing crime being a rule of evidence, not of pleading.

3. Explosives — Complaint for injuries to child based on attractive nuisance theory held insufficient.

A complaint alleging that defendant placed dynamite caps used on his farm $1\frac{1}{4}$ miles from town in a colored tin box in his shed located near the public road, and that plaintiff, a newsboy 11 years old, removed one while delivering defendant's paper, and was later injured by its explosion, but not alleging that defendant knew or had reason to believe that the caps would prove attractive to boys of plaintiff's age and mental capacity, nor that defendant knew or had reason to believe that children of the class to which plaintiff belonged would be so lacking in moral discernment as to be tempted to purloin such caps, did not allege facts sufficient to charge defendant with negligence.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Elden Bradley, a minor, by Mabel Bradley, his guardian ad litem, against J. C. Thompson. Judgment for defendant, and plaintiff appeals. Affirmed.

Raymond W. Stewart and Lyle W. Ruckert, both of Los Angeles, for appellant.

Drapeau, Orr & Gardner, of Ventura, for respondent.

FINLAYSON, P. J. Plaintiff, a boy 11 years of age, brought this action to recover damages for injuries alleged to have been caused by defendant's negligence. He claims that his asserted right of recovery is justified by the doctrine of the turntable and attractive nuisance cases. Defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment for defendant was entered accordingly, and plaintiff appeals.

The complaint alleges, in substance, the following: Plaintiff was injured as the result of the explosion of a dynamite cap which he had taken from a tin box found by him on defendant's premises—a parcel of land about one-quarter of a mile north of the town of Moorpark, Ventura county, and upon which defendant intended planting apricot trees. A quantity of dynamite caps had been purchased by defendant for the purpose of blasting holes in his land in which to plant the trees. A number of the caps having been thus used by defendant, the unused ones were deposited in a brass-colored tin box which defendant caused to be placed on one of the crossbeams, about three feet from the ground, which supported a shed on his premises. The shed, which rested on posts reinforced by the crossbeams, was located a

few feet from a public road along which plaintiff and other children and persons, with defendant's knowledge and consent, had been accustomed to travel for some time prior to the day on which the accident occurred. The tin box, so placed on the crossbeam with its dangerous contents, was about one foot in depth, was uncovered, unprotected, and unguarded. "Defendant, well knowing said dynamite caps to be dangerous and attractive to children, negligently placed [them] upon the said crossbeam * * * and within easy reach of pedestrians traveling upon said road." Plaintiff, while traveling along the public road for the purpose of delivering a newspaper at defendant's house, "was attracted by said tin box containing said dynamite caps, because of its color, condition, appearance, and surroundings." It is not alleged that plaintiff was upon defendant's premises with the latter's knowledge and consent. The allegation is that plaintiff and other children and persons "traveled along said road" with defendant's knowledge and consent. It is alleged that plaintiff, a lad of 11 years, "was then and there too young and inexperienced to foresee the danger which might result from said dynamite caps contained in said tin box," and that he was "wholly ignorant of the dangerous character and composition" thereof. He took some of the caps from the box while it rested on the crossbeam, and in the course of his play one of the caps exploded, causing the injuries for which he seeks damages.

Appellant, as we have stated, claims that the case presented by his complaint is within the principle of the turntable and attractive nuisance cases—a principle which has been applied in such cases as *Barrett v. Southern Pacific Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; *Cahill v. Stone, etc., Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700; and *Faylor v. Great Eastern, etc., M. Co.*, 45 Cal. App. 194, 187 Pac. 101. The doctrine has been stated in the following terms:

"One who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto and are usually unable to foresee, comprehend, and avoid the danger into which he thus knowingly allures them." *Cahill v. Stone, supra*.

[1] The doctrine of the turntable and attractive nuisance cases is an exception to the general rule that a property owner owes no duty to trespassers except not willfully or intentionally to inflict an injury upon them. Inasmuch as the injury caused

by the offending instrumentality in this class of cases is the result of a trespass committed by the child, it is incumbent upon the plaintiff to obviate what otherwise would be the legal consequences of the trespass by alleging and proving all the facts which are necessary to remove the effect of the trespass as an objection to a recovery. From the complaint in this case it appears that plaintiff was a trespasser upon defendant's premises and that he purloined the dynamite caps; also that but for such trespass and misappropriation of the caps he would not have been injured. It behooves plaintiff, therefore, to allege all the facts necessary to remove that objection to a recovery and thus bring his case within the principle of the attractive nuisance cases. If his complaint does not allege every fact necessary to obviate the consequences of his own tortious conduct, it fails to remove the objection that his own fault or negligence was a proximate, contributory cause of his injuries. The question, therefore, is: Does plaintiff's complaint allege all the facts necessary to remove the effect of his own culpable conduct as a bar to a recovery?

In many, if not most, of the attractive nuisance cases the injury is the result of but a mere technical trespass upon the defendant's property, and the only wrong which the child commits is in the use of the dangerous instrumentality or appliance. That is to say, usually the injury occurs while the child is playing with or upon the turntable or other dangerous or attractive contrivance. It may well be expected that the sportive and playful instincts of children will cause them to be attracted to some object upon or about which they can play, even though they have to trespass upon private property in order to accomplish the object of their venturesome daring. For not only is it true that young children, as a rule, are unable to appreciate the perils embodied in dangerous contrivances to which they are attracted, but it is equally true that, generally speaking, such children, in their thoughtless eagerness for play, do not possess a lively sense of the moral tortiousness of their conduct if it does not exceed the limits of a mere technical trespass upon private property, i. e., if their conduct, though involving the unauthorized use of another person's property as a plaything, stops short of actual theft or of the unlawful misappropriation of the property of another.

[2] In the instant case there was in plaintiff's conduct something more than a mere technical trespass. Here the child, though 11 years old, and presumably possessing the average understanding of a boy of that age, committed an act of grave moral turpitude by appropriating defendant's property. It may be conceded that, had this element of wrongdoing been absent from the case, and had there been naught but a mere technical

trespass upon defendant's premises, all question as to plaintiff's immaturity of intelligence and foresight—such immaturity as would have sufficed to excuse his conduct and to avoid the consequences of his own thoughtless trespassing upon the property of another—would have been foreclosed by those averments in the complaint which allege, in substance, that plaintiff was attracted to the tin box because of its color, condition, appearance, and surroundings, and that he was "too young and inexperienced to foresee the danger" which might result from playing with the dynamite caps. *Cahill v. Stone, etc., Co.*, supra, p. 577 (96 Pac. 84). But since the injury was the direct result of plaintiff's speculation as well as of his trespass upon defendant's land, the complaint should have contained some averment which would have sufficed to show that this 11 year old boy was ignorant of the moral turpitude involved in his conduct—such an averment, for example, as that he was deficient in understanding and that therefore he did not realize the culpability of his conduct in making free with another's property. True, a boy under 14 years of age is prima facie presumed to be incapable of committing crime (Pen. Code, § 26); but this is a rule of evidence, not a rule of pleading, and it does not dispense with some allegation sufficient to show that the child did not appreciate the moral iniquity of his conduct where, as here, the complaint discloses that the injury was the result of his surreptitious taking of property which did not belong to him.

As we view the case it is ruled by the decision in *Nicolosi v. Clark*, 169 Cal. 746, 147 Pac. 971, L. R. A. 1915F, 638. There the plaintiff, a boy 10 years of age, purloined dynamite caps from a tool box which the defendant had left in a street where he had been lawfully engaged in excavating a sewer trench. There, as here, the complaint alleged that the child being of tender years, was attracted by the open box and was prompted by childish curiosity; that he was "wholly ignorant of the dangerous character and composition of said dynamite caps"; and that, "without fault or negligence on his part" he took from the box "one of said dynamite caps, and while handling the same the said dynamite cap exploded" and injured him. The defendant demurred to the complaint upon the ground that it did not state a cause of action. The trial court sustained the demurrer, and our Supreme Court, holding that the demurrer was properly sustained, expressed itself as follows:

"The mere fact that plaintiff in such an action as this is of tender years does not require that the alleged cause of action be submitted to the jury to determine whether or not the plaintiff, through negligence or other cause, was himself so in fault as to destroy his right of action. Where the facts, as here, are set forth

in the complaint, the question is one of law. If the complaint clearly establishes plaintiff's negligence in point of law, the demurrer was properly sustained. * * * In the case at bar the plaintiff was clearly guilty of trespass, if not of pecculation. If a boy of ten years of age is not chargeable with knowledge that he has no right to make free with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods, it can only be because that particular boy is of deficient intellect and understanding. But this is not alleged. Not being alleged, we hold it plain as a proposition of law, that he was guilty of an unwarranted trespass, barring his right of recovery."

[3] Moreover, the complaint in this case does not allege facts sufficient to charge defendant with negligence. To make out a case of negligence on the part of the defendant in this class of cases facts must be alleged showing that the defendant knew, or ought to have known, that children of the class to which the plaintiff belongs would be likely to use the dangerous instrumentality in the manner which caused the injury. The question in every case is whether the injury might have been anticipated or foreseen had the defendant exercised the care and forethought of a reasonably prudent person. 20 R. C. L. pp. 83, 84, title "Negligence," par. 73. In *Gates v. Northern Pacific Ry. Co.*, 37 Mont. 103, 94 Pac. 751, Mr. Justice Holloway, in a carefully considered concurring opinion, says:

"I think such landowner should be held liable to the injured child only in a case presenting all of the following facts: (1) That the injured child was too young and inexperienced to appreciate the danger, and was therefore incapable of contributory negligence. (2) That the injury was caused by an unguarded, dangerous machine, or other dangerous thing peculiarly attractive to children of the class to which the injured one belongs. (3) That the landowner impliedly invited children of that class to come upon his premises." (Italics ours.)

In the instant case there is nothing in the complaint to justify the inference that defendant knew, or had reason to believe, that a boy of 11 years, of average intelligence and possessing the moral sense usual in a lad of that age, would enter defendant's close and purloin these dynamite caps. The only allegation respecting defendant's knowledge is that "defendant, well knowing said dynamite caps to be dangerous and attractive to children," negligently placed them upon the crossbeam. It is not even alleged that defendant knew, or had reason to believe, that the caps would be attractive to children of plaintiff's class. They might be attractive to "children," as the complaint alleges; they might be attractive to children of 7 years or less, or even to some older children or to children of deficient mentality; and

yet they might not be attractive to a normal boy of 11 years of age. It is not enough that defendant's conduct might have constituted negligence with respect to some children. To justify a recovery against this defendant facts must be alleged and proved which show that his conduct constituted negligence with respect to this particular boy and not with respect to some other child or children. But not only is this complaint deficient in failing to allege that defendant knew or had reasons to believe that the caps would prove attractive to boys of plaintiff's age and mental capacity, it is deficient in failing to allege facts showing that defendant knew, or had reason to believe, that children of the class to which plaintiff belongs would be so lacking in moral discernment as to be tempted to purloin these dynamite caps. While the caps and the tin box in which they were contained were left in such a way that a thief might not find it difficult to reach them, it cannot be said, from the facts alleged, that defendant was bound to anticipate that a normal boy of the age of this plaintiff might surreptitiously appropriate what was so evidently the property of another.

The judgment is affirmed.

We concur: WORKS, J. CRAIG, J.

65 Cal. App. 280

SAKURAI v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4562.)

(District Court of Appeal, Second District, Division 1, California. Jan. 15, 1924.)

1. Guardian and ward ⚡17—Order appointing guardian when made and entered becomes decree.

An order appointing a guardian when duly made and entered becomes a decree of the court.

2. Guardian and ward ⚡15—Court's duty to approve bond when order appointing guardian valid.

In view of Code Civ. Proc. §§ 1393, 1808, it is the duty of the court when a valid order of appointment of a guardian has been made to approve a duly executed bond with sufficient sureties when such bond is made in compliance with the terms of the order of appointment.

3. Guardian and ward ⚡10—Act disqualifying person ineligible to guardianship held not to interfere with guardian properly appointed.

Since Code Civ. Proc. § 1751a as added by St. 1923, p. 584, providing that no person ineligible to citizenship may be appointed guardian of any estate in real property, cannot be construed as interfering with the qualification of any guardian under a valid order of appointment, it does not authorize the court's refusal to approve a surety bond of a guardian made in

compliance with the terms of the order appointing him.

4. Mandamus ☞28—Lies to compel inferior tribunal to exercise discretion exercisable in but one way.

If vested discretion can be legally exercised in but one way, mandamus will lie to compel the inferior tribunal so to exercise it.

5. Guardian and ward ☞18—Vacating order appointing guardian unauthorized.

In view of Code Civ. Proc. § 1801, providing procedure on notice for the removal of a guardian where cause for such removal exists, where order for appointment of guardian of a minor had been duly entered and became a decree, an order vacating and setting aside the original order after the expiration of time within which an appeal might have been taken was unauthorized.

Application for writ of mandate by Mary Sakurai, by T. Sakurai, her guardian ad litem, and another, against the Superior Court of the State of California in and for Los Angeles County, and Victor R. McLucas, Judge. Writ granted.

Louis B. Stanton, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Robert M. Clarke, and Louis P. Boardman, both of Los Angeles, for respondents.

CONREY, P. J. On petition for writ of mandate. It is conceded by respondents that prior to the 16th day of August, 1923, it was lawful for the superior court in a proper case to appoint as guardian of an estate any suitable person, notwithstanding that such person was ineligible to citizenship in the United States. Section 1751a of the Code of Civil Procedure was added to that Code by an amendment which became effective August 16, 1923. Stats. 1923, p. 584. That section provides that—

"No person ineligible to citizenship in the United States * * * may be appointed guardian of any estate which consists in whole or in part of real property."

On the 8th day of August, 1923, pursuant to proceedings leading thereto in due form, the superior court of Los Angeles county made and entered in its minutes an order that T. Sakurai be appointed guardian of the estate of Mary Sakurai, and that letters of guardianship be issued accordingly upon his taking the oath as required by law and giving bond to said minor in the sum of \$1,000. The said Mary Sakurai is a minor child born of Japanese parents in the state of California, and is the owner of real property situate in the county of Los Angeles. The said T. Sakurai is a native and subject of the empire of Japan and is not eligible to citizen-

ship in the United States. He is the father of the petitioner herein, the said Mary Sakurai.

On the 18th day of August, 1923, the said T. Sakurai presented for approval of the judge of the superior court in the department where said order of appointment of guardian had been made a bond as required by said order, which bond, with sufficient sureties, was executed in due form as the guardian's bond in accordance with the terms of section 1754 of the Code of Civil Procedure. The judge has refused to approve said bond, basing such refusal solely upon the fact of the status of said T. Sakurai as an alien ineligible to citizenship in the United States, and upon the ground that by reason of the provisions of section 1751a, Code of Civil Procedure, he was precluded from approving such bond. Thereupon said Mary Sakurai presented to this court her petition for a writ of mandate to compel respondent court to approve said bond.

[1, 2] An order appointing a guardian, when duly made and entered, becomes a decree of the court. The provisions of the Code relative to the estates of decedents in so far as they relate to practice in the superior court apply to proceedings under the chapter relating to guardian and ward. Code Civ. Proc. § 1808. Section 1393 of the Code of Civil Procedure, relating to bonds of executors and administrators, provides that all such bonds must be approved by a judge of the superior court before being filed. Reading together the above-mentioned sections, it clearly is the duty of the court, when a valid order of appointment of a guardian has been made, to approve a duly executed bond with sufficient sureties when such bond is made in compliance with the terms of the order appointing the guardian. The order here in question was a complete decree of the court prior to the 16th day of August, 1923. Nothing remained to give it all the force and effect of any decree of court. So far as the appointment of the guardian was concerned, the judicial action was finished. The qualification of the guardian by presenting and filing a sufficient bond and by taking the oath of office were not a part of the order of appointment, but were only proceedings required to be taken for the purpose of carrying into effect the decree as made and entered. There is nothing contained in section 1751a, Code of Civil Procedure, which purports to interfere or can properly be construed as interfering with the qualification of any guardian under a valid order of appointment.

[3, 4] We therefore are of the opinion that the provisions of section 1751a furnish no valid excuse for the refusal of the judge to approve the bond. No other excuse is offered, since it is not denied that the bond was in due form and with sufficient sureties.

It is well settled that mandamus will issue to correct an abuse of discretion in such a case. If the vested discretion under the facts can be legally exercised in but one way, mandate will lie to compel the inferior tribunal so to exercise it. *Newlands v. Superior Court*, 171 Cal. 741, 744, 154 Pac. 829.

[5] In the return to the alternative writ of mandate herein respondents state that at a session of said superior court duly held on November 26, 1923, the court entered an order vacating and setting aside the order of August 8, 1923, and placed upon its calendar for further hearing the matter of the appointment of a guardian of said minor's estate. This order appears to have been made ex parte, not only after the order of August 8th had been duly entered and thus had become a decree of court, but also after the expiration of the time within which an appeal from the order of appointment might have been taken. The Code provides a procedure upon notice for the removal of a guardian where cause for such removal exists. Code Civ. Proc. § 1801. We find no authority in law for the arbitrary vacation by the superior court of a valid decree once entered by its order.

Let the preemptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 60

VAIL v. NICHIBEI BUSSAN CO. et al.
(Civ. 4687.)

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1923. Hearing Denied by Supreme Court Feb. 21, 1924.)

1. Fraudulent conveyances — Burden upon creditor to bring himself within Civ. Code, § 3440.

The burden is upon him seeking the benefits thereof to bring himself within the purview of Civ. Code, § 3440, relating to fraudulent transfers of personal property, and prescribing the effect as evidence of fraud of a want of immediate delivery and continued change of possession.

2. Fraudulent conveyances — Burden on plaintiff of showing lack of change of possession and control held not sustained.

In an action under Civ. Code, § 3440, to set aside an alleged fraudulent conveyance of merchandise, where defendant testified that, while owner of the merchandise in question he "took in some new partners who are the same men that are with me today," the fact that he did not state that these men took actual possession of the property or exercised any dominion over same, held, not sufficient to sustain the burden resting on plaintiff to prove his contention that defendant had remained individually in possession and control of the property until the time of the alleged fraudulent

transfer by the partnership to a corporation of which defendant became manager.

3. Evidence — In absence of evidence, finding should be against party having burden of proof.

Where no evidence is introduced upon an issue, a finding thereon should be against the party having the burden of proof.

4. Fraudulent conveyances — What constitutes delivery and continued change of possession under statute questions of fact.

Under Civ. Code, § 3440, relating to fraudulent transfers of personalty and making want of immediate delivery and continued change of possession conclusive evidence of fraud but introducing no new rule touching what shall constitute a delivery and change of possession, such matters are questions of fact.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry R. Vail against the Nichibei Bussan Company, a corporation, and S. Tatsuno and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. Clarence Ogden, of San Francisco, for appellant.

Gillogley, Crofton & Payne, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought to have certain transfers of personal property declared void and the property subjected to execution in satisfaction of a judgment obtained upon August 20, 1921, against the defendant S. Tatsuno for over \$2,000 upon a promissory note dated September 29, 1920.

The complaint alleged that on September 28, 1917, S. Tatsuno was the owner and in possession of certain personal property consisting of a stock of merchandise in a dry goods store in San Francisco, Cal.; that about October 15, 1920, S. Tatsuno transferred this personal property to Tsuyo Tatsuno, intending thereby to delay, hinder, and defraud the creditors of S. Tatsuno, and subsequent to November 1, 1920, Tsuyo Tatsuno transferred the property to S. Tatsuno, T. Tsuchiya, M. Uchiyama, N. Yokiyawa, and Tsuyo Tatsuno, intending thereby to hinder, delay, and defraud the creditors of S. Tatsuno, and that on December 1, 1920, the five persons last named, as co-owners, transferred the property to Nichibei Bussan Company, a corporation, intending to delay, hinder, and defraud the creditors of S. Tatsuno; that the Nichibei Bussan Company had notice of the intended fraud upon the plaintiff as a creditor of S. Tatsuno.

For a second cause of action, the plaintiff added to the allegations contained in the first count, the following: That on Septem-

ber 28, 1920, and prior thereto, S. Tatsuno was the owner of and in possession of the merchandise in dispute, and has ever since remained and now is in possession and control of said property, and in addition thereto the bank account carried in the name of Nichibei Bussan Company; that S. Tatsuno is manager of and in control of the Nichibei Bussan Company.

The trial court found specifically that all the allegations of the complaint were untrue and found the facts to be: That on or about December 1, 1920, the defendants S. Tatsuno, T. Tsuchiya, M. Uchiyama, and M. Yokozaawa, as copartners transferred the property to S. Tatsuno, T. Tsuchiya, M. Uchiyama, N. Yokozaawa, as copartners and co-owners, were in possession of the store and merchandise mentioned in plaintiff's complaint; that at said date the said copartners transferred said property to the defendant Nichibei Bussan Company, a corporation; that said transfer was made in good faith and without any intent to hinder, delay, or defraud any creditor of S. Tatsuno and that said transfer was accompanied by an immediate and continued change of possession of the property transferred.

The appellant complains of the findings against him, asserting they are unwarranted by the evidence. The record is very brief; the plaintiff's case resting upon the following testimony by the defendant S. Tatsuno:

"I am one of the defendants in this action. My business is the dry goods business, at 1701 Post street. The name of the store is the Nichibei Bussan Company. I have been connected with it from 1902, I think. I have been employed in the dry goods business under the name Nichibei Bussan Company from 1902 right down to date. Originally, when I first start in business I had two partners, Mr. Kano and Mr. Koto. Mr. Koto stayed in the business, I think about two years until he died. When he died we paid to his doctors a fee and expenses and that used up his interest, when we paid the expenses of his funeral and sickness. I think that is it; I don't know if it was exactly. Later Mr. Kano went to Los Angeles, and we separated. I then bought his interest. Then I was all by myself for a little while. Mr. Kano sold out to me one day before the fire in 1906. Then I took in some new partners who are the same men who are with me today. We continued to conduct the store as the Nichibei Bussan Company. When we first opened the store sometimes I signed, and sometimes Mr. Kano signed, and sometimes Mr. Koto signed checks for the payment of goods. After Mr. Kano and Mr. Koto went out I signed the checks. I was manager of the store during the course of the partnership formed after Kano and Koto were out. The corporation was formed in 1920. The same men who were my partners after Mr. Kano and Mr. Koto left formed this corporation. There were no new persons interested in the corporation. The business has continued down to the present time as a corporation. I am manager of the corporation. Mr. Tsuchiya is president of the

corporation. I sign the checks. The name is just the same except we add 'a corporation,' and we have continued on in the same place of business. After Kano and Koto went out of our original partnership no articles of partnership were ever signed between myself and the new partners. No papers were ever made. We never published any notice of the formation of this partnership or that I was selling to them. I am still the manager of the Nichibei Bussan Company, now a corporation, and I still sign all the checks and I signed all the checks before the formation of the corporation."

Upon cross-examination, Mr. Tatsuno testified:

"At the time the Nichibei Bussan Company, a corporation, took over the store we changed the name over the door and issued cards announcing that it was a corporation and changed the bank account from the name of the partnership to the name of the corporation. Before the formation of the corporation the name was Nichibei Bussan Company, after Nichibei Bussan Company, a corporation, incorporated."

[1-3] Appellant argues that since S. Tatsuno merely testified that he "took in some new partners who are the same men that are with me to-day" and failed to state that these men took actual possession of the property or exercised any dominion over the same, the finding should have been that Tatsuno alone remained in possession up to the time of the transfer to the corporation and not that the copartners were in possession of the same at the time of said transfer. This argument overlooks the fact that the burden of bringing himself within the purview of section 3440 of the Civil Code rested upon the plaintiff. He did not sustain the burden of proving the fact that S. Tatsuno, individually, was in "possession and control of the property" at the time of the transfer to the corporation. Appellant contends that the assumption should be in his favor, in the absence of any proof upon the subject. On the contrary, when no evidence is introduced upon an issue, the finding should be against the party having the burden of proof. *Dieterle v. Bekin*, 143 Cal. 683, 688, 77 Pac. 664.

[4] It appears from findings, properly made, that the transfer to the corporation sought to be set aside as fraudulent against the creditors of S. Tatsuno was made by a copartnership and not by S. Tatsuno individually, and that the partnership was in possession of the property at the time of the transfer and delivered the possession of the same to the corporation. The fact strongly relied upon by appellant that S. Tatsuno was retained in the employ of the corporation as manager of the store, despite the fact that he had been actively engaged in the management of the business under the partnership arrangement, is only a circumstance which would have aided a finding in favor of appellant upon the question of

change of possession, had such a finding been made, but there is nothing conclusive about it. The ultimate fact was the immediate delivery and actual and continued change of possession of the goods from the vendor to the vendee, and when it is apparent to all the world that the vendor has ceased to be the owner and another has acquired and openly occupies that position, the statute is satisfied. *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178. In the present case there was evidence that notice of the sale of the property by the partnership to the corporation had been recorded in the recorder's office of the city and county of San Francisco on November 23, 1920; that the name had been changed over the place of business; that new cards and stationery had been used bearing the new name indicating the corporate entity; that the bank account had been changed; that one of the former partners had become president of the corporation. Section 3440 of the Civil Code makes the want of an immediate delivery and continued change of possession conclusive evidence of fraud, but it introduces no new rule touching what shall constitute such delivery and change of possession. That was a question of fact for the trial court, which has been determined against the plaintiff, and therefore the circumstances upon which he relies becomes of no significance upon the present appeal.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

65 Cal. App. 319

PEOPLE v. FEIGELMAN. (Cr. 1012.)

(District Court of Appeal, Second District, Division 1, California. Jan. 17, 1924.)

1. Criminal law §620(1)—Consolidation of prosecutions for grand larceny committed more than year apart not an abuse of discretion.

Under Pen. Code, § 954, authorizing consolidation of two or more prosecutions of the same class, the court did not abuse its discretion in consolidating and trying at the same time two prosecutions for grand larceny, though committed more than one year apart.

2. Depositions §89—Proof held to show due diligence to obtain presence of witness at trial to admit his deposition.

Under Pen. Code, §§ 1335-1346, providing for examination of witnesses upon application made upon affidavit stating * * * "(4) that the witness is about to leave the state," proof introductory to production of a deposition, that a process server armed with subpoena, went to witness' hotel, found him gone, and made return accordingly, that witness returned later,

but checked out the same day, that a deputy sheriff connected with the district attorney's office telegraphed witness' sister, who replied that witness had left for Europe, showed due diligence to obtain his presence, and that he was not within the state.

3. Depositions §35—Proof held to show substantial compliance with statute requiring notice of taking depositions.

Where clerk in the office of defendant's attorney received and acknowledged service of notice of application to take testimony, defendant's attorney appeared on the examination, making only a general objection that section 1338 had not been complied with, no error was committed in holding that Pen. Code, § 1338, requiring three days' published notice of application for conditional examination of a witness about to leave the state, had been substantially complied with, since, under section 1341, defendant's counsel could have prevented the examination by proof that witness was not going to leave the state.

4. Depositions §36—Prima facie showing for taking deposition of witness made by presentation of affidavit.

Under Pen. Code, §§ 1335-1346, providing for examination of witnesses upon application on affidavit that witness "is about to leave the state," the prosecution by its affidavit presented on application for the order to take the deposition made a prima facie showing that witness had left the state.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Joe Feigelman was convicted of grand larceny, and he appeals. Affirmed.

Frank E. Dominguez, Clare W. Woolwine, and H. L. Giesler, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CONREY, P. J. By indictment in case superior court No. 16949 defendant was charged with grand larceny from the person of one Bernard Odell, committed on the 3d day of August, 1921. By information in case superior court No. 18925 he was charged with grand larceny from the person of Willett Woolsey, committed on the 9th day of September, 1922. By order of court the two cases were consolidated, and thereafter were tried at the same time. The defendant was convicted on both counts, and thereafter was sentenced to imprisonment in the state prison. He appeals from each judgment and in each case from the order denying his motion for a new trial.

[1] Section 954 of the Penal Code authorizes the court to order the consolidation of two or more criminal actions where the indictments or informations charge the commission of two or more different offenses of the same class of crimes or offenses. The fact that the two crimes charged against

the defendant were committed, the one more than a year after the other, does not in our opinion furnish any ground for the claim that the court abused its discretion in consolidating said actions and causing them to be tried at the same time.

[2] On the 30th day of August, 1921, pursuant to an order of the superior court, the testimony of Bernard Odell was taken upon conditional examination, the order therefor being based upon an affidavit stating, among other things, that the witness was then about to leave the state. By an order of that same date the case was set down to be tried on the 24th day of October, 1921. The trial was postponed from time to time, and did not actually occur until the 31st day of May, 1923. Sections 1335 to 1346, inclusive, of the Penal Code provide for the examination of witnesses conditionally as therein set forth. The application must be made upon affidavit stating "(4) that the witness is about to leave the state. * * *" The application may be made to the court or a judge thereof and must be made upon three days' notice to the opposite party.

When the Odell deposition was offered in evidence testimony was introduced for the purpose of showing that due diligence had been exercised to procure the attendance of the witness Odell at the trial, but that such attendance could not be secured, and that in fact the witness was out of the state. The process server, a deputy sheriff, armed with a subpoena, on the 7th day of May, 1923, went to the Northern Hotel, in the city of Los Angeles, where Odell had been living, and was there informed that Odell had gone away and had left a forwarding address at Pittsburg, Pa. Return upon the subpoena was made accordingly. It appears that in fact Odell at that time had gone to Bakersfield and returned to the Northern Hotel on or about the 15th day of May. On the same day he "checked out" from the hotel and again left his forwarding address, a street number at Pittsburg, Pa. It does not appear that the process server or the district attorney knew that Odell had thus returned to the city of Los Angeles. Thereafter a deputy sheriff, whose duties were in connection with the office of the district attorney, on the 29th day of May, telegraphed to Odell at Pittsburg, in the name of the district attorney, stating therein that this case was set for May 31st, and asking advice as to whether Odell could be here. By reply of the same date one Mrs. Goldstein, a sister of Odell, replied that Odell had left for Europe. We think that these facts were sufficient to warrant the court in determining that due diligence had been exercised to obtain the presence of the witness, and that the witness was not within the state of California.

[3,4] The defendant objected to the admission in evidence of the Odell deposition not only upon the ground that due diligence

had not been exercised to obtain the presence of that witness at the trial, but also upon the ground that the provisions of section 1338 of the Penal Code were not complied with by the prosecution, in that the defendant or his attorney were not served with the notice required under said section, which is a 3 days' notice of the application to the superior court for an order to take such testimony. Mr. Burke, of the district attorney's office, testified that prior to making the application he had a telephone conversation with the attorney of the defendant wherein said attorney stated that he would waive notice of such application. Defendant's attorney testified that this conversation did not occur. The court, in deciding upon the admission of the deposition in evidence, stated that it was not necessary to pass upon the effect of this testimony, for the reason that, in view of other facts, the matter was immaterial. These facts were that notice of the time and place of taking the deposition before the magistrate had been delivered to a clerk in the office of defendant's attorney, who acknowledged service thereof; that defendant's attorney in fact appeared at the taking of the deposition, where he cross-examined the witness and made no objection that the 3 days' notice required under section 1338 had not been served upon him, although he did make a general objection that the provisions of the Code had not been complied with. We are of the opinion that, in view of these facts, the court committed no error in holding that the deposition was a conditional deposition taken in substantial compliance with the provisions of the statute. As is pointed out by the Attorney General in his brief, notwithstanding said order of the superior court for the taking of the deposition, the defendant at the time when he appeared before the magistrate had an opportunity to prevent the taking of the deposition, if in fact the witness was not about to leave the state. For the Penal Code, at section 1341, provides that, if at the time and place so designated it is shown to the satisfaction of the magistrate that the witness is not about to leave the state, the examination cannot take place. The prosecution by its affidavit presented on application for the order to take the deposition had made a prima facie showing that the witness was about to leave the state. By appearing at the taking of the deposition without challenging or attempting to disprove this fact, the defendant in effect waived the objection, and he should not later be heard to complain that the proceedings are defective merely because he was not served with three days' notice of the application for the order to take the deposition.

It is not denied that the evidence is sufficient to justify the verdict. No miscarriage of justice appears to have occurred in the conviction of the defendant.

The said judgments are and each of them is affirmed, and the orders denying the several motions for a new trial are and each of them is affirmed.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 249

BRIGGS et al. v. SHERMAN et al.
(Civ. 3917.)

(District Court of Appeal, Second District, Division 2, California. Jan. 11, 1924.)

Landlord and tenant §152(11)—Provision of lease against "alterations" held not violated by construction of gate.

Lessees of one portion of a storeroom, divided by a partition a few feet high running from the rear to a point not far from a common door at the front, by constructing a gate at the end of such partition between it and the frame of the common door in such a way as to keep persons out of their store when they were not there held not to have made an "alteration" in violation of a covenant of their lease that they would not make or suffer any alterations to be made without the consent of lessor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alter—Alteration.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Clayton W. Briggs and another against Nellie M. Sherman and husband. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hyman Schwartz, of Los Angeles, for appellants.

Nichols, Cooper & Hickson, of Pomona, for respondents.

WORKS, J. This is an action of unlawful detainer. The complaint alleges that defendants held over after breach by them of certain covenants of a lease under which they occupied the premises in question in the cause, and after due notice to quit. Judgment went for defendants, and plaintiffs appeal.

The lease involved in the action was made to respondents by a predecessor in interest of the appellants. The latter, and their predecessor before them, occupied one-half of a certain storeroom, and the lease to respondents demised the remaining half. The instrument contained a provision that the lessor "agrees to pay the water rate during the continuance of this lease, also to furnish free heat, electricity to be furnished by the lessee." One of the allegations of the complaint is that respondents breached the covenant of the lease requiring them to furnish

electricity for the premises. The trial court in effect found this averment to be untrue, for it found specifically that the predecessor of appellants, after the execution of the lease, entered into an agreement with respondents waiving the furnishing of electricity by them in consideration of the agreement of respondents to allow him the use of a certain space in the rear part of the half of the storeroom covered by the lease; that these mutual understandings were executed by appellants' predecessor taking possession of and occupying thereafter the space mentioned and by his thereafter paying the bills for electricity; that the predecessor of appellants notified the latter of this modification of the lease prior to the transfer to them of his interest in the property; and that appellants thereupon entered into possession of the space mentioned and thereafter always continued to occupy it and thereafter paid and continued to pay all bills for electricity for the entire premises without objection and without demand upon or notice to respondents until shortly before the commencement of the action. Appellants contend that these findings are without support in the evidence, but the contention is baseless. There was ample testimony from several witnesses, including the predecessor of appellants, to support each of the findings mentioned. This evidence was so plain and direct that we do not find it necessary to recite it.

The lease provided that the lessees should not "make or suffer any alterations to be made" on the premises without the written consent of the lessor. The complaint alleges that this covenant had been broken, but the trial court found that the allegation was untrue. Appellants insist that this finding is unsupported by any evidence. The portion of the premises covered by the lease was separated from the remaining half of the store by a partition a few feet high running from the back of the room to a point not far from the door at the front which gave ingress to the entire place. What appellants complain of as an "alteration" was a gate placed by respondents on their side of the room and swinging between the forward end of the partition and the frame of the common door at the front of the store. A witness said of this gate that it was "about ten feet long, and about five feet high, made with slats, oh, about three or four inches apart; they are pine wood made with slats to be folded back against the post in four sections, and was plain lumber, unplanned, hardly finished." One of appellants testified that the gate could be fastened at the end near the front door by means of a latch which "corresponded to a screen door latch or something of that sort," and "was attached by light hinges and screws to the center part at the end of this center partition." He also testified that "the whole structure constituted

a gate simply and effectively, simply for the purpose of keeping people out of the Shermans' store when they were not there, when their business was closed." This evidence amply supports the finding. The gate was not an "alteration" under the terms of the lease (2 C. J. 1166). It did not substantially change the character of the building or of any part of it. It is apparent from the evidence that it could have been removed at any time without material change in or damage to the building.

Other points are made by appellants, but they are in effect but statements in another form of the points of which we have already made disposition.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

65 Cal. App. 237

GREEN v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 4626.)

(District Court of Appeal, Second District, Division 1, California. Jan. 11, 1924.)

Injunction ¶145—Court held without jurisdiction to enter temporary injunction because of failure to serve affidavits until day of hearing.

Under Code Civ. Proc. § 527, providing that a party who has obtained a temporary restraining order must at least two days before hearing serve a copy of the complaint and all affidavits to be used at such hearing, on the adverse party, where affidavits presented and used at such hearing were not served on defendant until the day of the hearing, *held*, that the court had no jurisdiction except to dissolve the restraining order, no discretion in the matter being vested in the court by the statute.

Application by Max Green for a writ of prohibition to be directed to the Superior Court of Los Angeles County, Harry R. Archbald, Judge thereof. Writ granted.

J. W. Satterwhite, of Los Angeles, for petitioner.

J. Edward Keating and Craig & Bromley, all of Los Angeles, for respondents.

HOUSER, J. This is an application for a writ of prohibition to be directed to the superior court in and for the county of Los Angeles and to Harry R. Archbald, as judge thereof, requiring the said respondents to desist from any action or proceeding based upon a temporary injunction following a restraining order issued out of said court under the order of the said judge.

The facts appear to be that Rosa Green had brought a suit in accounting against Max Green and had obtained from the court

an order restraining the defendant from dealing generally with the subject-matter of the action, and directing defendant to show cause on the 18th day of October, 1923, why a temporary injunction pending the trial of the cause should not be issued to the same effect. In accordance with the said order, the defendant personally appeared, his attorney being excusably absent. Although the order to show cause did not appear on the court's calendar, the matter was nevertheless called; and, according to the return, as appears by the affidavit of the judge filed herein, the defendant personally requested a continuance, to which request the attorneys representing plaintiff consented, and an order was thereupon made by the court continuing the hearing of said order to show cause until October 26, 1923. On said date defendant served on plaintiff and filed in the action a counter affidavit setting up certain matters not relevant here, and plaintiff also filed therein two affidavits neither of which was in reply to anything contained in defendant's counter affidavit and which affidavits of plaintiff had been prepared preceding the date of service of defendant's counter affidavit, and preceding said date of hearing of the order to show cause. Over defendant's objection, the court proceeded to hear the matter, received in evidence plaintiff's said two affidavits, and ordered a temporary injunction to issue.

Defendant assigns several reasons why the court had no jurisdiction to order a temporary injunction in the premises; but for the purpose of deciding the question of whether or not a writ of prohibition should issue, but one of such reasons need receive consideration by this court. Section 527 of the Code of Civil Procedure, which indicates the necessary steps to be taken in obtaining a temporary injunction, contains, among other provisions, the following:

"When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order."

In the case of *Kelsey v. Superior Court*, 40 Cal. App. 229, 180 Pac. 662, it was held that a failure by the plaintiff to serve on the defendant a copy of his points and authorities at least two days before the hearing was sufficient to divest the court of jurisdiction, excepting for the sole purpose of dissolving the restraining order theretofore issued; that consequently the order of tempo-

rary injunction issued by the court was a nullity; and that a writ of prohibition should issue as against further proceedings under such order. The language of the statute covering the situation here is plainly to the effect that, unless all affidavits to be used on the hearing be served upon the opposite party at least two days prior thereto, the court shall dissolve the restraining order. The facts of the instant case are that certain affidavits used by the plaintiff were not served on the defendant until the day of the hearing. The evident purpose of the statute is to prevent surprise—to the end that no unfair advantage may be taken of the defendant in the way of evidence which has not been anticipated. An examination of the record herein discloses that entirely new matter was injected into the case by the allegations contained within the affidavits presented by the plaintiff on the day of the hearing, and it might well be that the defendant was entirely unprepared to meet such new issues. That fact, however, is beside the point for the reason that the statute leaves no room for the exercise of discretion by the court. As bearing upon the duty of the court where all the affidavits used on the hearing were not served as directed by the statute, what the affidavits contained is entirely immaterial. The court is neither required nor permitted to determine either the substance or the effect of the affidavits; the allegations thereof may be germane or they may be wholly irrelevant so far as affecting the propriety of the action by the court as indicated by the statute is concerned. Where it appears that affidavits which were used on the hearing were not served on the opposite party at least two days before such hearing was had, one duty only is prescribed, and that is an order dissolving the restraining order. The measure of the power to be exercised by the trial court in the matter of provisional injunctions is contained within the provisions of the section of the Code to which reference has been made (*United Railroads v. Superior Court*, 170 Cal. 758, 151 Pac. 129, Ann. Cas. 1916E, 199) and the language of that section is so plain and unambiguous that no room exists for interpretation (*Kelsey v. Superior Court*, 40 Cal. App. 236, 180 Pac. 662; *German Sav., etc., Society v. Aldrich*, 5 Cal. App. 216, 89 Pac. 1063). We see no escape from the conclusion that because of the fact that plaintiff did not serve upon defendant at least two days prior to the hearing of the order to show cause "a copy of * * * all affidavits to be used in such application," the superior court had no jurisdiction therein other than to dissolve the temporary restraining order.

It follows that the respondents should proceed no further in the premises other than

to order the dissolution of the restraining order and the order of temporary injunction. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

193 Cal. 325

BRIGGS & TURIVAS v. PACIFIC TRADING CO. (S. F. 10470.)(Supreme Court of California. Feb. 18, 1924.
Rehearing Denied March 17, 1924.)**1. Sales 81(5)—Contract to buy wire held to require buyer to give instructions as to where to send it.**

A contract evidenced by a letter from a California buyer to seller in Illinois, agreeing "to buy" wire "outright and place same in warehouse, payment to be made against warehouse receipt or domestic or export bills of lading, as such may be the case," imposed on the buyer the duty of giving instructions as to where to make delivery, and the seller was not required to make tender or delivery of the wire until buyer forwarded instructions as to its destination.

2. Sales 181(11)—Evidence held to support implied court finding that seller performed within reasonable time.

In an action for damages for breach of contract "to buy" wire "outright and place same in warehouse," in the absence of instructions as to where and how to send the wire, evidence that seller, three months later, warehoused the wire before buyer attempted to cancel, supported an implied court finding that seller had performed its part within a reasonable time.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Briggs & Turivas against the Pacific Trading Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. E. Bien, of San Francisco, for appellant.

Brownstone & Goodman, of San Francisco, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice Kerrigan prior to his retirement, is hereby adopted as the opinion of the court:

This is an action for damages for breach of a contract to buy a carload of wire. Plaintiff recovered a judgment of \$2,848.10, being the difference between the contract price and the market value of the goods, and defendant appeals.

The facts of the case as they appear from the various letters and telegrams exchanged between the parties to this contract and from the deposition of one Frank A. McMonagle, the manager of the plaintiff corporation, are as follows:

During the year 1918 the plaintiff was an Illinois corporation, having its place of business in Chicago. At the same time the defendant was a California corporation, having its principal place of business in San Francisco. W. S. Hanford acted as agent for the plaintiff in dealing with the defendant in San Francisco. At a place in Chicago, known as Blue Island, the plaintiff had a quantity of wire of various sizes and some of which was rusted to a certain extent. After some negotiations the defendant wrote to the plaintiff a letter which, and the acceptance of its terms by plaintiff, constituted the contract on which this suit is based. The letter is as follows (on the letterhead of the Pacific Trading Company, Inc.):

"San Francisco, Cal., U. S. A. W. S. H. 427.

"September 17, 1918.

"(Received Sep. 21, 1918.

"W. S. Hanford.)

"Briggs & Turivas Co. Chicago, Ill.—Gentlemen: Attention Mr. W. S. Hanford. You may take our firm order for one (1) car—approximately 80,000 lbs. black soft steel wire, gauges 2-6. Price 3c. flat f. o. b. cars Chicago. We agree to buy this outright and place same in warehouse providing said material is as stated—slightly rusty, and not rusted into the goods. Payment to be made against invoice and warehouse receipts, or domestic or export bills of lading, as such may be the case. Yours very truly, Pacific Trading Co., Inc. G. K. Fujioka, Asst. Mgr. Export Dept. RK:MD."

At the time the letter was written the World War was in progress, and an altogether abnormal condition existed in the iron and steel market. The letter was received by the plaintiff on September 21, 1918, and thereupon Frank A. McMonagle, the manager of the plaintiff corporation, testified that he telephoned to the plaintiff's yard to prepare the wire for shipment. Shortly afterwards, as he testified, he prepared tags for the purpose of marking the coils, and which were placed thereon. The record does not show any communication thereafter between the parties until December 13, 1918. On that date the defendant wired the plaintiff that its purchaser had canceled its order and therefore that the defendant considered its order to the plaintiff canceled. This telegram read:

"Our order black rusty wire one car account delayed receipt of draft and warehouse receipt our purchasers have canceled therefore we consider our order canceled."

To this the plaintiff replied as follows:

"Your wire thirteenth sale contract nine six two wire now in warehouse being unloaded. Absolutely insist on your acceptance of same in view of fact no cancellation received prior to shipment."

A warehouse receipt, introduced in evidence by the plaintiff, showed that the wire had been deposited in a Chicago warehouse on December 12th, the day before defendant telegraphed its cancellation. Some correspondence followed between the parties, and on January 22, 1919, the plaintiff drew a sight draft on the defendant, attached thereto the warehouse receipt and forwarded the same through its bank to the Seaboard National Bank of San Francisco. The defendant refused to pay the draft, and this action was commenced.

[1] The defendant urges in support of its appeal that the plaintiff was in default under the terms of the contract, with the consequent right on its part to cancel, thus terminating its liability. This contention is based upon the argument that no time being specified in the contract for the delivery of the goods, the seller was by law given a reasonable time therefor, which the testimony showed to be 10 days, and that it did not make delivery within said time nor at any time before defendant's cancellation, nearly three months after the giving and acceptance of the order.

This contention, we think, is based upon a misconception of the meaning of the contract, under which, it is clear, the seller was not required to make tender or delivery of the wire until the buyer forwarded instructions as to its destination. The buyer in its order used the expression:

"We agree to buy this outright and place same in warehouse. * * * Payment to be made against warehouse receipt or domestic or export bills of lading, as such may be the case,"

—plainly implying that the buyer had not yet determined how or when it desired delivery to be made, that it might order the goods to be placed in a warehouse, or that it might order them to be shipped to a domestic or foreign destination. In this situation the seller was entitled to await further instructions, which the buyer neglected to furnish; and when the latter finally attempted to cancel the order, it gave as its reason:

"Account delayed receipt of draft and warehouse receipt our purchasers have canceled, therefore we consider our order canceled."

It would appear from this language that the defendant had resold upon certain conditions as to dispatch of draft and warehouse

receipt the wire purchased from the plaintiff, which conditions not having been complied with by the defendant, its customer upon that ground canceled its order. The defendant then plainly says: "Therefore we consider our order canceled." But its right to cancel its order did not depend upon its customer's action with reference to a contract with which the plaintiff had no concern. Unless the plaintiff was in default, the defendant is bound by its contract. Upon the trial of the case the defendant offered no evidence whatever, but the plaintiff's evidence showed that after the making of the contract the defendant gave no instructions to the plaintiff as to delivery or shipment. And if it be said that the delay referred to in defendant's telegram of cancellation was the plaintiff's delay in warehousing or shipping, the absence of these instructions furnishes the complete answer. Apparently at the time defendant placed its order with the plaintiff it did not know where its customer, assuming that it had one, would want the material delivered. Receiving no instructions upon this point, plaintiff was not required to make a delivery. Indeed, it would not know where to deliver the wire had it so desired. Under the circumstances of the case the plaintiff adopted a proper course of action, that is, to keep the goods until defendant should send instructions. Not having heard from the defendant, the plaintiff deposited the wire in a warehouse. At the time it did so, the contract was still in existence, but the defendant not having given instructions as to the delivery of the wire within a reasonable time could have been put in default by plaintiff. *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964; *Williston on Sales*, §§ 450, 451, et seq.; *Mecham on Sales*, vol. 2, p. 972. But while plaintiff could have put defendant in default for its delay in proceeding with the execution of the contract, no such right existed in the defendant. It was the defendant's and not the plaintiff's duty to take the first affirmative action under the contract, which was to notify plaintiff where to make delivery. The defendant's attempted cancellation was therefore ineffective for any purpose, and the plaintiff was justified in refusing to abide by this attempted cancellation and in insisting that defendant live up to its agreement.

Some stress is laid by the appellant upon certain language to be found in one of plaintiff's letters in which it attributes whatever delay there was in warehousing the goods to certain labor trouble. This refers to the fact that the plaintiff kept the goods on hand a considerable time before sending them to a warehouse. As we have seen, there was no obligation upon plaintiff's part, in the absence of specific instructions from the defendant, to deposit them in a warehouse, and it had no need to offer any excuse for delay in doing so. The fact that it offered an excuse affords no ground for implying an obligation

at variance with the plain terms of the contract.

The respondent in its brief has devoted some space to an attempt to show that title to the goods passed to the defendant. As to this, it is sufficient to say, first, that the question is not involved in the case, and, second, that this action was brought upon the proper and correct theory that title had not passed.

[2] The evidence in the case supports the implied finding of the trial court that the plaintiff had done and performed on its part all things to be done and performed by it within a reasonable time.

The judgment is affirmed.

(193 Cal. 330)

TRENOUTH et ux. v. SUPERIOR COURT OF SANTA CLARA COUNTY et al.
(S. F. 11038.)

(Supreme Court of California. Feb. 21, 1924.)

Certiorari ¶10—Appropriate procedure after denial by Court of Appeals of an application for certiorari stated.

After denial by the District Court of Appeals of an application for a writ of certiorari to review an order of a lower court, the appropriate procedure under the rules of the Supreme Court is an application for a rehearing in the Supreme Court upon the petition and the order of the District Court of Appeals denying same.

In Bank.

Application by George Trenouth and wife for a writ of certiorari to review an order of the Superior Court of Santa Clara County, and P. G. Gosbey, Judge thereof. Writ denied.

John W. Sullivan, of San Jose, for petitioners.

PER CURIAM. The petition is denied. The petitioner having applied to the District Court of Appeal for a similar writ, which petition was by said court denied, the appropriate procedure under the rules of this court is that of an application for a rehearing in this court upon said petition and the order of the District Court of Appeal denying the same.

(193 Cal. 330)

HARDESTY v. HARDESTY. (L. A. 7931.)

(Supreme Court of California. Feb. 23, 1924.)

I. Marriage ¶58(4)—Fact of pregnancy at time of marriage and concealment thereof from innocent spouse is fraud.

A husband suing to annul a marriage for fraud based on defendant's concealed pregnancy at the time of marriage by one other than plaintiff, it is not necessary that defendant at time of marriage made representations as to her condition, since the fraud consists in the fact of pregnancy, together with the concealment of

that fact, and defendant's ignorance that she was pregnant is no defense.

2. Marriage ¶64—Award giving child alternately to guilty and innocent spouse held erroneous.

Under Civ. Code, § 85, the court in annulling a marriage for fraud must award custody of children of such marriage only to the innocent parent, and is forbidden to provide for division of custody and for the education and maintenance of such children out of the property of the innocent party.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Thomas M. Hardesty against Aileen Hardesty. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded, with directions.

Donald P. Lane, of Long Beach, and H. Clyde Harms, of Los Angeles, for appellant.

S. H. Underwood, of Long Beach, for respondent.

MYERS, J. The parties hereto intermarried in this state on August 19, 1918. The defendant gave birth to a child seven months and ten days after the marriage took place, having been pregnant before and at the time of the marriage by a person other than the plaintiff. Such pregnancy was not disclosed to the plaintiff and he had no knowledge of the same and believed that the child was his child and a child of their marriage, and continued in such belief up to September 11, 1922, at which time he learned the facts above stated. This action for the annulment of the marriage was commenced in March, 1923. In the meantime a second child had been born—a child of this marriage and of the parties hereto, whose name is Helen Hardesty, and who was about eleven months of age at the time of the commencement of this action. The question of the custody of this child is the principal point involved upon this appeal.

The trial court found all of the facts in favor of the plaintiff and rendered judgment annulling the marriage. The plaintiff appeals from the portion of the judgment which makes provision for the custody of the child of the parties, which is as follows:

"It is further ordered, adjudged and decreed that the custody of the child of the parties hereto, Helen Hardesty, be awarded to the father, plaintiff herein, until said child reaches the age of six years. The mother, defendant herein, be allowed to take the child to her home at any point within the state of California during the months of September, October, November, December, January, and February of each year. When said child reaches the age of six years further order of court to be made. During such time the child is with the mother, the father is to pay \$30 a month for her support."

Section 85 of the Civil Code reads as follows:

"The court *must* award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and *may* also provide for their education and maintenance out of the property of the *guilty party*." (Italics added.)

[1] It is appellant's contention that the portion of the judgment appealed from, which is above quoted, is in clear violation of the Code section referred to. There seems no room for doubt that this section is applicable to the instant case. The action was one for annulment of a marriage on the ground of fraud. The fact of pregnancy existing at the time of the marriage, together with the concealment of that fact from the innocent spouse, amounts in law to the perpetration of a fraud. *Baker v. Baker*, 13 Cal. 87, 103; *Barnes v. Barnes*, 110 Cal. 418, 422, 42 Pac. 904. There is no suggestion that the findings of fact herein were not amply supported by the evidence. Indeed, the defendant by her verified answer did not deny the essential allegations of the complaint. She denied the making of any express representations to the plaintiff concerning her character or condition, but no such representations are necessary to the maintenance of the action (*Donovan v. Donovan*, 91 Mass. [9 Allen] 140), and these denials were therefore immaterial. The fraud consists in the fact of pregnancy which disables the party from fulfilling the marriage contract, together with the concealment of that fact from the other party to the contract. She does not deny that she was pregnant by another at the time of her marriage to plaintiff, but contents herself with denying that she then knew that she was so pregnant. This denial is equally immaterial for the reason last stated.

[2] A consideration of the language of the Code section above quoted, with particular reference to the words there italicized, leads to the conclusion that the Legislature intended to make it the duty of the court in annulling a marriage upon the ground here involved to award the custody of the children of such marriage only to the innocent parent, and to forbid the court from making provision for the education and maintenance of such children out of the property of the innocent party. We are of the opinion, therefore, that the court erred in that portion of the judgment appealed from. While in terms it awarded the custody of the child to the plaintiff, in effect it divided the custody equally between the two parties, awarding it to each in alternate periods of six months. We find no warrant in the law for the provision limiting the award of custody to a term of six years or to any period short of the minority of the child. We do not

mean to intimate hereby that the trial court is without authority, in the exercise of a sound discretion, to specify, within reasonable limits, when the mother may visit or take the child, and the conditions thereof. But any such provision which would have the effect of awarding the custody of the child to the guilty party for substantial portions of the time would, in our opinion, be in contravention of the statute. It is but fair to state that respondent has filed no brief herein, and we are therefore left in the dark as to the theory upon which the learned court proceeded or the considerations which moved it to the action taken.

The judgment appealed from is reversed, and the case remanded to the trial court, with directions to enter judgment upon the findings in accordance with the conclusions above indicated.

We concur: RICHARDS, J.; SEAWELL, J.; LENNON, J.; WASTE, J.; LAWLOR, J.

193 Cal. 334

DODD et al. v. DUNN. (L. A. No. 7832.)

(Supreme Court of California. Feb. 23, 1924.)

1. Appeal and error  948—Assignment failing to show abuse of discretion by trial judge in allowing amendment not considered on appeal.

It being within the discretion of the trial court to allow or refuse an amendment at will, an assignment of error that the court erred in allowing plaintiffs to amend their complaint, with no showing of abuse of discretion by the trial judge, will not be considered on appeal.

2. Contracts  332(2) — Amended complaint held to state cause of action by architects for services.

In an action to recover for services rendered as architects, an amended complaint held to state a cause of action, where the contract was set out in *hæc verba*, stating the agreed price for the services and defendant's promise to pay therefor, and the only modification pleaded being a change in the character of the buildings for which the plans and specifications were to be prepared.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by W. J. Dodd and William Richards against F. B. Dunn. Judgment for plaintiffs, and defendant appeals. Affirmed.

Daly, Daly & Todd, of Long Beach, for appellant.

Lloyd W. Moultrie, of Los Angeles, for respondents.

MYERS, J. The plaintiffs recovered judgment in the court below in an action upon

contract to recover the agreed price for services rendered by them as architects employed by the defendant. The defendant has appealed therefrom upon the judgment roll alone. But two points are made by him upon this appeal.

[1] The first is that the court erred in allowing plaintiffs to amend their complaint. The original complaint herein declared upon an express written contract, whereby the defendant employed the plaintiffs to prepare the plans and specifications for certain proposed buildings therein described, and agreed to pay them the sum of \$6,000 for their services in so doing. It alleged the performance thereof by plaintiffs, and the failure to pay on the part of the defendant. The parties went to trial upon the issues as framed by this complaint and the defendant's answer thereto, and at the trial plaintiffs were permitted to file an amended complaint. The amended complaint declared upon the same written contract, and alleged an executed parol modification thereof. The modification consisted only in this: That the written contract described the buildings for which plans and specifications were to be prepared as "a class 'A' theater and apartment house with necessary space below for the ultimate construction of a public bathhouse." The parol modification provided for "a theater and apartment house building arranged so that the entrance to the mezzanine floor of the theater would be from the street level above the ground floor of the theater, eliminating any space below the theater for the ultimate construction of bathrooms." Appellant concedes that it was within the discretion of the trial court to allow or refuse amendments to pleadings, and that the policy of our law is that such discretion should be liberally exercised in the furtherance of justice. He makes no showing whatever which would indicate the slightest abuse of discretion by the trial judge in the instant case. This point, therefore, does not call for any further consideration upon our part.

[2] The second point made by appellant is that the amended complaint does not state facts sufficient to constitute a cause of action, and the judgment is not supported by the findings. This point is based upon the contention that—

"There is no allegation that the parol modification provided for the payment by defendant of the sum of six thousand (\$6,000.00) dollars or any other sum."

There is no merit whatever in this point. The amended complaint pleads in *hæc verba* the written contract stating the agreed price for the services to be \$6,000, and containing the defendant's promise to pay the same, and the only modification pleaded is the change above mentioned in the character of the buildings for which plans and specifica-

tions were to be prepared. The findings follow the allegations of the amended complaint, and all of the facts are found in favor of the plaintiffs.

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; WASTE, J.

193 Cal. 311

ENSIGN v. SOUTHERN PAC. CO.
(S. F. 10254.)

(Supreme Court of California. Feb. 16, 1924.)

1. Death $\S$ 76—Finding of causal connection between injury and death sustained.

Evidence that decedent, while loading pipes in a box car, sustained an injury to his back due to the bumping of the car by a switch engine, and that thereafter his health began to fail, and he was unable to do any heavy work, and that he consulted several doctors and a professional masseur to obtain relief, and that due to his weakened power of resistance he became a prey of tuberculosis, which resulted in a rectal abscess, tubercular in origin, which necessitated an operation, which resulted in his death, *held* to justify the jury in finding a causal connection between the happening of the injury and decedent's death.

2. Death $\S$ 17—Injury proximate cause of death from disease resulting from weakened condition.

If, on account of the weakened condition of a person caused by an injury, he is rendered more susceptible to germs than if he had not been injured, or because of his debilitated condition he is unable to resist the attack of germs present in his system, then the disease resulting from the germs is a natural sequence to his condition resulting from the injury, and the injury is the proximate cause of his death, and the disease is but one of the links in the chain of causation.

3. Pleading $\S$ 236(5)—Amendment to conform to proof as to date of accident held properly allowed.

In an action for the death of plaintiff's decedent alleged to have resulted from injuries received while loading pipes in a box car, the court did not err in exercising its discretion under Code Civ. Proc. $\S$ 473, in granting an amendment to plaintiff's complaint to conform to the proof of the real date of the accident, where the trial took place some five years thereafter, and the injury at the time appeared trivial, and there being no question but that the car was loaded by decedent and his helper, as alleged in the complaint.

4. Evidence $\S$ 317(18)—Hearsay testimony to show that one received proper care after injury held improperly admitted.

In an action for the death of plaintiff's decedent, the court erred in permitting plaintiff to testify as to what decedent told her about his condition after the injury alleged to have resulted in his death and the treatment and doctors that had been recommended to him by

others, and what other people and doctors had told her was the proper treatment for his injuries, to show that deceased had received ordinary care after his injury; such testimony being purely hearsay.

5. Evidence ⚡127(3)—Declarations of injured person five hours after accident held not part of res gestæ.

In an action based on accidental injury resulting in death of plaintiff's decedent, declarations of decedent made several hours after the accident at the home of his father-in-law as to his back being wrenched were not admissible as constituting any part of the res gestæ.

6. Evidence ⚡355(7)—Private memorandum containing entries of decedent, offered on behalf of plaintiff suing for his death, held inadmissible.

In an action based on injuries resulting in death of plaintiff's decedent, the court erred in admitting a private memorandum of decedent to show that medicine received by him before the injury had been for his father, and that decedent was in good health prior to his injury; such memorandum not being admissible under Code Civ. Proc. § 1946, governing the admission of entries of a deceased person.

7. Appeal and error ⚡1053(3)—Error in admitting evidence as to pecuniary circumstances of decedent held not cured by instruction.

In an action based on injuries resulting in death of plaintiff's decedent, the court erred in permitting plaintiff to testify that decedent was unable to take certain treatments because he had no money, and everything he owned was mortgaged, where no issue as to the reasonable care of decedent was made, and the error was not cured by an instruction that the pecuniary circumstances of the plaintiff or heirs of the deceased could not increase or diminish the amount of damages plaintiff was entitled to recover, especially where a motion of defendant to strike out such testimony was refused.

8. Trial ⚡235(1)—Instruction as to how to weigh the evidence held not erroneous.

An instruction which merely states the general rule as to how the jury shall weigh the evidence is not erroneous.

9. Trial ⚡253(7)—Hypothetical instruction directing verdict should require jury to base it on all the evidence.

In an action based on injuries resulting in death, an instruction directing a verdict for defendant if its evidence showed that there was no negligence on its part or that there was no causal connection between the injury and the death was properly modified by requiring the jury to base their verdict upon all the evidence.

10. Trial ⚡250—Instruction as to duty of injured person to secure medical treatment held unnecessary.

In an action based on injuries resulting in death, a requested instruction that an injured person was required only to secure such medical treatment as an ordinarily prudent person would have had was unnecessary and confusing, where defendant had not alleged or attempted to prove that the absence of medical treatment

or inefficient service was the cause of plaintiff's decedent's death.

11. Trial ⚡251(1)—Instruction should be applicable to issues.

Instructions extraneous to any issue in the case held improperly given.

12. Trial ⚡296(9)—Instruction held not erroneous as leaving determination of material allegations of complaint to jury.

An instruction that plaintiff could recover if all the material allegations of any one of the causes of action were proved by a preponderance of evidence was not erroneous as leaving the determination of the material allegations to the jury where the court had already pointed out in another instruction the material averments of the complaint in each cause of action.

In Bank.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Heman B. Ensign, as administrator of the estate of Peter Carmine, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank McGowan and Blaine McGowan, both of San Francisco, for appellant.

Puter & Quinn, of Eureka, for respondent.

LENNON, J. This is an appeal by the defendant, Southern Pacific Company from a judgment rendered against it in the sum of \$15,000 and in favor of the plaintiff, as administrator of the estate of Peter Carmine, deceased, as damages for the death of said deceased resulting from an injury alleged to have been suffered by the deceased as the result of the negligence of the defendant. The main contention urged in support of a reversal is that it was not shown that the injury to the deceased was the proximate cause of his death. It is argued in this behalf that the verdict of the jury, with its implied finding that the death of the deceased proximately resulted from the injury caused by defendant, rested, not upon the firm foundation of satisfactory evidence, but rather upon conjecture, surmise and speculation.

It is plaintiff's claim that, while the deceased's death did not immediately follow the infliction of the injury, nevertheless the injury was the initial step in a chain of causation which resulted finally and as a natural consequence in the death of the deceased. And, while there are several distinct steps in the claimed chain of causation, and while the death occurred some little time after the infliction of the injury, both of which factors render more difficult, of course, the task of the plaintiff of proving a direct causal connection between the death and the injury, nevertheless we cannot say the plaintiff has not sufficiently shown by competent evidence a causal connection existing be-

tween each link in the chain and the step immediately preceding it.

Peter Carmine, so the evidence shows, in 1914, at the time of the alleged injury, was living with his family on a ranch near Klau, in San Luis Obispo county, about 15 miles from Paso Robles. The ranch was a stock and dairy ranch. During the latter part of May, 1914, Carmine entered into an arrangement with the superintendent of a quicksilver mine near Klau to haul some of the mining machinery from the mine to Paso Robles, and to there load it into the cars of the defendant Southern Pacific Company. The machinery consisted of heavy quicksilver pipes, which were about 6 or 8 feet long, about 12 inches in diameter, and each weighing between 600 and 700 pounds. The pipes were too heavy for Carmine to handle alone, and Carmine hired a helper, Charles Pemberton, to assist him in loading the pipes into the box car. The pipes were first loaded upon a hand truck, known in railroad parlance as a "dolly." The "dolly" was rolled into the car over an iron apron which overlapped the station platform and the threshold of the car. When placing the pipes in position, in the north end of the car, Carmine used a crowbar, and Pemberton, his helper, used a car stake as a pry. Carmine and his helper were in the act of placing one of these pipes in position when the car was jarred by the impact of two empty box cars which were "bumped" against it by a locomotive operating in the vicinity. This "bumping," it is alleged, caused the injury to Carmine's back. Pemberton described the bumping and its results in this manner:

"We had one end up there and we had our wooden pry, a kind of a car stake about 3x3, and a crowbar. Carmine was upon the right of me, and we were moving that to the north end of the car inside, and he [Carmine] was lifting that up kind of leaning ahead of this way when this bump came. When the bump came against the car, with the jar I dropped my bar, and that threw the weight on him, and it kind of broke him down like, and he turned around a couple of times and put his hand on his back."

In coupling onto the "empties" the locomotive, it appears, struck the car onto which it was being coupled with such force that it drove the two cars against the car in which Carmine and his helper were working, driving that car back several feet. Pemberton testified that after the accident he and Carmine replaced the iron apron, which had slewed around, and finished loading the remaining two pipes into the car. The testimony of Pemberton is sufficient to sustain the implied finding of the jury that the accident which is alleged to have caused the injury actually occurred. The story of the manner in which the accident occurred is not so inherently improbable as to warrant this court in saying that the jury was not justified in finding that it did happen.

Carmine's wife testified that upon Carmine's return home the next day he did not jump down from his wagon, as was his habit, but climbed down, first stepping on the hub of the wheel and then stepping to the ground. She helped him unharness and put away the team. When he got off of the wagon he put his hand to his back. That night he awakened her with the request that she rub his back. At the time she noticed that it "was a little swollen, and felt hot" to her hand, and "there was some projection of one of the vertebra." She had had occasion to notice a few days before that his back was not in that condition.

There is testimony in the record tending to show that the deceased previous to the injury to his back was an active, hard-working, healthy man. After the accident Carmine was unable to do any lifting, his father or his wife lifting the buckets of milk for him after he had milked the cows on his ranch. He walked stooping over to the left, with his hand on his back. His left leg gradually became shortened and drawn up. Although previously he had been a sound sleeper, he became restless, and there were nights when he could not sleep at all. In June, 1915, he was in bed for over three months, and during that time had no use of his lower limbs. Both arms were affected, and his wife had to feed him. He gradually got better, and was able after a time to walk with two canes.

Dr. Sobey, the doctor who attended Carmine prior to and at the time of his death, testified that, although he had made no examination of Carmine's spine because it was an old injury, and he was interested mainly in the tubercular phase of the case, still his spine was out of alignment; "he was not straight up and down"; "he walked with a cane and a decided limp," and he was "inclined to the side." This is clearly sufficient to prove the injury to the spine even if the entire testimony of Professor De Brock, a professional masseur, who was perhaps not qualified to testify as to any facts calling for a detailed knowledge of anatomy, be disregarded. The fact, however, that a professional masseur was consulted corroborates to some extent the fact that Carmine had sustained an injury to his back. There is also other testimony that he sought the aid of several physicians in an effort to obtain relief. His weight steadily declined. In 1915 he weighed about 145 pounds; in 1916, 130 pounds; in 1917, about 115 pounds; and in 1918, at the time of his death, he weighed but 85 pounds. During this time he had developed a tubercular cough.

Dr. Chain, who had practiced as a physician and surgeon for 15 years, and who was at the time of the trial city physician and health officer of Eureka, testified that the accepted theory at the present time in reference to the presence of tuberculosis germs in the

human body is that practically 100 per cent. of the people have a tubercular lesion in their body somewhere, and in some stage of the disease, either healed, quiescent, or in an active state. He testified that anything that would lower the general resistance of a person would cause a quiescent tubercular process to "light up."

In 1918 Carmine developed a rectal abscess which the physician who attended him testified was probably tubercular in origin. An operation was performed in July, 1918. Carmine's vitality was very low, and he failed to rally from the anæsthetic administered preparatory to the operation. The evidence is clear that it was reasonable and probable that the rectal abscess was due to the tuberculosis from which Carmine was suffering. Dr. Sobey testified that the operation he performed was for fistula ano, "probably tubercular in origin"; that he found Carmine tubercular at the base of the spine; that his body was "practically riddled with tuberculosis." He testified very positively that, although the abscess might possibly be due to some other cause, because of the tubercular condition of the patient he considered the abscess tubercular in origin.

This testimony completes the chain of causation contended for by plaintiff.

[1] The jury were justified under the evidence hereinabove set out in arriving at the conclusion, as they evidently did, that the back of the deceased was wrenched; that as a consequence he suffered pain, with attendant loss of sleep, which resulted in a lowering of his vitality; that by reason of his weakened power of resistance he became the prey of tuberculosis; that as a result a rectal abscess, tubercular in origin, developed, which necessitated an operation which resulted fatally. In other words, the jury found, and were justified in finding, that the ultimate result could be traced through successive stages to the original injury and that the responsibility rested upon the one who put in operation the chain of events which resulted in the death of the deceased.

[2] It was not necessary for the plaintiff, in order to recover, to show that the tuberculosis was traumatic in origin. If, on account of the depleted and weakened condition of a person caused by an injury, he is rendered more susceptible to germs than if he had not been injured, or if, because of his debilitated condition, he is unable to resist the attack of germs present in his system, then the disease resulting from the germs is a natural sequence to his condition resulting from the injury, and the injury is the proximate cause of his death, and the disease is but one of the links in the chain of causation. *Robinson v. National Life & Accident Ins. Co.* (Ind. App.) 129 N. E. 707; *Larson v. Boston Elev. Ry. Co.*, 212 Mass. 262, 98 N. E. 1048, 1050; *Crane El. Co. v. Lippert*, 63 Fed. 942, 11 C. C. A. 521; *Jones v. City of*

Caldwell, 20 Idaho, 5, 116 Pac. 110, 48 L. R. A. (N. S.) 119; *Ohio & M. Ry. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297.

[3] One of the contentions of the defendant is that the trial court erred in permitting an amendment of the plaintiff's complaint changing the date of the alleged accident from May 20, 1914, as testified to by Mrs. Carmine and by the plaintiff, to May 27, 1914. This amendment was occasioned by the fact that the defendant introduced in evidence a letter from Carmine himself written to the owner of the machinery which he had been loading, which fixed the date of the loading as May 27, 1914. The trial of the case took place some five years after the accident, and, considering the nature of the accident, which at the time appeared to be trivial, it is quite natural that the exact date of the injury should not have been retained in the minds of the witnesses. Furthermore, there is no question but that the car in question was loaded by the deceased and his helper, as alleged in the complaint. The permission to make the amendment was therefore properly within the discretion of the trial court. Section 473, Code Civ. Proc.

[4] Testimony admittedly hearsay was introduced on the part of the plaintiff to show, it was claimed, that the deceased had received ordinary care after the injury, and that his injuries and death were not due to lack of such care. This testimony, to which objection is made, was the testimony of Mrs. Carmine as to the opinions and advice of others as to the proper treatment of her husband. Mrs. Carmine was permitted to testify that Dr. Glass recommended exercise of the arms and lower limbs; that Professor De Brock, the professional masseur, was highly recommended to her by one of his patients; that she had called Dr. Dresser on the phone and explained to him the symptoms of the deceased, and that Dr. Dresser told her to go ahead with the treatment she was using, and also indicated other treatments to be employed; that a lady nurse instructed her how to rub her husband's back, and that a man nurse told her that where he had worked in a hospital in Los Angeles they were always using hot applications for an injury of the same kind as her husband's. Mrs. Carmine was permitted to testify, over the objection of the defendant, that Dr. Dresser recommended that deceased see a bone specialist by the name of Dr. Baldwin; that Dr. Dresser told him to go see a man whom Dr. Baldwin had operated on in order to satisfy himself of the doctor's ability; that her husband had gone to see the man; that the man had been operated on by Dr. Baldwin because one of his vertebra was diseased; that the man had to wear a brace for a long time thereafter, and could not lift 50 pounds. In other words, Mrs. Carmine was permitted to testify as to what her husband had said this man had

told him. This was hearsay twice removed. Mrs. Carmine admitted on the stand that her knowledge was derived from her husband, and that she based her description regarding this man's condition not only upon what her husband had told her, but also on what a good many other people had said. The defendant had no opportunity to contradict this hearsay testimony, and, while perhaps no single instance narrated in the testimony complained of could be said to be seriously prejudicial, nevertheless the frequency and persistency with which this testimony was iterated and reiterated could not, we think, fail to make a substantial impression upon the minds of the jury adverse to the defendant's case.

[5] The declarations made by the deceased, as testified to by the father-in-law of the deceased, concerning the condition of his back, which were made several hours after the accident, were plainly hearsay. The father-in-law of the deceased testified, among other things, that the deceased spent the night at his home after the accident, and then complained of his back, saying it "was wrenched." Clearly that did not constitute any part of the *res geste*, and therefore did not fall within the exception to the hearsay rule. *Estate of James*, 124 Cal. 653, 57 Pac. 578, 1008; 10 Cal. Juris. 1076.

[6] The admission in evidence of a book marked "Day," purporting to be a memorandum kept by Peter Carmine, the deceased, showing an account between himself and his father, was improper. In order to show that two years before the alleged injury the deceased was a sick man, requiring medical attention, and in contradiction of the testimony of Mrs. Carmine that the deceased was in good health before the time of the alleged injury, Sonne, a stage driver, testified on behalf of the defense that he had delivered to the deceased some arnica and smartweed to be used on his back. In rebuttal of the testimony of Sonne, and in support of the testimony of Mrs. Carmine to the effect that the medicine was used by the father of the deceased, and not by the deceased, the plaintiff introduced in evidence several pages from the book marked "Day," claimed to contain an account in the handwriting of the deceased of transactions between the deceased and his father, which pages showed items of medicine similar to that delivered by the stage driver bought by the deceased and charged to his father. The entries in question were in the nature of a private memorandum of the deceased, and the admissibility of the various items are governed and controlled by the provisions of section 1946 of the Code of Civil Procedure, which reads as follows:

"The entries * * * of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as *prima facie* evidence of the

facts stated therein, in the following cases: 1. When the entry was made against the interest of the person making it. 2. When it was made in a professional capacity and in the ordinary course of professional conduct. 3. When it was made in the performance of a duty specially enjoined by law."

The point decided in this case is analogous to that decided in the case of *Thompson v. Orena*, 134 Cal. 26, 30, 66 Pac. 24, 25, wherein it was said:

"A private memorandum book in the handwriting of decedent, and kept by her in her lifetime, showing items of money collected for rent, and other collections, as well as expenditures, and including items of money paid to plaintiff, was placed in evidence by appellant, and afterwards stricken out on motion of plaintiff. In this there was no error. Section 1946 of the Code of Civil Procedure provides as to what entries or writings of a decedent may be used as evidence, and these entries, offered as they are on behalf of the estate of the decedent, are not admissible under that section. The book, containing only private memoranda, cannot be held admissible under the rule admitting a tradesman's books, or other entries made in the regular course of business."

[7] Perhaps the most serious error was the introduction in evidence of the testimony of Mrs. Carmine to the effect that Peter Carmine was unable to take certain treatments because of the fact that he had no money and that everything he owned was mortgaged. The introduction of the testimony was permitted upon the issue of reasonable care after the injury, but, as has been pointed out, no such issue was made. Although an instruction was given to the effect that the pecuniary circumstances of the plaintiff or the heirs of the deceased could not increase or diminish the amount of damages which the plaintiff was entitled to recover, if entitled to recover at all, it cannot be said to have cured the error. The court's instruction was general. The jury were not told to disregard this particular evidence. On the contrary, a motion made by the defendant to strike out was refused. This refusal, sanctioning, as it did, the evidence, accentuated the error of its introduction. It cannot be said that by reason of the general instruction the minds of the jury recurred to this particular evidence and eliminated it from consideration. Where the element of sympathy enters into a case, the difficulty is that it is as likely to result in the giving of a verdict against the evidence of nonliability as it is to increase the verdict where a liability exists. Sympathy permeates the whole case and introduces an irrelevant factor which may result not only in the giving of an excessive verdict but a verdict where none would otherwise be given. It cannot be said, we think, that evidence of poverty, particularly where that poverty has apparently resulted from the efforts to meet

obligations arising from an illness resulting from the injury in suit, is not prejudicial. The cases in this state are unanimous in holding the admission of such testimony prejudicial error sufficient to call for a reversal of the case. *Mahoney v. S. F., etc., Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Green v. Southern Pacific*, 122 Cal. 563, 55 Pac. 577; *Story v. Green*, 164 Cal. 768, 130 Pac. 870, Ann. Cas. 1914B, 961; *Steinberger v. Cal. Electric, etc., Co.*, 176 Cal. 386, 168 Pac. 570; *Johnston v. Beadle*, 6 Cal. App. 251, 91 Pac. 1011; *Wilbur v. Emergency Hospital Ass'n*, 27 Cal. App. 751, 151 Pac. 155; *Lawrence v. Southern Pacific Co.*, 189 Cal. 434, 208 Pac. 966; *Malone v. Hawley*, 46 Cal. 409.

As previously indicated, the errors narrated undoubtedly contributed materially to the verdict, and must therefore be held to have been prejudicial to the defendant's case. As a consequence the case must be remanded for a new trial.

[8, 9] In view of the necessity for a new trial some discussion is proper of the contentions made by the appellant that certain instructions given to the jury were erroneous. Instruction No. 2 requested by plaintiff is a mere general stereotyped instruction which is given in nearly every case. It merely stated the settled rule as to how the jury should weigh the evidence, and cannot, we think, be said to be prejudicial to the defendant in the instant case. Instruction 12 of plaintiff's requested instructions, however, is not very clear, and might well have been omitted. In view of the fact that there were no particular or peculiar presumptions arising out of the evidence it seems unnecessary to charge the jury that "by the term preponderance of evidence is meant simply when all the evidence, including the presumption of law, if there be any applicable to the case, on one side, taken together, is stronger than all the evidence on the other side, taken together, including the presumption of law." Defendant objects to a modification of its requested instruction No. 2, which before modification stated that, if the testimony offered by the defendant, Southern Pacific Company, showed that there was no negligence at said time and place, then the verdict must be for the defendant. As so stated it was clearly incorrect. The jury are to determine from all of the evidence in the case whether or not there was negligence shown on the part of Southern Pacific Company. By striking out the phrase "offered by the defendant, Southern Company" the court made the instruction speak the law correctly. The same is true of the criticism of the modification made of defendant's requested instruction No. 5.

The defendant claims that the jury should have been instructed that, omitting the evidence of the plaintiff as to the cause of the

death, the defendant was entitled to a verdict if its evidence showed that the deceased did not die from the alleged injury. The jury was to arrive at a determination of the cause of the death of the deceased from all of the evidence in the case and an instruction which would have instructed the jury to take into consideration only the evidence offered by the defendant would have been clearly erroneous. Of these two instructions as given the defendant has no grounds for complaint.

[10, 11] Instructions No. 9 and No. 14, requested by plaintiff, which instructed the jury in effect that an injured person was required only to secure such medical treatment and to have the injury treated in the same way as an ordinarily reasonable and prudent person would have had it treated, was wholly unnecessary, since it had no application to any issue in the case. The defendant had not alleged or attempted to prove that the absence of medical treatment or inefficient service was the cause of Peter Carmine's death. Such instructions could have had no tendency but to confuse the jury, and should therefore have been omitted. So, likewise, the instructions No. 10 and No. 11, given at plaintiff's request, dealing with the employment by the deceased by the Joshua Hendy Iron Works, to whom the quicksilver pipes were being shipped, were wholly extraneous, and had no place in this case. There was no dispute that the deceased was not in the employment of said company.

[12] Defendant claims that instruction No. 13, which instructed the jury that "it is sufficient to entitle him [plaintiff] to recover if the plaintiff shall have proven by a preponderance of the evidence all of the material allegations of any one of the causes of action," left the determination of the material allegations to the determination of the jury. Inasmuch as the court, in instruction No. 3, had already pointed out the material averments of the complaint in each cause of action, this contention is without merit. We have critically examined the remaining instructions challenged by counsel for the appellant, and we are satisfied that the instructions are not susceptible to the criticism made against them.

The judgment is reversed, and the case remanded for a new trial.

We concur: WILBUR, C. J.; WASTE, J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.

MYERS, J. I concur in the judgment and with what is said in the opinion of Mr. Justice LENNON herein, except that I am inclined to the opinion that the evidence herein is insufficient to support the implied finding of the jury that the death of the decedent proximately resulted from the original injury complained of.

193 Cal. 197

BOGART v. GEORGE K. PORTER CO. et al.
(Porter et al. Interveners). (S. F. 10154.)(Supreme Court of California. Feb. 15, 1924.
Rehearing Denied March 14, 1924.)**1. Limitation of actions** ⚡5(3)—**Statute making contract for benefit of third person enforceable by him held not to render statutes of limitation inapplicable.**

Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, does not exempt third person's right of action from the operation of the statutes of limitation, in view of section 309, and Code Civ. Proc. §§ 343, 348.

2. Limitation of actions ⚡46(12)—**Right of action on note against one which assumed payment accrued at maturity when subsequent to the assumption.**

Right of action on note against trustees of dissolved corporation, which assumed payment thereof on maker's transfer of his assets to corporation before maturity of the note accrued upon maturity of the note, and was barred four years thereafter under Code Civ. Proc. §§ 312, 337, subd. 1, regardless of whether the right of action found its source in the agreement of the immediate parties to the promise to pay the debt, or was based on the theory that the corporation became the principal debtor and the maker its surety, and that plaintiff was entitled in equity to enforce the obligation under Civ. Code, § 2854.

3. Limitation of actions ⚡124—**Commencement of action against maker's estate held not to stop running of statute against corporation which had assumed payment.**

Where a corporation assumed payment of note on maker's transfer of assets to corporation, the corporation became in effect a joint and several obligor upon the note, the same as if it had been a signer thereof, and the commencement of an action upon the note against the maker's estate did not stop the running of limitations as to the corporation.

4. Limitation of actions ⚡13—**Mortgages** ⚡275—**Grantee assuming payment of debt estopped to deny validity thereof at the time, but may set up limitations subsequently running.**

A grantee who assumes payment of a debt cannot contest the validity thereof as a valid and subsisting obligation at the time he assumed it, and will not be heard to claim that it was not at that time a valid and subsisting obligation, but is not thereby estopped to plead limitations subsequently running against his own obligation.

5. Contracts ⚡20—**If assumption of payment of note was mere offer, acceptance within reasonable time was necessary.**

Where maker of note for a valuable consideration transferred his assets to a corporation which assumed the maker's liabilities, the payee's assignee could not recover against the trustees of corporation after dissolution thereof, and 11 years after the corporation assumed

the indebtedness on the theory that assumption of the debt was merely an offer, and that the cause of action did not accrue until acceptance, since, if acceptance was necessary, such acceptance should have been made within a reasonable time, and on plaintiff's failure to accept within a reasonable time the proposal was revoked by operation of law under Civ. Code, § 1587, subd. 2.

6. Limitation of actions ⚡43—**Period of limitations runs from accrual of cause of action.**

Generally the period of limitations runs from the time when the cause of action accrues; that is, when the creditor is entitled to commence and maintain an action thereon, under Code Civ. Proc. § 312.

7. Limitation of actions ⚡65(1), 66(15)—**Demand or acceptance necessary to perfect right of action must be made within reasonable time.**

Where a demand or acceptance is necessary before suit to perfect a right of action, a party cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand or acceptance, but must make it within a reasonable time.

8. Attorney and client ⚡104—**Attorney's knowledge held imputable to client.**

Knowledge of attorney for payee's assignee that a corporation to which maker had transferred his assets had assumed the payment of a note held chargeable to assignee, precluding her from bringing action against the corporation's trustees after dissolution, and 11 years after corporation's assumption of the debt, though the attorney had in the meantime been an officer of the corporation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Mary M. Bogart against the George K. Porter Company, Fred L. Boruff, Kate C. Boruff, Hellman Commercial Trust & Savings Bank, and others, in which Benjamin F. Porter and others intervened. From judgment for plaintiff, the last three named defendants appeal. Reversed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellants.

Philip C. Boardman, of San Francisco, for defendants.

Hutchinson, Van Fleet & Christin, of San Francisco (Alan C. Van Fleet, of San Francisco, of counsel), for interveners.

Frank J. Solinsky and Edward R. Solinsky, both of San Francisco, for respondent.

MYERS, J. Defendants appeal from a judgment in favor of plaintiff in an action upon a promissory note. The sole contention urged by them upon this appeal is that the cause of action was barred by the statute of limitations.

After the former decision of this case, a rehearing was applied for by the respondent

upon the ground that we had failed to consider one of the points made by her upon the oral argument, and that we had, in effect, overruled the case of *More v. Hutchinson*, 187 Cal. 623, 203 Pac. 97. The rehearing was granted in order that we might give further consideration to the point stressed upon the application therefor and re-examine our former conclusions in the light of their claimed conflict with the *More* Case. After such re-examination we adhere to those conclusions upon the points then under consideration, and are satisfied that they present no real conflict with the rules announced in the *More* Case.

On August 5, 1905, George K. Porter executed and delivered to O. H. Bogart, plaintiff's assignor, the note here sued on, which is for the sum of \$2,575.20. The instrument is made payable 18 months from the date thereof, to wit, March 5, 1907. After the execution of the note, and about September 10, 1906, Porter caused the incorporation of the George K. Porter Company. This company was formed principally to take over, hold, own, manage, and control the properties of Porter. In pursuance of this plan Porter a few days thereafter granted and conveyed to the company all of his real and personal property wheresoever situated. The company, as part of the consideration for this conveyance and transfer, agreed to and did assume the payment of all the outstanding indebtedness of Porter existing at the time of said conveyance. This agreement was never rescinded. Shortly thereafter, on November 16, 1906, Porter died. The claim of Bogart upon the note was duly presented within the statutory period to the executors of the estate of Porter. It was rejected, and a suit was duly commenced upon the note, which action is still pending and undetermined. On January 27, 1909, Bogart assigned, transferred, and set over to his wife, the plaintiff herein, all of his right, title, and interest in and to the said note and in and to the action based thereon for its collection, then pending against the executors of Porter's estate. About this time the affairs of the George K. Porter Company became involved and litigation resulted. A settlement was effected, under which a division of the assets of the corporation was made among its stockholders. In pursuance of this settlement the company conveyed all the real property located in the county of Los Angeles, valued at the sum of \$750,000, in equal parts to its three principal stockholders, Kate C. Boruff, one of the defendants, and Estelle C. Christin and Benjamin F. Porter, interveners herein. At this time there still remained in the company undistributed certain lands situated in different counties of the state, which, together with certain personal property, amounted in value to about \$65,000. On September 30, 1911, this property was transferred and con-

veyed to the Merchants' Bank & Trust Company, a corporation, now the Hellman Commercial Trust & Savings Bank, defendant herein, for the purposes of sale, and for the payment out of the proceeds thereof of the taxes thereon and other incidental expenses connected therewith, and also for the payment of all the indebtedness of the Porter Company. Thereafter this last-named company failed to pay its license tax and forfeited its charter, and its directors, Kate C. Boruff, Fred L. Boruff, Louis P. Boardman, and J. E. Pearce, became its trustees by operation of law. Under all of these circumstances, and upon the promise of the Porter Company to pay all of the outstanding indebtedness of George K. Porter, this action was commenced January 20, 1917, against the George K. Porter Company, its trustees, above named, and against the Hellman Commercial Trust & Savings Bank, as the holder of certain assets of the Porter Company charged with the payment of its indebtedness under the conveyance, as above indicated. The facts, as above stated, are interpreted in the light most favorable to respondent's contentions and in support of the judgment.

[1] Appellants contend that whether the gist of plaintiff's action be considered to be upon the original note which matured in 1907, or upon the assumption thereof by the George K. Porter Company in 1906, or upon the implied assumption thereof by the bank in 1911, in either event it is barred by the statute of limitations; this action having been commenced more than 4 years subsequent to all of those dates. Respondent contends that her cause of action rests upon the agreement of the George K. Porter Company in 1906, whereby it assumed and agreed to pay all of the outstanding indebtedness of the said George K. Porter; that under the well-recognized rule of equity, which has been enacted as a rule of law in section 1559 of the Civil Code, providing that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it," her right of action is exempted from the operation of any of the statutes of limitation. Her position is that the phrase "at any time before the parties thereto rescind it" expresses the only limitation upon her right to maintain her action, and that all statutes of limitation are excluded thereby. We cannot accept this view. The rule of law there expressed is a rule of substantive law, and is not adjective or procedural. It means that the cause of action arises in favor of the third person upon the making of such a contract, and that such a cause of action subsists until the parties thereto rescind their contract. It does not mean that the right to commence and maintain an action upon such cause of action is exempted from the statutes of limitation. This conclusion

is fortified by a consideration of the various provisions of title 2, part 2, of the Code of Civil Procedure, relating to the time of commencing civil actions. The Legislature has there specified the limitations applicable to a wide variety of actions, and then, to rebut the possible inference that actions not therein specifically described are to be regarded as exempt from limitations, it has specified a 4-year limitation upon "an action for relief not hereinbefore provided for" (section 343); and where it has intended that an action shall be exempt from limitations it has said so in clear and unmistakable language. Code Civ. Proc. § 348; Civ. Code, § 309.

It is the theory of some of the decisions that the right of action thus recognized finds its source in the agreement of the immediate parties thereto (George K. Porter and the George K. Porter Company) from which the law operating upon the acts of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded. *Washer v. Independent M. & D. Co.*, 142 Cal. 703, 76 Pac. 654. Other cases proceed upon the theory that—

"When a grantee contracts with his grantor to pay the latter's debt or obligation in payment, or in part payment, for the conveyance, the creditor or obligee may accept and appropriate that contract to himself and maintain a suit in equity to enforce it. In that event the grantee becomes the principal debtor and the grantor the surety, and the creditor's suit stands on the equitable doctrines that the creditor may have the benefit of any security or obligation given by the principal debtor to the surety, * * *." *Silver King Coalition Mines Co. v. Silver King Cons. Min. Co.*, 204 Fed. 169, 122 C. O. A. 405, Ann. Cas. 1918B, 571; 3 *Pomeroy's Eq. Jur.* (4th Ed.) p. 2891; *Williams v. Naftzger*, 103 Cal. 438, 440, 37 Pac. 411; *Daniels v. Johnson*, 129 Cal. 415, 418, 61 Pac. 1107, 79 Am. St. Rep. 123.

"In fact, the relief granted is merely the application towards the payment of the debt by a court of equity of the mortgagor's property, consisting of the promise running to him from the grantee of the mortgaged premises." 1 *Williston on Contracts*, p. 724.

[2] Under the rule of the cases which hold that the right of action "finds its source in the agreement of the immediate parties thereto," it is apparent that the obligation from the promisor (grantee) to the third person (creditor) arises at once upon the making of the agreement. The law instantly "creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." The cause of action therefore arises at once, and the right of action thereon accrues when the obligation is breached. If the original indebtedness does not mature until after the assumption thereof by the promisor (grantee), the breach would occur and the right of action accrue when, upon the maturity of the original indebtedness, the promisor failed to pay the

same. *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818. If the original indebtedness had matured prior to the assumption thereof, the obligation would be breached immediately upon its creation, and the right of action would accrue at that time. *Davis v. Davis*, 19 Cal. App. 797, 127 Pac. 1051; *Daniels v. Johnson*, supra.

Under the rule of the cases which proceed upon the theory that the grantee (promisor) becomes the principal debtor and the grantor (promisee) his surety, and that the creditor (third person) is entitled in equity to enforce that obligation and apply it to the satisfaction of his claim, it is clear that the basis of his action is the obligation from the grantee to his grantor. That obligation is fully created when the contract to assume the debt is entered into, and the right of action thereon would accrue at the time and under the conditions as above stated. This conclusion is supported by a consideration of the provisions of section 2854 of the Civil Code, that—

"A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, *upon the maturity of the obligation*, compel the application of such security to its satisfaction." (Italics added.)

It follows that under either of the foregoing theories as to the nature of plaintiff's cause of action herein her right of action thereon as against the George K. Porter Company accrued upon the maturity of the obligation which the latter had assumed, which matured March 5, 1907. Assuming it to be founded upon an instrument in writing, it outlived at the expiration of 4 years after it accrued. Code Civ. Proc. § 337, subd. 1; section 312.

[3] The obligation herein was kept alive by the commencement of the action upon the note against the estate of George K. Porter, deceased, which suit is still pending and undetermined. This undoubtedly has the effect of keeping the right of action alive as against that estate, but not as against any other parties liable upon the note. Conceding that the indebtedness evidenced by this note was a part of the indebtedness assumed and agreed to be paid in 1906 by the George K. Porter Company, the latter became, in effect, a joint and several obligor upon that note, the same as if it had been a signer thereof, and the rule would apply that the pendency of an action against one of several joint obligors stops the running of the statute of limitations only as to him who was the party defendant at the time it was filed. *Jeffers v. Cook*, 58 Cal. 147, 150; *Spaulding v. Howard*, 121 Cal. 194, 198, 53 Pac. 563; *Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592; *Sherman v. S. K. D. Oil Co.*, 185 Cal. 534, 548, 197 Pac. 799.

[4] Respondent relies upon the rule stated

in 3 Pomeroy Eq. Jur. (4th Ed.) p. 2888, as follows:

"That a grantee who thus assumes payment, in whole or in part, of a mortgage as a portion of the purchase price of the land conveyed to him, cannot contest the validity of the mortgage on any ground and thus evade the liability which he has assumed."

Respondent construes this rule to mean that such a grantee cannot defend against the enforcement of such a mortgage even upon the ground that the action thereon is barred as to him by the statute of limitations. But the rule does not go thus far either in its language or in its meaning. It means only this: That a grantee who thus assumes payment of a mortgage cannot contest the validity thereof as a valid and subsisting obligation at the time he assumed it; or, in other words, that he will not be heard to claim that it was not at that time a valid and subsisting obligation. That this is the extent and the limitation of the rule is made manifest by an examination of the numerous cases which are cited by the author to this portion of his text. All of those cases, with the exceptions hereafter noted, were cases wherein the grantee sought to contest the validity of the mortgage upon a ground which, if successful, would have established its invalidity at the time he assumed it, such as failure or want of consideration therefor, fraud, undue influence, nonexecution, usury, etc. The rule is but a particular application of the general rule of estoppel by deed. A grantee who by a covenant in his deed expressly recognizes the existence and validity of a particular debt or other obligation, and assumes and agrees to pay the same, is estopped thereby to claim that such debt or obligation was not valid or subsisting at the time he so recognized and assumed it, but the estoppel thus arising goes no further than the admissions of the covenant out of which it arises. This is apparent from the cases cited by the author. For example, in *Sherman v. Goodwin*, 12 Ariz. 42, 95 Pac. 121, *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, and *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, it was held that where the deed does not specifically describe the particular debt, but contains a general clause whereby the grantee assumes "all mortgage and other liens standing against the property," or "all the outstanding indebtedness of the grantor," such grantee is not estopped thereby from contesting the validity of any such claimed mortgage, lien or indebtedness.

"If the promisor's agreement is to be construed as a promise to discharge whatever liability the promisee is under, the promisor must certainly be allowed to show that the promise [e] was under no liability. Thus one who in return for an assignment of property assumed all the grantor's debts would certainly be al-

lowed to dispute the validity of any debt. On the other hand, if the promise means that the promisor agrees to pay a sum of money to A, to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted to that amount or at all. The promisee has decided that question himself. Where the promise is to pay a specific debt, for example, to assume a specific mortgage, especially if the amount of it is deducted from the consideration paid by the promisor for the mortgaged property, this construction will generally be the true one. Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury or other defenses, of which the debtor might have availed himself." 1 Williston on Contracts, § 399.

This limitation of the rule was recognized and impliedly approved by this court in *Alvord v. Spring Valley G. Co.*, 106 Cal. 547, 553, 40 Pac. 27. So, also, it was held in *Davis v. Davis*, 19 Cal. App. 797, that such a grantee cannot set up that the mortgaged debt when he assumed it was barred by the statute of limitations, because to do so would be to contradict the covenants of his deed, which recognized the debt as a then valid and subsisting obligation. That the rule here in question rests upon the doctrine of estoppel by deed is also expressly recognized in the cases of *Hurwitz v. Gross*, 5 Cal. App. 614, 618, 91 Pac. 109, and *San Ramon Valley Bank v. Walden Co.*, 53 Cal. App. 534, 536, 200 Pac. 662, as well as in the case of *Alvord v. Spring Valley G. Co.*, supra.

"The nature of a creditor's right against one who has promised the debtor to pay the debt is also involved in determining when the statute of limitations bars the creditor's action. On principle the creditor must have a claim that has not been barred against the original debtor [see, also, *Daniels v. Johnson*, 129 Cal. at page 418, 61 Pac. 1107, 79 Am. St. Rep. 123], and the latter must also have such a claim against the promisor. But courts which allow a direct right to the creditor against the promisor hold that, though the creditor's original claim is barred, he may nevertheless enforce a claim against the promisor, *if the statutory period has not run since the debt was assumed.*" 1 Williston on Contracts, § 398. (Italics added.)

No case has been cited herein, nor have we found any, which decides that the statute of limitations will not run in favor of a grantee, upon his contract to assume a debt, or that a grantee who is sued upon a debt, the payment of which he has assumed by a covenant in his deed, is estopped to defend upon the ground that the statute has run upon his obligation since the maturity thereof. There are cases in which language is used which seems to support this conclusion, but upon analysis it is found that such language goes beyond the points decided and is irrelevant to the facts there under consideration. For example, in *Davis v. Davis*, supra, the court cites a Michigan case and holding "that where a vendee assumes the

payment of a mortgage indebtedness, he waives all defenses thereto except payment." That question was not involved in the Davis Case. The sole question there was whether such a vendee could defend on the ground that the indebtedness was not a valid obligation at the time he assumed it, and the court correctly held that he could not. The Michigan case there cited (Terry v. Durand Land Co., 112 Mich. 665, 71 N. W. 525) did use the language above quoted, but all that it decided in this connection was that such a grantee could not set up want of consideration between the assignee and the assignor of the mortgage as a defense to a suit by the assignee. The case there cited as authority for the quoted dictum (Crawford v. Edwards, 33 Mich. 354) went no further. The same is true of the case of Key West, etc., Co. v. Porter, 63 Fla. 448, 58 South. 599, Ann. Cas. 1914A, 173. Allen v. Freear, 50 Cal. App. 645, 195 Pac. 748, was a suit in equity brought by a creditor of one Bateman to impose a trust upon certain property. Bateman, who had become financially involved in the conduct of a grocery business, conveyed the same to Freear in trust to conduct the business, pay Bateman's debts from the proceeds thereof, and then to reconvey to Bateman a one-half interest therein, and upon no other consideration. Freear sold the business in violation of the trust, receiving therefor a note and mortgage, upon the proceeds of which it was sought to impose the trust. Freear pleaded the statute of limitations, and the District Court of Appeal held that the trust being a positive one, though resting in parol, the statute could not run until a repudiation and knowledge thereof. It then added:

"Moreover, Freear having received the property under the express agreement to pay the debts of Bateman, and there being no repudiation thereof, it does not lie in his mouth to plead the statute as against Bateman's creditors. He cannot be heard to say that while the debt is due from the person with whom he contracted, that the statute has intervened"—citing *Washer v. Independent, etc., Co.*, *Williams v. Naftzger*, and *Davis v. Davis*, supra.

If this language is to be given the broad effect contended for by respondent herein, it is not supported by the cited cases or by any others which have been called to our attention. Under the facts in that case the statute of limitations had not run under any tenable theory of the nature of the cause of action. The language above quoted was not necessary to the decision, and is not to be regarded as authority herein.

It is to be noted that there is no element of trust in the instant case, so far as the question of the liability of the George K. Porter Company is concerned, and the respondent so concedes. There is neither allegation nor evidence nor finding which would support the inference that a trust re-

lationship existed on the part of that defendant. It clearly appears that the conveyance of property from Porter to the Porter Company was not upon any trust, but, on the contrary, passed to the grantee upon a valuable consideration, not merely the legal title, but the entire beneficial interest in the property conveyed, and the trial court found that "the said corporation thereupon became the owner of all the said property."

[5] In the case of *More v. Hutchinson*, supra, it was held that the rule that suit may be brought by the third person upon a contract entered into for his benefit immediately upon the execution of the contract arises from the fact that the suit itself is deemed an acceptance of the contract, and until such acceptance there is no liability on the part of the person making the contract, but such contract, as far as the third person is concerned, amounts to a mere offer or proposal. On the authority of that case it is now argued that the assumption by the George K. Porter Company of the debts of Porter was a mere offer or proposal which did not give rise to any obligation in favor of plaintiff until the acceptance thereof by plaintiff; that plaintiff never accepted it until the commencement of this action, and, therefore, the statute of limitations could not have run. This point was not made nor was that case cited in any of the briefs on file herein, although the case had been briefed three different times by both parties upon this appeal; first, upon the original appeal, then upon application for rehearing in the District Court of Appeal, and again upon application for hearing by this court after decision by the District Court of Appeal. The point was mentioned and the *More Case* cited for the first time in the oral argument at the hearing by this court after decision by the District Court of Appeal, but nothing was said to indicate that the point was not discussed or that case cited in the briefs on file. The former opinion was written in response to the arguments presented in the briefs, and therefore did not dispose of the point now urged.

[6, 7] The case of *More v. Hutchinson* was dealing with the peculiar statute of limitations applicable to stockholders' liability which forms an express exception to the general rule with respect to the time when the statute begins to run. Code Civ. Proc. § 359. The general rule is that the statute runs from the time when the cause of action accrues (Code Civ. Proc. § 312), or, in other words, when the creditor is entitled to commence and maintain an action thereon. But the statute under consideration in the *More Case* runs from the time when the liability was created, which may be, and frequently is, an entirely different point of time. This distinction was pointed out in the case of *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87, which was cited in the opin-

ion in the More Case. The statute of limitations there under consideration looks to the time when the defendant's liability arose, but the general rule is that a statute of limitation looks to the time when the plaintiff's right to commence the action accrued.

"The theory of our statute of limitations is that a creditor has four years (or other time, as the case may be) on any day of which he may, of his own volition, commence an action." *Union Collection Co. v. Soule*, 141 Cal. 99, 74 Pac. 549.

Plaintiff herein had nearly 7 years, on any day of which she might, of her own volition, have commenced this action. The bringing of the suit constitutes the acceptance which creates the obligation and perfects the right of action. *Morgan v. Overman S. M. Co.*, 37 Cal. 534, 537; *More v. Hutchinson*, supra. So, with reference to a promissory note payable on demand, the bringing of the suit is a sufficient demand, and the statute runs not from the time of the demand, but from the execution of the note. *Brummagim v. Talant*, 29 Cal. 503, 89 Am. Dec. 61. Where a demand or acceptance is necessary before suit to perfect a right of action, a party cannot indefinitely and unnecessarily extend the bar of the statute by referring such demand or acceptance, but must make it within a reasonable time. *Thomas v. Pac. Beach Co.*, 115 Cal. 136, 142, 46 Pac. 899; *Meherin v. S. F. Produce Exchg.*, 117 Cal. 215, 217, 48 Pac. 1074; *Dennis v. Bint*, 122 Cal. 39, 44, 54 Pac. 378, 68 Am. St. Rep. 17; *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99; *People v. Cal. Safe Dep., etc., Co.*, 41 Cal. App. 727, 731, 183 Pac. 289, and cases there cited.

[8] It is argued that the instant case is not governed by the rule last mentioned, because it is not a case wherein the acceptance is required merely to perfect a right of action upon a cause of action already existing but presents a situation, as in the More Case, wherein the acceptance is necessary to create the obligation itself which constitutes the cause of action. So, also, was the case of *Thomas v. Pac. Beach Co.*, supra, but, granting this contention, and giving full application herein to the rule of the More Case, and conceding that the contract of the George K. Porter Company, whereby it assumed and agreed to pay Porter's debts, was, as to the plaintiff, nothing more than a mere offer or proposal, which could not give rise to an obligation unless and until accepted by plaintiff, it follows that the duty rested upon the plaintiff to accept such proposal within a reasonable time, and upon her failure to do so the proposal was revoked by operation of law. Civ. Code, § 1587, subd. 2; 1 Williston on Contracts, § 54. The "proposal" herein was made in 1906, and not accepted by plaintiff until 1917. It is suggested that plaintiff did not know of its existence

until "a year or two" before this action was commenced. But it conclusively appears from the record that her attorney, who was especially charged with the collection of this particular indebtedness, was fully cognizant of all of the facts as early as 1910, and she is chargeable with that knowledge. 1 Cal. Jur. pp. 846-854, and cases cited. Counsel for respondents urge that the knowledge acquired by Mrs. Bogart's attorney, Mr. Louis P. Boardman, of the existence of the resolution of assumption of indebtedness which is the foundation of the present action was acquired by him, not while he was acting as her attorney but while he was acting as director and vice president of the corporation, and they urge that she is not chargeable with this knowledge under the rule that "a client, as principal, is not bound by knowledge obtained by his attorney as agent in the course of other employment," citing *Wittenbrock v. Parker*, 102 Cal. at page 101, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172. That rule is not applicable to the facts of this case. It appears by the uncontradicted testimony of Mr. Boardman himself that he was acting as Mrs. Bogart's attorney during all of the time from the date of the assignment of the note to her by her husband in 1909 until shortly before the commencement of the present action; that as such attorney he was in charge, by express arrangement with her, of all proceedings that were had or taken in the action relative to the disposition of the note or otherwise, and also relative to all considerations of settlement and compromise; that he acquired full knowledge of the existence of the resolution in 1910; and that he did not become director or vice president of the defendant corporation until July, 1911; that prior to his employment by or in behalf of the defendant corporation he held many consultations with representatives of the George K. Porter Company, at which "the outstanding indebtedness of the company was considered, including this obligation represented by this note." The rule invoked by counsel is subject to the qualification that "knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, although such knowledge may have been acquired before the agency was created, if it appears that such knowledge was present in his mind at the time he acted for the principal." *Cooke v. Mesmer*, 164 Cal. 332, 338, 128 Pac. 917, 920; *Christie v. Sherwood*, 113 Cal. 526, 530, 45 Pac. 820. It further appears from Mr. Boardman's testimony that he was actively engaged during the years 1909 and 1910 in taking depositions to be used in the trial of the action of Mrs. Bogart against the Porter estate upon this note, and that during the years 1910 and 1911 he was negotiating as attorney for Mrs.

Bogart with the officers of the defendant corporation for a settlement by compromise of her claim upon this note. The circumstance that Mr. Boardman, before accepting employment in behalf of the Porter Company, deemed it necessary to have an express understanding with the representatives of that company that such employment should be without prejudice to his position as attorney for Mrs. Bogart, and without prejudice to his right to proceed upon her claim, shows that he had in mind at that time the knowledge that her claim was against the corporation, and therefore adverse to it. Under these circumstances his knowledge of the existence of the resolution which is the foundation of the present action must be deemed to have been her knowledge from the time he first acquired it in 1910.

It cannot be said that an acceptance after an unexplained delay of more than six years was within a reasonable time. 6 Cal. Jur. pp. 56, 57, and cases cited. It follows that plaintiff is not entitled to recover herein in either view of the case. If it be deemed that the contract of assumption by the George K. Porter Company, ipso facto, created the cause of action here sued upon, the action is barred by the statute of limitations. If it be deemed that such assumption constituted a mere offer or proposal, the same was revoked by operation of law before its acceptance by plaintiff, and therefore never gave rise to the obligation here sought to be enforced.

With respect to the question of the liability of the Hellman Commercial Trust & Savings Bank, it is to be noted that this defendant did not assume, or agree, or promise, or offer to pay any indebtedness whatsoever. The George K. Porter Company conveyed to it certain property in trust for certain specified purposes, among which was the payment of the debts of the grantor, and it still holds said property under said trust. It follows that, if the respondent were entitled to recover herein as against the Porter Company, she would also be entitled to have her claim satisfied out of the assets held by the bank in trust for that company. But, having no enforceable claim as against the Porter Company, she has none against the bank.

The judgment is reversed.

We concur: WILBUR, C. J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

193 Cal. 297

McKEON v. LISSNER et al. (S. F. 10156.)

(Supreme Court of California. Feb. 16, 1924.
Rehearing Denied March 17, 1924.)

1. Carriers ⚡280(4)—Care required as to elevators not affected by license statute.

The degree of care required of owners and operators of elevators was not affected by St.

1917, p. 84, forbidding the operation of elevators without a license from the Industrial Accident Commission, and providing for the inspection and approval of elevators by inspectors appointed by the Commission.

2. Carriers ⚡317(5)—Rules and regulations respecting elevators held admissible on issue of negligence.

In prospective tenant's action against apartment house operators for injuries caused by defective condition of automatic elevator, evidence as to the orders and rules promulgated by the Industrial Accident Commission respecting the maintenance and operation of similar elevators and as to inspections made by the Commission under St. 1917, p. 84, held admissible.

3. Carriers ⚡320(14)—Negligence in operation of defective automatic elevator held for jury.

In prospective tenant's action against operators of apartment house for injuries caused by defective automatic elevator, the question of negligence held for the jury.

4. Carriers ⚡315(1)—Plaintiff in suit for elevator injury, having specified certain negligence, could not prove other negligence.

In prospective tenant's action against operators of apartment house for injuries caused by defective automatic elevator, in which the only specification of negligence in the complaint was the failure to keep the elevator in repair, the plaintiff could not recover on proof of negligent failure to keep the hallway leading to elevator lighted.

5. Carriers ⚡347(4) — Contributory negligence of prospective tenant in walking into elevator shaft held for jury.

In prospective tenant's action against operators of apartment building for injuries caused by defective condition of automatic elevator when she walked into elevator shaft, thinking elevator in place, in which there was evidence that the door would not have been open if the elevator had been in good condition, the question of the prospective tenant's contributory negligence was one for the jury.

6. Trial ⚡191(7), 240—Instruction as to liability as to operator of automatic elevator held argumentative and invasive of province of jury as assuming fact.

In prospective tenant's action against operators of apartment building for injuries caused by defective automatic elevator, involving an issue as to whether the defendants knew that the elevator was in a defective condition, an instruction that, "You are instructed that the defendants in operating the automatic elevator therein for the carriage of tenants and their guests and persons who visited the place on business were not excused from liability for injuries due to an inherent structural defect in the appliance, or from some lack of repair, on the theory that the elevator installed was as perfect an elevator as could be constructed under the then condition of electrical knowledge and science, as the law does not contemplate that such appliance may be used to the peril of the life or limb of those who may be invited to employ them, at least without adequate warn-

ing and protection against the perils attending such employment," held erroneous, being argumentative and invasive of the province of the jury, in that it assumes an inherent structural defect or some lack of repair.

7. Carriers — 293—Operators of apartment house not liable for injuries to prospective tenant from defective elevator, unless negligent.

Operators of apartment house were not liable for injuries to prospective tenant caused by an inherent structural defect in an automatic elevator or lack of repair thereof, unless negligent with respect thereto.

8. Trial — 251(8) — Instruction authorizing finding not within issues held erroneous.

In prospective tenant's action against operators of apartment building for injuries caused by defective automatic elevator, in which the only negligence alleged in the complaint was the negligent failure to keep elevator in repair, instruction held erroneous as inviting the jury to predicate a finding of negligence as to a matter entirely outside of the issues.

9. Trial — 191(7)—Instruction held erroneous in that it assumed negligence.

In prospective tenant's action against operators of apartment building for injuries caused by defective automatic elevator, in which the complaint alleged the negligent operation of the elevator in defective condition, instruction held erroneous, in that it assumed the negligence of the defendants.

10. Carriers — 293—Operators of apartment building liable for injuries caused by negligence in maintenance of elevator, though they employed inspector.

If operators of apartment building were negligent in the maintenance of an automatic elevator, the mere fact that they employed an inspector and that he made inspections did not relieve them from liability for injuries to prospective tenant caused by such negligence.

11. Carriers — 316(7)—Proof of defect in elevator not proof of ultimate fact of negligence.

In prospective tenant's action against operators of apartment building for injuries caused by defective automatic elevator, the mere proof of a defect in the elevator, whether latent or patent, was not proof of the ultimate fact of negligence, but was a probative fact, which merely tended to prove negligence.

12. Carriers — 316(7)—Res ipsa loquitur doctrine held inapplicable.

In prospective tenant's action against operators of apartment building for injuries caused by defective automatic elevator, in which the only negligence specified in the complaint was the failure to keep the elevator in order and repair, the res ipsa loquitur doctrine held inapplicable.

13. Appeal and error — 760(1)—Court will not search entire record to ascertain whether substance of refused instruction was embodied in given instructions.

Appellant's contention that court erred in refusal to give 12 instructions requested by

them, with the mere general assertion that "these instructions we submit expressed the law correctly, and were relevant and pertinent, nor did the court give equivalent instructions," will not be considered, since the court will not search the entire record to ascertain whether or not the substance thereof has been embodied in the instructions given.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Alice T. McKeon against A. L. Lissner and another. Judgment for plaintiff, and defendants appeal. Reversed.

Rehearing denied; Richards, J., not participating.

Redman & Alexander, of San Francisco, for appellants.

Ford & Johnson, of San Francisco, for respondent.

MYERS, J. [1] Defendants appeal herein from a judgment on verdict in favor of the plaintiff in an action to recover damages for personal injuries sustained by the plaintiff in falling to the bottom of an elevator shaft in an apartment house operated by the defendants. We adopt the following portion of the opinion of the District Court of Appeal herein, which was prepared by Mr. Justice St. Sure:

"Plaintiff, looking for an apartment, visited a certain apartment house of which defendants were lessees. Being admitted to the building, she approached an automatic elevator maintained in the premises for the use of tenants and others. The door of the elevator cage was open, and plaintiff, believing that she saw the cage in its proper place, stepped through the doorway, and fell to the bottom of the shaft, a distance of about 14 feet. She received injuries for which a jury awarded her damages in the sum of \$4,000. Defendants appeal from the judgment.

"The automatic elevator was of a type now generally in use in apartment houses. There was a grill door in the elevator itself, and on each landing there was another door of wired glass opposite the elevator entrance. So-called 'safety' locks were installed on each floor, which permitted any one of said last-mentioned doors to be opened when the elevator was at that floor. The elevator could be brought to any floor by pressing a button located at such floor. Buttons were installed in the elevator cage with numerals on them corresponding to the floors in the building, and a passenger in the elevator would be carried to any particular floor by pressing the corresponding button in the elevator. It was necessary that both the door on the shaft and the elevator door be closed before the cage could be moved, and it was impossible to open the shaft door at any floor except the one at which the elevator was standing if the mechanism was in order. If parts of the mechanism were out of order the shaft door might be opened without the elevator being at the same level, sometimes at once, and easily, and

again with difficulty, and after trials lasting from half an hour to an hour. In addition to the inspection of the elevator by the Industrial Accident Commission (provided for by an act of the Legislature approved April 6, 1917; Stats. of that year, page 84), defendants had a weekly inspection made by a private company, part of which inspection consisted in testing the doors. The testing of the shaft door, according to an inspector of the company, consisted in dropping the cage about three feet below each floor and trying the shaft door three or four times to see if it would open. Such an inspection had been made two days before the accident, and no defects noted. Immediately after the accident the lock was removed from the door, and it was found that a spring inside had broken, probably through crystallization of the tempered steel of which it was made. This was a gradual process and not discoverable by the tests made by the inspector, nor except by removing the lock itself.

"The evidence shows that plaintiff had made two visits to the apartment house on the day she was injured. The first visit was at about 2 o'clock, and the second at about 5 o'clock in the afternoon. She readily used the elevator on the occasion of her first visit. On her second visit she approached the elevator, and thought she saw the cage door open. 'When I got back to the place where the elevator was located I turned,' she testified. 'I found the door open, and then, of course, I am accustomed to automatic elevators, having lived in places nearly two years where I operated one several times a day; so, of course, an open door said to me that the cage of the elevator was there, but I stood there just a moment; I was only there a moment looking, and I thought I saw this cage, and I looked straight ahead of me, and I thought I saw the elevator, and I looked down, and I thought I saw the elevator floor, so, of course, I stepped in and fell down. The elevator wasn't there. There was no light in the hallway at the time that I went in there the second time. It was as dark as could be, and that is the reason I stopped and looked for the floor of the elevator. It appeared to me at 5 o'clock that it was a little bit darker than when I was there at 2 o'clock. My recollection is that it was a bright day. I was thoroughly acquainted at that time with automatic elevators. In my experience with automatic elevators I have seen an automatic elevator with the door ajar and the cage there. I have seen this on more than one occasion. I lived in an apartment house before that for a long time. I have lived on the top floor in an apartment house, and very often I had to walk downstairs when I was in a hurry, simply because when I pressed the button the elevator did not come up to me because the door down on the third floor had been partially open. I know positively that you cannot move the elevator if the door is the least bit open. You can't open the door unless the cage is at the floor. I found the door ajar and the cage appeared to be at the floor. I looked, and thought I could discern this black cage. You can see the floor, and it is rather black, and I saw what I thought to be the black floor of the cage, and of course I thought the elevator was there. I stepped in, and I remember myself falling. I knew I was falling. The next I remember was being down at the bottom of the pit.'

"After viewing the premises during the trial, plaintiff testified that she was impressed 'that something had been done to brighten the light up greatly; it seemed very much brighter. The sun was shining right through the transom above the two doors. The light yesterday appeared much better than on the day I was there. There was plenty of light there. * * * A police officer, who appeared at the scene of the accident, and assisted in removing plaintiff from the pit of the elevator shaft, testified, 'When I went back to the elevator that hall around the elevator was to me rather dark.' The defendants testified that a light was always maintained in the elevator cage, and their manager and one of the tenants testified that the light was lit at 2 o'clock on the day of the accident, and also at the time the accident occurred. An elevator inspector testified that upon the occasion of his visit the light in the elevator cage was always burning; that 'if the light was out you never could see the punch buttons.'

"Defendants' points on appeal are, first, that there was no evidence of negligence whatever; second, that plaintiff was guilty of contributory negligence; third, errors in the instructions of the court; and, fourth, errors of the court in refusing to give instructions requested by defendants.

"In their argument, given in support of the first point, counsel for defendants call our attention to the fact that the Legislature in 1917 (Stats. of that year, page 84) passed an act forbidding the operation of elevators without a license to be issued by the Industrial Accident Commission, after inspection and approval of elevators by inspectors appointed by it, the inspection fees to be paid by the elevator owner or operator, and by the terms of the act the owner or operator is obliged to comply with orders issued by the commission respecting repairs, alterations, etc., of the elevator. Counsel earnestly contend that 'since the passage of this act owners and operators of elevators have ceased to be free agents'; that 'the statute of 1917 revolutionized the law relating to the responsibility of owners and operators of elevators'; that 'a new system was put in operation by that act, and the old system of freedom of action, coupled with responsibility, was abolished'; that 'the theory underlying the act in question is that these matters cannot safely be trusted to the control of private enterprise, but should be taken in hand by public authority.'

"With this contention we are unable to agree. An examination of the statute discloses, as expressed in the first clause of its title, that it is 'an act for the periodical inspection of elevators operated in places of employment in this state,' etc. Sections 1 and 2 of the act seem designed to protect employees in the place where the elevator is maintained, and it may be, as suggested by counsel for plaintiff, that the act has no application to the maintenance of the elevator involved herein. However, we are not called upon to decide such a question in this case.

"We cannot conceive that it was the intention and purpose of the Legislature, in the passage of said act, to 'revolutionize' the law relating to the responsibility of owners and operators of elevators. We think that the act was intended merely for the purpose of providing additional safeguards in the type of elevators used and

in the mechanism employed in their operation; and that the periodical inspection of the same was provided for to the end that the public generally, as well as employees in the building where elevators are used, might have additional protection against injury or loss of life. The legislation was probably inspired through an enlightened appreciation of the value of human life, rather than for the purpose of relieving the owners and operators of all responsibility. In our opinion the measure of the owner's care prescribed by the law and owing to persons lawfully using an elevator has not been diminished in the slightest degree by said act of 1917."

[2, 3] To the foregoing it should be added that the facts as to the requirements of the orders and rules promulgated by the Industrial Accident Commission respecting the maintenance and operation of elevators similar to the one here in question, and as to the inspections made by that Commission, were proper to be placed in evidence and to be considered by the jury in its determination of the question whether or not the defendants were negligent in the maintenance of the elevator under all the circumstances in evidence, which was, in the first instance at least, a question of fact for the jury.

[4] In answer to appellants' contention that the evidence was insufficient to support the implied finding of negligence of defendants, respondent replies that negligence was proven in at least two particulars: (1) "The maintaining of the dark and confusing hallway leading to the elevator," and (2) "in operating the elevator with a broken spring, when no inspection had been made adequate to disclose the defective appliance." It is to be noted that the first specification of negligence above is entirely outside the issues made by the allegations of the complaint and answer herein. The complaint contains no allegation of negligence other than that which had to do with and was expressly limited to the failure of defendants "to keep said elevator and said apparatus for operating the same in order and repair." In such case the plaintiff can recover only upon proof of one or more of the acts or omissions alleged in the complaint. *Marovich v. Central California Traction Co.* (Cal. Sup.) 216 Pac. 595, and cases cited. Inasmuch as this case must be reversed because of errors in the instructions, to be hereinafter noted, and as the evidence may not be the same upon a second trial thereof, we do not deem it necessary to here pass upon the question of the sufficiency of the evidence to sustain the allegations contained in the complaint.

[5] In response to appellants' contention that respondent was guilty of contributory negligence, it is sufficient to say that such negligence cannot be said to appear conclusively as a matter of law from the evidence herein. *Jacobi v. Builders' Realty Co.*, 174 Cal. 708, 711, 164 Pac. 394, L. R. A. 1917E,

696; *Muller v. Hale*, 138 Cal. 163, 167, 71 Pac. 81.

The court, at the request of plaintiff, gave the following instruction to the jury:

"You are instructed that the defendants in operating the automatic elevator therein for the carriage of tenants and their guests and persons who visited the place on business were not excused from liability for injuries due to an inherent structural defect in the appliance, or from some lack of repair, on the theory that the elevator installed was as perfect an elevator as could be constructed under the then condition of electrical knowledge and science, as the law does not contemplate that such appliances may be used to the peril of the life or limb of those who may be invited to employ them, at least without adequate warning and protection against the perils attending such employment."

[6-8] This presents an excellent illustration of the danger inhering in the practice of copying language used in an opinion of a reviewing court and embodying the same in an instruction to be given to the jury. The above instruction consists in part of a garbled quotation from the opinion of this court in the *Jacobi* Case, supra, at page 710 (161 Pac. 395.) The passage from which the quotation was taken reads as follows:

"If the apparatus, though it be the last achievement of mechanical and scientific skill, *is not a suitable appliance* to be used in the transportation of passengers, to employ it for that purpose is negligence. The law does not contemplate that such appliances, in the experimental stage of their development, may be used to the peril of the life and limb of those who may be invited to employ them, at least without adequate warning and protection against the perils attending such employment." (Italics added.)

By lifting the second sentence thereof out of the context by which it was limited and qualified it was given an apparent meaning entirely different from that which it was used to convey. The language quoted, as used in the opinion, was expressly applied to apparatus which was in the experimental stage of development, and which, "though it be the last achievement of mechanical and scientific skill, *is not a suitable appliance* to be used in the transportation of passengers." The quoted language was used arguendo in the discussion of a case wherein it had been proved, without conflict, that the apparatus in question was not only seriously defective, but was actually known by the defendant to be so defective prior to the time of the injury. Embodied in an instruction to the jury, under the issues and evidence as presented in the instant case, it is open to the criticism that it is argumentative, invades the province of the jury to determine the facts, and misstates the law applicable thereto. It is not only argumentative, but is arguing against a contention made in the *Jacobi* Case which has not been made at any time

in the case at bar, so far as the record discloses. It invades the province of the jury, in that it assumes that there was in the case at bar either an inherent structural defect or some lack of repair, whereas both of these were questions of fact for the jury's determination. It misstates the law, in that it tells the jury, in effect, that defendants would be liable for injuries due to an inherent structural defect or to lack of repair, regardless of whether defendants were or were not negligent with respect thereto. It is further erroneous in its application to the instant case, in that it invites the jury to predicate a finding of negligence upon the failure of the defendants to give "adequate warning and protection against the perils attending such employment," which finding, if made, would be entirely outside of the issues herein.

[9] The court also instructed the jury as follows:

"You are instructed that even though you may find from the evidence that prior to the accident defendants had employed an inspector to inspect its elevator, as well as the doors and other appliances in use in connection therewith, and that an inspection failed to disclose any defect in the elevator or the doors or the other appliances used in connection therewith, and that they were apparently in a reasonably safe condition; but, if you find that the accident occurred by reason of a defect or a failure to keep the appliances in repair, the mere fact of the employment of an inspector will not relieve defendants from the consequences of their negligence."

This instruction was erroneous in that it virtually assumed that the existence of a defect in the elevator or its appliances would be conclusive proof of negligence. It said to the jury in effect:

"If you find that such defect existed, you must find that the defendants were negligent, and the fact that they employed an inspector will not relieve them from the consequences of their negligence."

[10, 11] Thus the instruction assumed the existence of the very fact which was in issue in the case, and upon which the plaintiff's right to recover depended; namely, the negligence of the defendants. It is, of course, true that, if the defendants were negligent in the matter of the maintenance of the elevator, the mere fact that they employed an inspector and that he made inspections would not relieve them from the consequences of such negligence. But the defendants were not insurers and were not liable herein, unless they were negligent, and the question whether they were or were not negligent was an ultimate question of fact which was to be determined by the jury upon a consideration of all of the probative facts in evidence. The mere proof of a defect in the elevator, whether latent or patent, was not proof of the ultimate fact of negligence, because it was not necessarily in-

consistent with the exercise of due care by the defendants. It was a probative fact which merely tended to prove the ultimate fact of negligence. Likewise, the mere proof that defendants employed an inspector who made periodic inspections was not proof of the ultimate fact that defendants exercised due care, because it was not necessarily inconsistent with negligence on their part. It was a probative fact which merely tended to prove the ultimate fact of the exercise of due care. It would therefore have been entirely proper for the court to instruct the jury:

"If you find that the accident occurred by reason of a defect or a failure to keep the appliances in repair, and if you find that the defendants were negligent in failing to discover or in failing to remedy such defect or disrepair, the mere fact of the employment of an inspector will not relieve defendants from the consequences of their negligence."

This was doubtless the rule of law which the learned trial judge had in mind, and, in substance, the instruction which he intended to give. But the omission therefrom of the qualifying phrase above italicized gave to it the effect of withdrawing from the consideration of the jury a material question of fact which it was the sole province of the jury to determine. The questions whether the existence of the defect was due to defendant's negligence and whether their failure to repair it was a *negligent* failure were questions for the jury, which the court had no right to determine.

[12] The trial court also gave to the jury six different instructions, each of which embodied a statement of the rule of *res ipsa loquitur*, and instructed the jury to apply the same in its consideration of the issues. Appellants do not contend that any of these instructions embodied an incorrect statement of the rule itself, but do contend that the rule itself is wholly inapplicable to the situation here under consideration, because of the circumstances that the elevator in question was not being operated by the defendants or their servant at the time of the injury, and that the plaintiff was not injured as the result of any movement or operation of the elevator, but rather as the result of her own act in stepping into the open elevator shaft. In this connection it is sufficient to advert to the fact already mentioned that the complaint herein contains no allegation of negligence other than that which had to do with and was limited to the failure of defendants "to keep said elevator and said apparatus for operating the same in order and repair." There was not the slightest hint or suggestion in the complaint of a claim that the defendants were negligent in omitting to have the hallway leading to the elevator properly lighted. Evidence to the effect that the hallway was dark was admitted

in behalf of the plaintiff at the trial. It was properly admitted because it was one of the circumstances immediately surrounding the happening of the accident—the *res gestæ*—and also because it was relevant to the issue of contributory negligence. Under these circumstances instructions embodying the *res ipsa loquitur* doctrine should not have been given, because they authorized the jury to base a verdict upon a theory of negligence which was entirely foreign to the issues in the case. We so held, in effect, in *Marovich v. Central Cal. Traction Co.*, supra. The point there decided was not precisely identical with the one here presented, but the rationale of the rule there applied applies with equal force to the present situation. The defendants were brought into court upon notice that they were charged with negligence in respect of the repair of the elevator, and in no other respect whatever. They were never notified that any other or different claim would be made against them. Under these circumstances, to tell the jurors, after the close of the trial, that if they should find that the defendants were negligent in the matter of lighting the hallway they should return a verdict for plaintiff, would be to authorize a verdict against the defendants upon a claim against which they had never been called upon to defend themselves. This, in effect, is what was done by the giving of the *res ipsa loquitur* instructions. If plaintiff desired to rely upon this additional claim of negligence, she should have notified the defendants thereof by pleading it in her complaint. *Cary v. L. A. Railway Co.*, 157 Cal. 599, 603, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329.

The allegations of the complaint herein were as follows:

"At all of the times herein mentioned defendants carelessly and negligently failed and neglected to keep said elevator and said apparatus for operating the same in repair, and said elevator and said apparatus for operating the same were at all of said times, because of said carelessness and negligence of said defendants, out of repair and failed to operate in this: That the apparatus for operating said elevator provided by defendants to be used by passengers in bringing said elevator from one floor to another and to open the doors in the shaft, as aforesaid, caused said doors to open when the elevator car was not at the place in said shaft opposite the floor where the elevator was sought to be used."

The allegations in the first portion of the foregoing quotation were obviously particularized and limited by the specifications in the latter portion thereof, but if we assume that they were not so limited, and for the moment wholly ignore the particular specifications, we have left a general allegation of negligence in failing and neglecting to keep said elevator and the apparatus for operating the same in repair.

"It is well settled that it is sufficient to charge negligence in general terms, and that, when that which is done is stated, it is sufficient to say that it was negligently done without stating the particular omission which rendered the act negligent." *Sharpless v. Pantages*, 178 Cal. 122, 172 Pac. 384.

That is precisely what the plaintiff did in this case, if we ignore the specification of particulars above quoted. It obviously follows that in order to recover she was required to prove some negligent act or omission on the part of the defendants in doing that which was alleged to have been negligently done by them, to wit, in keeping the elevator and its apparatus in repair. Under these circumstances she could not recover upon proof of some negligence which was wholly disconnected with the keeping in repair of the elevator and its apparatus, such as, for example, the insufficient lighting of the hallway leading to the elevator. *Cary v. Los Angeles Ry. Co.*, 157 Cal. 599, 603, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329; *Marovich v. Central California Traction Co.*, supra (Cal. Sup.) 216 Pac. 595. But this is precisely what the plaintiff has sought to do, and what the given instructions upon the *res ipsa loquitur* doctrine have enabled her to do. The jury was told that "plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required to show that the accident is one which would not ordinarily occur had due care been employed," and "that the happening of the accident, if any, affords reasonable evidence, in the absence of explanation by the defendants that the accident, if any, was the result of a want of proper care on the part of the defendants." The jurors were thus invited to predicate a verdict against the defendants upon any theory of negligence which might find support in the evidence, regardless of whether or not it was within the issues. Plaintiff is now contending that the verdict is sufficiently supported by evidence that the hallway leading to the elevator was insufficiently lighted, and this may well have been the theory of the jurors upon which their verdict was based. But this is entirely unconnected with the claimed failure to keep the elevator in repair, and is therefore wholly outside of the issues herein.

[13] Appellants complain of the refusal of the trial court to give to the jury 12 different instructions which were requested by them. In this connection they content themselves with the general assertion that "these instructions we submit expressed the law correctly, and were relevant and pertinent, nor did the court give equivalent instructions." From some examination of the record we find the equivalent of several of the refused instructions in the instructions given. We cannot be expected to search the en-

tire record with respect to each of the 12 refused instructions for the purpose of ascertaining whether or not the substance thereof has been embodied in the instructions given.

No question is made upon this appeal as to the degree of care incumbent upon the appellants in the maintenance of the elevator. Respondent asserts and appellants concede that they were held "to the utmost care and diligence of very cautious persons and responsible for the slightest neglect."

We are satisfied that the error in giving the instructions which are above quoted was of so serious a character as to produce a miscarriage of justice, and the judgment is therefore reversed.

We concur: WILBUR, C. J.; WASTE, J.; SEAWELL, J.

193 Cal. 337

Ex parte SMITH. (Cr. 2609.)

(Supreme Court of California. Feb. 26, 1924, as Modified March 24, 1924.)

1. Courts $\S$ 97(3)—Decision of United States Supreme Court as to whether a statute is violative of federal Constitution conclusive.

The decision of the United States Supreme Court as to whether a statute is in violation of United States Constitution is conclusive on state court.

2. Constitutional law $\S$ 298(1)—Master and servant $\S$ 14½—Statute fixing maximum fee of employment agencies held invalid.

St. 1923, p. 938, $\S$ 11½, fixing maximum fee of employment agencies, held violative of the due process clause of Const. U. S. Amend. 14.

In Bank.

In the matter of the application of H. B. Smith for a writ of habeas corpus. Petitioner discharged.

Fredericks & Hanna, of Los Angeles, for petitioner.

R. Clarence Ogden, of San Francisco, amicus curiæ.

U. S. Webb, Atty. Gen., and J. M. Friedlander, of Los Angeles, for respondent.

PER CURIAM. Application for a writ of habeas corpus. The petitioner, who, on the 19th day of August, 1923, was engaged in the business of conducting an employment agency in the city of Los Angeles, is restrained of his liberty by the chief of police of said city of Los Angeles by virtue of a warrant of arrest issued upon a criminal complaint charging him with the violation of that portion of section 11½ of an amendatory act of the Legislature approved June 18, 1923 (Stats. 1923, p. 938), which provides as follows:

"* * * In all other employment, which classification shall include also semi-manual employments such as those of clerks, bookkeepers,

typists, stenographers, domestics, and mercantile, office, professional and semi-professional employments, the fee charged shall in no case exceed ten per centum of the wages or salary earned for the first month, the twenty-six working days, or shorter period, to be determined in the same manner as in the case of manual employments. In determining any such per centum proper allowance may be made for items of board, lodging, or other consideration or privilege, or for differences arising by reason of rating the compensation otherwise than according to the time of work or service.

"This section shall not apply to an association of teachers conducting an employment agency exclusively for the purpose of securing employment for its own members, nor to bona fide schools, having been established for at least three years, securing employment for its own pupils without compensation."

The offense consists in charging and collecting fees in excess of the amounts provided by said act. No violation of the act so far as it relates to applicants for employment classified as "manual" is claimed, and therefore it is not necessary to reprint the portion of the act dealing with that classification. It is admitted by respondent that the business of conducting an employment agency is lawful, useful and beneficial to society. It is claimed, however, that the business furnishes an exceptionally fertile field for the growth of industrial abuses, which it was the purpose of the Legislature to prevent by the adoption of said amendatory act. It is the claim of respondent that the act is regulatory merely and operates upon a subject which properly falls within the police power of the state.

All of the main facts of the case have been stipulated to, excepting the question as to whether or not the maximum fees fixed by the act before us are so low as to be prohibitory of the business rather than regulatory of said occupation or business. The disputed question of fact, in view of our conclusion becomes an immaterial issue, and the only question left for determination is the constitutionality of the act. The act is assailed by petitioner on the ground that it is in contravention of the Constitution of the United States, and particularly the due process clause of the Fourteenth Amendment thereto; also that it contravenes the provisions of sections 1 and 13 of article 1 of the Constitution of this state.

These objections find support in our decisions and also in the decisions of the United States Supreme Court. The constitutional question raised is not a new one. The Legislature of 1903 adopted a statute which placed a limitation on the amount of fees that an employment agency may charge which, in legal effect, was identical with the limitation fixed by the act before us, and this court, in disposing of the question, said:

"The petitioner is engaged in a harmless and beneficial business. As part of his 'property' in that business are the services that he renders in obtaining employment for those seeking it. It is not compulsory upon any one to employ him, and whose seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted, 'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities' of one class of citizens 'in a manner before unknown to the law.' For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, 'instead of calling upon others to show how and where the authority is negatived.'" *Ex parte Dickey*, 144 Cal. 238, 77 Pac. 925, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428.

The Supreme Court of the United States, in *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, made an exhaustive review of the authorities touching the right to contract about one's affairs, including the right to make contracts of employment, and held that such a right was a part of the liberty of the individual which is protected by the Fifth Amendment to the Constitution of the United States. The question under consideration was whether Congress had the constitutional power to fix standards and minimum wages for women and children engaged in any occupation within the District of Columbia. Its conclusion was that the act in question passed the limits prescribed by the Constitution and was therefore, invalid. Surely the reasons which may be advanced for establishing standards of minimum wages for women and children are not less potential than those which may be urged in favor of the validity of the act before us.

[1] The same arguments made for and against the validity of the act in the instant case were made in the *Adkins Case*, and the conclusion there reached was the result of a very full and deliberate consideration of the many authorities which have been cited in the case at bar. The question being a federal one, the decision of the highest court of the country on the subject is conclusive upon us, even if we found ourselves without a precedent within our own jurisdiction.

[2] Upon the authority of the cases cited, and a long list of others referred to therein,

we are of the opinion that the statute in question is invalid and that the prisoner is entitled to his discharge.

Ordered that the prisoner be discharged.

193 Cal. 782

Ex parte BOYNTON. (Cr. 2608.)

(Supreme Court of California. Feb. 26, 1924.)

Constitutional law —298(1)—Master and servant —14½—Statute fixing maximum fee of employment agencies held invalid.

St. 1923, p. 938, § 11½, fixing maximum fee of employment agencies, held violative of the due process clause of Const. U. S. Amend. 14.

In Bank.

In the matter of the application of E. C. Boynton for a writ of habeas corpus. Petitioner discharged.

Fredericks & Hanna, of Los Angeles, for petitioner.

R. Clarence Ogden, of San Francisco, amicus curiæ.

U. S. Webb, Atty. Gen., and J. M. Friedlander, of Los Angeles, for respondent.

PER CURIAM. The principle of law which rules *Ex parte Smith* (Cr. No. 2609) 223 Pac. 971, this day decided, is decisive of the instant case. The facts of the two cases are so similar in material respects as to bring both within the same rule of law.

Upon the authority of *Ex parte Smith*, the writ is granted, and the petitioner is released from custody.

193 Cal. 341

SAN DIEGO & A. RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. No. 7834.)

(Supreme Court of California. Feb. 26, 1924.)

Master and servant —405(4)—Finding of injury in altercation arising out of and in course of employment within Compensation Act sustained.

Evidence held to justify finding that shooting of employee in an altercation by another employee arose in the course of, and while he was in the proper discharge of, his employment, within Workmen's Compensation Act.

In Bank.

Proceedings before the Industrial Accident Commission under the Workmen's Compensation Act, by Mary Rote, claimant, for the death of her husband, opposed by the San Diego & Arizona Railway Company, a corporation, employer. The Industrial Accident Commission granted an award, and the employer brings certiorari. Affirmed.

Read G. Dilworth, of Coronado, and V. F. Bennett, of San Diego, for petitioner.

Warren H. Pillsbury, of San Francisco, and F. W. Fellows, of Los Angeles, for respondents.

WASTE, J. Del Rote, while employed by the petitioner here, was shot by a fellow employee. The respondent Commission found that the injury, which resulted in Rote's death, occurred in the course of, and arose out of his employment. It also found that the employee left surviving him, and wholly dependent, his wife, Mary Rote, to whom it awarded a death benefit in the sum of \$4,900, together with the usual allowance of \$100 for funeral expenses. This is a proceeding to annul the award.

It is the contention of the petitioner that Rote was not acting in the course of his employment at the time he was shot, and further that, even should it be found that the decedent may have been so acting at the time, the shooting which caused his death did not arise out of his employment in any capacity.

The record is very voluminous, but the salient facts are as follows:

On April 23, 1922, Rote was employed by the San Diego & Arizona Railway Company as trainmaster and also as road foreman of engines. In such capacity he was in charge of the operation of all trains as soon as they were made up, and seems to have been charged somewhat with oversight of the equipment furnished. C. B. Trott was, at the same time, employed by the petitioner as night foreman at its roundhouse. Trott was not officially under Rote's jurisdiction, but in the course of the latter's employment it was frequently necessary for him to be informed about matters at the roundhouse. The railway is not a large one, and the lines of authority over different departments do not appear to have been always recognized. For some time Trott had been in the habit of blowing the roundhouse whistle to call his men when he wanted them. Complaint was made by nearby residents about the noise thus made, and on the night before the shooting Rote went to the roundhouse and inquired for Trott, who was absent. His purpose was to inquire why the whistle was blown to call the men. He left directions with another employee at the roundhouse to tell Trott to discontinue the practice of blowing the whistle during the night, and reported what he had done to Mr. Lowe, superintendent and chief engineer of the petitioner. Trott, the roundhouse foreman, was angered by the message he received from his fellow employee.

The following night it was necessary to make up a train which should leave the depot at 10 o'clock. This train was usually a mixed freight and passenger train, in which case it was impossible to heat the train from the locomotive. On the night in question there were no freight cars, and it was desira-

ble to have an engine employed which had a steam-heating device. The making up of this train was part of Rote's duties. Just what actually occurred that night rests largely in the credence to be given to the testimony of various witnesses, and on the justifiable inferences and conclusions to be drawn from their testimony. It appears that the engine furnished by Trott, the roundhouse foreman, did not have the required heating device. Rote undertook to ascertain why the engine he wanted was not furnished. There were telephone conversations between Rote and Superintendent Lowe, and between Rote and the roundhouse foreman, Trott. Shortly after the train left the station, Rote accompanied by his wife, went in an automobile to the roundhouse. It is the contention of petitioner that as soon as Rote got there he began using abusive language to Trott, at the same time advancing in a threatening manner. The fact is that immediately after Rote entered the office of the roundhouse foreman a shot was fired, and Rote ran from the office pursued by Trott. Two more shots were fired, one striking Rote in the back. He was picked up by an automobile and taken to the police station, then to a hospital, where he died two days later. Trott was arrested and charged with murder. At the trial he testified that he did not intend to shoot Rote, but that his pistol became jammed while he was running, and that in striking his pistol to relieve the jam it was discharged twice, and that unfortunately Rote happened to be in the line of fire.

We have given but a mere synopsis of the testimony, and feel that it is unnecessary to go further into a narration of the events leading up to and immediately preceding the shooting. From all the facts and circumstances surrounding the fatal shooting affray, we are convinced that the Industrial Accident Commission was justified in concluding that the assault upon Rote occurred in the course of and actually arose out of his employment. The shooting took place while Rote was actually performing a duty in the course of his employer's business at the roundhouse. It arose out of the employment and was incident thereto, in that the assault grew out of circumstances occurring in the course of his work and not out of any prior or personal quarrel. Giving full weight to the contention of petitioner that Trott, the roundhouse foreman, was angered by the visit and message of Rote that Trott cease blowing the roundhouse whistle at night, and that bad feeling resulted between Trott and the decedent therefrom, we are unable to accept petitioner's point of view that the injury can be considered only as one arising out of a prior and personal quarrel. From the beginning of the incidents which led up to the killing, the relations between the two men actually arose out of the work of the two employees in the service of the petition-

er. Although the giving of any such directions was denied by the superintendent, there is evidence, which no doubt had compelling weight with the Commission, tending to establish the fact that Rote went to the round-house on the evening he was killed on the direct order of Lowe, for the purpose of ascertaining why the desired equipment had not been furnished for the night train.

The petitioner attempts to bring the injuries received by Rote within the line of authorities known as the "horse play" cases, such as, for instance, *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164. But this is not such a case. The injury here was one arising out of and in the course of Rote's employment within the meaning of the Workmen's Compensation Act, St. 1917, p. 831 (*Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 706, 151 Pac. 398), and can fairly be traced as an incident of such employment (*Warren Construction Co. v. Industrial Accident Comm.* [Cal. App.] 221 Pac. 381).

The evidence in this case justifies the finding and conclusion of the respondent that Rote was injured in an altercation which grew out of the proper discharge of his employment. It will serve no useful purpose to critically analyze the authorities cited from other jurisdictions or to elaborate the discussion on this point. As was said, in *Western Indemnity Co. v. Pillsbury*, supra:

"In its last analysis the petitioner's argument rests upon a supposed state of facts which was not established to the satisfaction of the Commission, and which was not shown by evidence free from conflict."

The award is affirmed.

We concur: MYERS, J.; RICHARDS, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

(193 Cal. 336)

NORTH CONFIDENCE MINING & DEVELOPMENT CO. v. FITCH et al.
(Sac. 3561.)

(Supreme Court of California. Feb. 25, 1924.)

Appeal and error ⇐345(1)—Appeal not dismissed on ground that notice was filed too late, where filed within due time after disposition of motion for new trial.

Where affidavits have been filed showing that a notice of intention to move for a new trial was properly served by mail, and the notice of appeal from the judgment was filed within due time after the disposition of the motion for a new trial, the appeal will not be dismissed on the ground that the notice of appeal was filed too late, notwithstanding the contention that the notice of intention to move for a new trial was not properly served and filed.

In Bank.

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

Action by the North Confidence Mining & Development Company against C. S. Fitch and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss. Motion denied.

See, also, 58 Cal. App. 329, 208 Pac. 328; 58 Cal. App. 335, 208 Pac. 330.

Richard Chute and William Grant, of San Francisco, for appellants.

Frank W. Street, and Horace M. Street, both of San Francisco, for respondent.

PER CURIAM. The respondents moved to dismiss the appeal from the judgment taken by the appellants upon the ground that the notice of appeal was filed too late. This question turns upon whether or not there was a motion pending for a new trial. Appellants claim that the notice of intention to move for a new trial was not properly served and filed. Since the hearing of the motion, affidavits have been filed showing that the notice of intention to move for a new trial was properly served by mail. The notice of appeal from the judgment was filed within due time after the disposition of the motion for a new trial, and the motion to dismiss the appeal from the judgment is therefore denied.

(193 Cal. 225)

In re BAIRD'S ESTATE.

BAIRD v. BAIRD et al.

(S. F. 10226.)

(Supreme Court of California. Feb. 16, 1924.
Rehearing Denied March 17, 1924.)

1. Appeal and error ⇐1097(2), ⇐1195(1)—Law of the case defined.

The rule of the law of the case is that trial and appellate courts must follow the rules laid down on a former appeal, whether the rules are right or wrong.

2. Appeal and error ⇐1099(7)—Insufficiency of evidence at previous trial to establish adoption held established as matter of law by decision on former appeal.

Decision on former appeal held to have established as matter of law that all the evidence adduced at the previous trial was insufficient as matter of law to establish an adoption, under Civ. Code, § 230, of an illegitimate child, by his father.

3. Appeal and error ⇐1096(1)—Matters looked to for determining whether the law of the case applies.

For the purpose of determining whether the law of the case should control, the court, on second appeal, will look not only to the opinion on the former appeal, but also to the record.

4. Appeal and error ⇨1099(7), 1195(3)—Insufficiency of the evidence established on former appeal law of case on subsequent trial, and appeal on evidence not materially different.

The law of the case controls the decision on a subsequent trial and appeal, the evidence not being substantially different in a material respect from that on a former appeal, where the decision established as matter of law that the evidence was insufficient, though the evidence was not quoted or cited in the opinion on former appeal.

5. Appeal and error ⇨1097(1), 1195(1)—Attempt to decide question of fact on appeal not law of case.

An appellate court having no jurisdiction to pass on questions of fact, any inadvertent attempt to do so would not be binding as the law of the case.

6. Appeal and error ⇨1097(1), 1195(1)—Department decision on former appeal held not to establish sufficiency of evidence of adoption.

Department decision reversing judgment against one seeking partial distribution of an estate, as having been adopted by deceased, held not to establish as the law of the case the sufficiency of the evidence of adoption; concurrence of three justices being, under Const. art. 6, § 2, necessary for a department decision, and the concurrence of one of the three participating justices having been limited to the single ground of error in refusing a jury trial, and the opinion of the others having expressly refrained from passing on the sufficiency of the evidence of adoption.

7. Evidence ⇨276—Declaration of decedent not competent proof that he had told his mother of his bastard child; "declaration against interest."

Declaration of decedent to witness that he had told his mother of the existence of his bastard child is not competent to prove that he had told his mother; not being a declaration against interest within Code Civ. Proc. § 1853.

8. Appeal and error ⇨1099(7)—Essentials of new evidence which will avoid the rule of the law of the case.

New evidence on a subsequent appeal, which will avoid the rule of the law of the case that the evidence is insufficient, and make it an open question, must be materially, essentially, or substantially different from that on the former appeal, and must not be merely cumulative to evidence of the same class, but must bring in a new and substantive fact.

9. Appeal and error ⇨1099(7)—New evidence in case involving question of adoption of bastard by father held not to take it out of rule of law of case.

The new evidence in case involving question of adoption, under Civ. Code, § 230, of a bastard by the father, held not essentially different from that on former appeal, to present no new substantive fact, to involve no new principle, and at most to be cumulative, and so not to avoid the law of the case, as to insuffi-

ciency of the evidence to establish such adoption.

10. Appeal and error ⇨1170(9)—Instructions conflicting with law of case and other correct instructions, prejudicial.

Giving instructions in conflict with the law of the case, and with other correct instructions given, is prejudicial within Const. art. 6, § 4½; it being impossible to say which was followed by the jury.

11. Bastards ⇨13—Each element of adoption by father must be established by preponderance of evidence.

Each of the elements for adoption of an illegitimate child by its father, under Civ. Code, § 230, must be established by a preponderance of the evidence, and, the proof failing as to one, adoption is not made out.

12. Bastards ⇨105—In proceeding in nature of contest of will to establish adoption by father, special verdict must cover elements of adoption.

The proceeding by an illegitimate child to establish an adoption by the father under Civ. Code, § 230, being in the nature of a contest of the deceased father's will, it being in favor of others, the jury's conclusions of fact must, under Code Civ. Proc. §§ 624, 1314, be in the form of special verdict covering all the elements of such an adoption.

13. Bastards ⇨13—"Public acknowledgment" of paternity as element of adoption by father defined.

"Public acknowledgment" of paternity, one of the elements of adoption of an illegitimate child by his father, under Civ. Code, § 230, is the opposite of private acknowledgment, and means the same kind of acknowledgment a father would make of his legitimate child.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Acknowledgment.]

14. Bastards ⇨13—Willful concealment of paternity from relatives opposed to public acknowledgment relative to adoption.

While to constitute public acknowledgment of paternity, as an element of adoption, under Civ. Code, § 230, of an illegitimate child by its father, he need not declare his paternity under all circumstances, his willful concealment of it from his business associates, his relatives with whom he is in frequent intercourse and on terms of affection, and their friends, is opposed to such acknowledgment, though he acknowledged his paternity to persons where he kept and supported the child and its mother, who were not likely to meet his relatives or business associates.

15. Bastards ⇨13—"Family" into which, as element of adoption, father must receive his illegitimate child, defined.

"Family," within Civ. Code, § 230, providing, as an element of adoption of an illegitimate child by its father, that he receive it, as his own, into his family, means no more than that he must have a home, a settled place of habita-

tion of which he is the head, into which he shall receive the child.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Family.]

16. Bastards ⇨ 13—**Abodes of illegitimate child and mother held not "family" or "home" of father, relative to adoption.**

The abodes where a father clandestinely kept and supported his illegitimate child and its mother, and where he and they were known under an assumed name, he all the time having a room at a hotel, given in the directory as his residence, *held* not his "family" or "home," within Civ. Code, § 230, as to adoption by receiving the child as his own into his family.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Home.]

17. Bastards ⇨ 105—**Child held not otherwise treated by father as legitimate.**

The father of an illegitimate child *held* not to have otherwise treated it as if it were a legitimate child, an element for adoption under Civ. Code, § 230; he, in addition to keeping it and its existence away from his family, making no provision for its future, though his attention was called to his will, giving the property to others.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of David Jennings Baird, deceased. Petition by David Jennings Baird for a partial distribution of the estate. From a decree for petitioner, Veronica C. Baird and others appeal. Reversed, with directions.

Mastick & Partridge, Karl C. Partridge, and Jos. T. O'Connor, all of San Francisco, for appellants.

C. M. Fickert and E. A. Cunha, both of San Francisco (R. P. Henshall and Robert R. Moody, both of San Francisco, of counsel), for respondents.

LAWLOR, J. The petitioner, David Jennings Baird, a minor, by Lydia M. Valencia, guardian of his person and estate, filed an amended petition praying for partial distribution to him of the above-entitled estate as the adopted child and heir of decedent. The petition alleges that petitioner is the illegitimate son of Miss Valencia and decedent; that decedent died after the birth of petitioner and that before his death, and within the meaning of section 230 of the Civil Code, he adopted petitioner as his own child; that petitioner is the sole surviving issue and only child of decedent; that decedent left an estate consisting of real and personal property; and that he left a last will in which no provision was made for petitioner. Petitioner prayed an order of court distributing to him the whole of decedent's estate, or such part thereof as the court shall direct, on

the delivery of a bond to the executor and executrix of the said will. An answer, denying, among other things, that petitioner is the child of, that he was adopted by, or was in any way related to, decedent, was filed by I. I. Brown, executor of said will, and by Veronica C. Baird, as executrix of and legatee and devisee under the said will.

The issues of adoption were tried by jury, and the special verdicts were in favor of petitioner. The court adopted the special verdicts of the jury, made findings of fact and conclusions of law, and entered its decree of partial distribution awarding to petitioner twenty \$1,000 Liberty bonds, 221 shares of the capital stock of the Sausalito Land & Ferry Company, and an undivided fourth interest—decedent's whole interest—in certain lands situate in Contra Costa county. An appeal from the verdict, from the entry thereof, and from the order and judgment was taken by Veronica C. Baird, individually, and as legatee and devisee under the said will of decedent, and as assignee of the interest of her sons, Miles T., Benjamin H., and Thomas R. Baird, as legatees and devisees under the said will. A second appeal from the decree of distribution was taken by Veronica C., Benjamin H., and Thomas R. Baird. A third appeal was taken from the verdict, from the entry thereof, from the order and judgment, and from the whole thereof, by C. H. Williams and R. C. Farley, individually; Adelaide McColgan, administratrix with the will annexed of the estate of D. A. McColgan, deceased, and F. W. Morrison and R. C. Farley, as trustees.

This is the third trial of the issues of adoption. The first was had before the court sitting without a jury. Judgment was given against respondent, and it was reversed on appeal upon the ground that the court erred in refusing his demand for a trial by jury. Estate of Baird, 173 Cal. 617, 160 Pac. 1078. The second trial was by jury and the verdicts and judgment were in favor of respondent. The judgment in that case was reversed upon the ground that a case of adoption had not been established. Estate of Baird, 182 Cal. 338, 188 Pac. 43.

The claim of respondent is that beginning a year before the birth of the child decedent and Miss Valencia, although not married, accomplished all the relations of man and wife and that she had no sexual intercourse with any other man; that from the date of respondent's birth until his own death decedent publicly acknowledged his paternity; that with Miss Valencia he had a family in the St. Helen and Octavia Apartments and at 230 I street, in the city and county of San Francisco, into which he received respondent; and that he otherwise treated him as a legitimate child.

Respondent was born in the St. Helen Apartments at 5 a. m., December 7, 1906, and

following a debauch decedent died in the house at 230 I street at 10 or 11 o'clock on the morning of November 25, 1908, a few months after he passed into his twenty-ninth year.

According to the evidence, Miss Valencia and decedent first met in 1898, and beginning in 1902 they entered upon an illicit relationship which continued until his death. Miss Valencia claims that they lived together as man and wife and that the relationship would have ripened into marriage but for the opposition of his relatives. Appellants claim that decedent associated with Miss Valencia for purposes of dissipation and illicit sexual intercourse and that the relationship had no other significance. Decedent never married. Prior to the San Francisco disaster on April 18, 1906, the couple occupied the relation of mistress and lover in several abodes in San Francisco. At the time of the fire their relationship was being carried on in the Alexandria Apartments at 570 O'Farrell street. A week or ten days later they took up quarters at 1310 Divisadero street in a cottage owned by Miss Valencia's mother. The next abode was at the St. Helen Apartments at 2070 O'Farrell street. They occupied this apartment for six or seven months, then moved to a room at the Octavia Apartments, and from there to a house at 230 I street, which was purchased by decedent for Miss Valencia. Following his death the place was sold and Miss Valencia received what was left.

Throughout the relationship between decedent and Miss Valencia he had relatives with whom he associated when they were in San Francisco. His mother, Mrs. Veronica C. Baird, a widow, visited Europe annually. He had a sister, a brother, Miles T. Baird, and two half-brothers, Benjamin H. and Thomas R. Baird. His eldest brother, John R. Baird, died in an accident in San Francisco in December, 1905. The sister married about this time and with her husband located in New York. She made occasional visits to San Francisco. During the entire period of his relationship with Miss Valencia decedent maintained quarters in hotels and other places in San Francisco, where at times he lived with his relatives.

1. Appellants' first contention is that the second decision (Estate of Baird, 182 Cal. 338, 188 Pac. 43) established the law of the case and that there is no change in the record herein in the essential facts upon which the above decision was based as to the asserted receipt of respondent into the family of the decedent and otherwise treating him as a legitimate child. Respondent's position is that the principle of the law of the case has no application whatever to the trial of an issue of fact. It is claimed that the decision on the former appeal was a decision on a question of fact and not of law, and that therefore the doctrine of the law of the case

could not apply. We quote what was said by respondent after asserting that important evidence must have been overlooked in the department decision:

"In the present instance it is not necessary to consider the question whether important evidence in favor of petitioner was overlooked on the former appeal for the reason that many new witnesses and much additional evidence was introduced on the last trial to which the previous decision of this court, not having had it before it, could have no application whatever."

Since appellants claim the evidence on this trial is substantially the same as on the last, and respondent contends it is different, and is sufficient to justify an affirmance of the judgment, we will discuss the former decision. Estate of Baird, 182 Cal. 338, 188 Pac. 43. And as respondent seeks to avoid the effects of the former decision and claims it is not only erroneous but that it does not establish the law of the case, it will be proper to consider the contention, although the nature and effect and the scope of the doctrine have been so frequently considered in this state that further discussion of the subject would seem to be a work of supererogation.

The reasons for the rule known as the law of the case are not always stated in the same way; in fact, various reasons have been assigned for this well-established principle. At the outset of the discussion and before commenting upon the cases cited by the respondent, we may say that an excellent discussion of the subject of the law of the case as established in this state will be found in 2 California Jurisprudence, 944, beginning with section 555, to and including section 569. The reason for the rule is stated in section 556. We will not undertake an elaborate discussion of the multitude of authorities in this state upon the subject of the law of the case. In a discussion of the principle excerpts from opinions may be misleading or entirely inaccurate. For instance, one of the cases relied upon by the respondent is Allen v. Bryant, 155 Cal. 256, 100 Pac. 704, where it is said:

"The sole reason for the existence of the doctrine is that the court, having announced a rule * * * applicable to a retrial of facts, both parties upon that retrial are assumed to have conformed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal."

If this were the sole reason for the existence of the principle, it might be true that in this case we would be justified in disregarding the law of the case for the reason that upon the last trial the respondent, at least, in his proposed instructions to the jury, hereinafter discussed, did not attempt to conform to the rule laid down upon the former appeal. There are, however, other

reasons for the rule sufficiently set forth in the section cited in 2 California Jurisprudence, to which we shall refer without further discussion.

[1, 2] The rule of the law of the case may be succinctly stated as the rule requiring both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong. It is sufficiently obvious as scarcely to require a statement of the proposition upon this appeal that the decision of this court upon the second appeal established as the law of the case that all the evidence adduced at the previous trial was insufficient as a matter of law to establish a legal adoption of the child. If any authority is needed for so obvious a proposition it will be found in a decision by this court in bank in *Brett v. S. H. Frank & Co.*, 162 Cal. 735, 738, 124 Pac. 437. It was there held that a decision on appeal that the evidence in the case was insufficient to go to the jury, and that the court should have granted a nonsuit was the law in the case, and that where the evidence upon the next appeal was not materially different the law of the case should control in the decision, both in the superior and appellate courts. The rule is also well stated by Mr. Justice Hart in the opinion of the District Court of Appeal, Third District, in *Merchants' Nat. Bank v. Carmichael*, 50 Cal. App. 749, 196 Pac. 76, with a collation of the authorities, as follows:

"If then, it be true that, as counsel for respondent contend is the fact, that the evidence received at the two trials of the action is substantially the same in all vital particulars, it of necessity follows that the doctrine of the law of the case applies, and per consequence the instrument sued on must be held to involve a stated account; and this would be so even if it were necessary to concede that the Supreme Court was in error in holding that said instrument involved an account stated. See 2 Hayne on New Trial and Appeal, p. 1658; *Dewey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 685; *Gunter v. Laffan*, 7 Cal. 588; *Cordier v. Schloss*, 18 Cal. 576; *Phelan v. San Francisco*, 20 Cal. 39; *Haynes v. Meek*, 20 Cal. 288; *Davidson v. Dallas*, 15 Cal. 75; *Ritter v. Stevenson*, 11 Cal. 27; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Jaffe v. Skae*, 48 Cal. 540; *Sharpstein v. Friedlander*, 63 Cal. 78; *Blankenship v. Whaley*, 142 Cal. 566, 76 Pac. 235; *Franz v. Mendonca*, 146 Cal. 640, 80 Pac. 1078; *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767; *Ellis v. Witmer*, 148 Cal. 528, 83 Pac. 800; *Emerson v. Yosemite*, 149 Cal. 50, 15 Pac. 122; *Reeve v. Colusa*, 151 Cal. 29, 91 Pac. 802."

[3-5] Upon the second appeal the court will not only look to the opinion of the court on the previous appeal, but also to the record for the purpose of determining whether or not the law of the case should control in the determination of the second appeal. *McKin-*

lay v. Tuttle, 42 Cal. 576; *Otten v. Spreckels*, 183 Cal. 252, 254, 191 Pac. 11. The respondent, after stating the rule of the law of the case, claims that this principle has no application whatever to the trial of an issue of fact. To avoid misunderstanding, we quote in part from the brief as follows:

"The decision of an Appellate Court upon a law point is, of course, controlling even if erroneous through all subsequent proceedings in the case, both in the trial court and in the Appellate Court again. There can be no question that this is the law in California as it is in every other jurisdiction. This principle has no application whatever to the trial of an issue of fact, otherwise it would be quite unnecessary for the Supreme Court ever to grant a new trial. Granting a new trial is for the purpose of setting the case at large so that the successful party, against whom a decision has been reversed, may make out a better case and that the other side, if errors have been committed against him, may conduct himself in such a manner as to obtain a decision in his favor. It is not a decision that the testimony of the witness is not to be believed nor does it preclude the trial court from receiving the former evidence and drawing from that evidence any proper conclusions. 'It is settled beyond controversy that a decision of the Court of Appeal, as to question of fact, does not become the law of the case.' *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. It is only where the exact case is again presented to the trial court upon the same evidence that the doctrine of the law of the case has any application and even, in that instance, its application is very much modified by certain principles to which we now direct attention. * * *

In support of this contention the case of *Allen v. Bryant*, supra, is cited. It is claimed that this decision establishes two principles which we will state in the language of the respondent:

"First, that the application of the doctrine of the law of the case does not apply where the evidence is different and, secondly, that it does not apply where it appears that the previous decision overlooked important evidence. * * *

As we have already pointed out, neither of these propositions is supported by the authorities. The evidence may be different, and yet unless it is substantially different in a material respect, the doctrine of the law of the case applies, and it applies notwithstanding the fact that in the previous decision evidence contained in the record is not quoted or cited in the opinion. These principles are established by the case of *Brett v. S. H. Frank & Co.*, supra, and the case of *McKinlay v. Tuttle*, supra.

The appellate courts in this state have no jurisdiction to pass upon questions of fact as distinguished from questions of law. If the court should inadvertently attempt to decide a question of fact as distinguished from a question of law, that decision would,

of course, not be binding. As we have already said, however, to determine that the evidence adduced at the trial, with all the inferences properly deducible therefrom, does not support the claim of adoption, is a determination of a question of law.

We have declared that under the doctrine of the law of the case the decision rendered upon the former appeal is binding both upon the trial court and upon this court. There are statements in some opinions by this court which justify some further discussion of that matter in view of the fact that the respondent insists that the former opinion is not binding because it passed upon a question of fact. In the case of *Sneed v. Osborn*, 25 Cal. 619, 628, this court, in denying a petition for rehearing, declared:

"Facts are stated, in the opinion of the court, solely that the course of reasoning adopted by the court, and the principles enunciated, may be the better understood. The court does not assume to find the facts in a case, for it has no authority to do so, except in case where an ultimate fact results, as a conclusion of law, from the proof of certain prior facts. If this court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the court below, and cannot prejudice the parties, where a new trial is had. It is upon questions of law, that the decision of the appellate court becomes the law of the case, and not upon questions of fact."

This observation of the court in denying a rehearing was directed to a situation where the court for the purpose of deciding the questions of law involved in the case states sufficient of the facts involved to disclose the pertinence of the law points decided. It had no reference to a case where the whole decision turned upon the sufficiency of the facts established by the record to support the judgment of the trial court.

In the case of *Robinson v. Thornton*, 114 Cal. 275, 46 Pac. 79, it was said, with reference to a prior decision in the case:

"But it was further decided * * * that the evidence taken at the former trial was sufficient to warrant the finding that Thornton did have such possession for said statutory period, and the judgment was reversed on account of said adverse possession of Thornton. But the question of such adverse possession is one of fact, and upon a subsequent trial the jury were not estopped by the decision of this court from finding the issue of such adverse possession differently from the finding at the former trial. They might have found that issue differently, even though the testimony was the same as at the former trial, but, as a matter of fact, there was at the latter trial additional testimony on that point. It was for the jury, therefore, to determine whether or not there was such adverse possession; and the court erred in taking that question away from the jury."

As we understand this case, it merely holds that when the question of adverse possession is involved in a case upon conflicting evidence, the jury may decide either way, and if upon one appeal it is held that there was sufficient evidence of adverse possession to support a finding and judgment based upon such adverse possession, upon a retrial the court or jury may determine the conflict in exactly the opposite way and would not be precluded from doing so because of the fact that on a former appeal the court has held there was sufficient evidence to justify a finding to the contrary. This case is not authority for holding that where upon an appeal the court has held that the evidence is insufficient as a matter of law to establish a fact, that the same question can again be submitted to a jury and decided adversely to the conclusion of the appellate court upon the matter of law.

The decision of this court in *Sneed v. Osborn*, supra, and the decision in *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000, are cited in the opinion in *Allen v. Bryant*, supra, in support of the doctrine there enunciated. The decision in *Wallace v. Sisson*, supra, was concurred in by only three justices in bank upon the point to which that case is cited, and was concurred in by the fourth justice (Garoutte) upon the ground that the evidence in the record under review was not the same as that presented to the court upon the former appeal. The point concurred in by three justices in bank was not a decision by the court. If the opinion in *Allen v. Bryant*, supra, justifies the contention of the respondent, it is not supported by the authorities cited and is in conflict with and in effect overruled by the subsequent decisions of this court hereinabove quoted. This must be true because a decision by this court that the evidence is insufficient to justify a finding or a judgment is necessarily a decision upon a question of law, for upon no other theory could the court pass upon the question. It should be further said with reference to the decision in *Allen v. Bryant*, supra, that upon the second appeal the court was of the opinion that upon the former appeal the District Court of Appeal had invaded the province of the jury in passing upon the credibility of witnesses.

It is clear from the foregoing discussion that the last decision was a decision upon a question of law and not of fact and that without regard to the correctness of the statement of the evidence or the legal principles declared therein said decision established the law of the case and was binding on the court below as it is binding here.

[6] 2. We will next consider respondent's contention that the first department decision (*Estate of Baird*, 173 Cal. 617, 160 Pac. 1078) established the law of the case. Respondent's contention is that there is a conflict

between the first and the second department decision and that—

"It is not at all clear that this conflict in these decisions does not take away the application of the rule of the law of the case and set everything at large under the decision of this court in the case of *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635. This much, however, is clear, the petitioner has as much a right to invoke the application of the law of the case based on the first decision rendered by Mr. Justice Shaw as the appellants in this case have a right to apply the rule of the law of the case based on the second decision."

In view of the fact that the concurrence of one of the justices was limited to the single ground that the trial court erred in refusing respondent's demand for a jury trial, the decision on that question would alone constitute the law of the case, since the concurrence of three justices is necessary for a department decision. Section 2, art. 6, Const.; see, also, section 4, art. 6, Const., as to the District Courts of Appeal before the amendment of 1917 (Stats. 1917, p. 1956); *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70; *Matter of Coburn*, 165 Cal. 202, 131 Pac. 352. In addition to this, the first department decision expressly refrained from passing on the sufficiency of the evidence to constitute an adoption in these words:

"Nothing we have said is to be taken as an expression of opinion on our part regarding the sufficiency of the evidence to prove that the decedent received the child into his family and treated it as if it were a legitimate child."

[7] 3. We will now take up respondent's contention that the additional evidence received on the last trial put the case at large so that the doctrine of the law of the case would not apply.

The briefs of appellants have undertaken to segregate the additional from the former evidence, but respondent's brief, after contending that the doctrine of the law of the case does not apply, presents both classes of evidence together. The testimony relied on in this connection is, first, that of Miss Valencia's masseuse, who did not testify on the second trial, to the effect that in a conversation with decedent in the St. Helen Apartment while Miss Valencia was present the witness asked him why they did not get married. His reply was they would "some day but it cannot be done now. My mother is too prejudiced, she is too bitter * * * against him presumably being married to Miss Valencia," that she asked him if he had not shown his mother the baby and offered to take it to his mother, but he said:

"She is too bitter. * * * It would not do any good. She is made of stone. * * * Q. Did Mr. Baird indicate to you at that time in his conversation whether or not his mother knew about the baby being in existence? A. He said his mother knew of the beautiful baby,

that he himself had told her, but that she did not—she turned a deaf ear to it all. Q. He said, though, that she had never seen the baby? A. He said she had never seen the baby, that she did not want to see the baby."

In Miss Valencia's testimony as to the incident she did not state that decedent said his mother knew about respondent.

We will at this point consider the purpose for which this testimony is competent. The position of appellants with reference to it is that it cannot aid respondent because—

"It is not evidence that Mrs. Baird did know of the existence of the child, or that deceased ever did tell her of it. * * * If offered as proof of the fact that decedent did tell his mother of the child, this evidence would have been clearly hearsay and inadmissible. It was, however, admissible as bearing upon decedent's attitude toward the child."

Section 1853 of the Code of Civil Procedure declares:

"The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible * * * to that extent against his successor in interest."

Section 1870, subd. 2, Code of Civil Procedure, provides:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * (2) The act, declaration, or omission of a party, as evidence against such party."

The testimony of this witness cannot be regarded as a declaration against interest, for to be competent as such the declaration must be against a pecuniary or proprietary interest at the time when made, in the absence of a statute. *Smith v. Hanson*, 34 Utah, 171, 96 Pac. 1087, 18 L. R. A. (N. S.) 520. Here any interest of decedent which might have been involved at the time he made the asserted statement was entirely too remote to give it probative value within the requirements of a declaration against interest. As distinguished from a declaration against interest, the statement was an admission to the witness of paternity and of his attitude toward the child. We conclude that the statement of decedent in the conversation with the masseuse was an admission of his paternity and of his attitude toward the child, propositions as to which a great deal of evidence was introduced in the former trials; it was, however, not competent evidence that decedent told his mother of the existence of the child. It follows that the part of this testimony which is competent is addressed to the elements of paternity and public acknowledgment—which were assumed in the last department opinion to have been established. We do not understand that respondent's brief claims the evidence was admissible other than as tending to prove public acknowledgment of paternity.

The portion of the testimony of this witness held to be admissible, whether it be regarded as tending to prove public acknowledgment or as showing the attitude of decedent toward the child, presents no new principle; but, as we have stated, it was not competent to prove decedent told his mother of respondent.

The next additional evidence was furnished by Miss Valencia. She testified to the effect that in 1905, when decedent, his mother, and a Miss Klein, a friend of the Baird family, were returning from a European trip, she took the same train from Chicago to New York and occupied a berth adjoining the one occupied by Mrs. Baird; that Mrs. Baird upset an ink bottle, asked Miss Valencia's permission to sit in the same seat with her while the damage was being repaired, which request was granted, and that she recognized Mrs. Baird and thinks "she must have known me"; that Mrs. Baird suddenly left the seat and called to her son; that at dinner time he said to her, "You must leave this train"; that she heard his mother say "she would not travel an inch with that Valencia woman. You put her off this train." That he left for San Francisco that evening with his mother, but she remained over in Chicago two days, and he met her at the ferry when she arrived in San Francisco. Mrs. Baird, in her deposition, disclaimed any knowledge of Miss Valencia being on the same train with her and her party.

Miss Valencia also supplied this additional evidence: She testified for the first time that she met Mrs. Baird at the physician's office when decedent was confined in the sanitarium, but that she would not recognize her; that the Baird family had her arrested for vagrancy in 1903 on a complaint sworn to by the attorney for the Baird family. The occasion of decedent being in the hospital will be later referred to. She also testified that Mrs. Baird tried to have her excluded from the hospital but that decedent told the physician he wished her to come. Two police officers, one in rebuttal, neither of whom appeared in the earlier trials, also testified that Miss Valencia was arrested on the charge of vagrancy in 1903, and that it was dismissed in the police court. They also testified that decedent protested the arrest and Miss Valencia quoted him as saying he would tell the attorney "to lay off this business and let you live in San Francisco, and I will have him tell the family, my sister and my mother, to leave us alone." It may be assumed from this and other evidence on the point that the jury inferred that in 1903, about the time it is claimed decedent tried to borrow \$5,000 from his sister to get rid of Miss Valencia, the attorney for the Baird family swore to the complaint in question and that he and decedent's sister were active in an attempt to break up the relationship.

Miss Valencia also testified that before

leaving 1310 Divisadero street to go to the St. Helen Apartments, two police officers came there and said to her, "Well, we have orders to come here and back up a wagon for you"; that decedent reported he had been to the police station about the matter and told her: "You will not have any more trouble, I told them you were my wife and this was my baby, and I was supporting this place." The child was not born at the time, and when this was called to her attention she offered an explanation. Miss Valencia was the only witness who gave testimony as to this incident. Under the rule applied to the testimony of the masseuse, the statement imputed to decedent that he would tell the attorney to deliver his message to his relatives is not evidence that it was delivered, nor is the statement of the police officers proof that his relatives knew the couple lived together at 1310 Divisadero street or that they were responsible for the statement of the police officers. Miss Valencia also testified that Mrs. Baird saw her and the child at a dry goods store "more than once" in January, 1908, that she only stared at them and walked out of the store because they were there; and that when Mrs. Baird's deposition was being taken she refused to remain in the same room with Miss Valencia. The latter enlarged on her former testimony that the ring "Dave to Dodie" was a wedding ring given to her before the birth of respondent; that decedent always wanted to marry her, and of her refusal to marry him when one of the unmarried couples, later referred to, were married in Redwood City a few weeks before he died.

The physician gave additional testimony to the effect that when decedent was in the sanitarium Mrs. Baird asked him if he would prohibit Miss Valencia from calling on the patient; that she referred to Miss Valencia as a very bad woman, and that she asked him if he knew they were not married, to which he answered, "Yes." Mrs. Baird denied that she had seen Miss Valencia at the sanitarium, and the physician said he did not believe she did. On the last trial the physician made this additional statement:

"Dave had asked me to keep this quiet as long as I could. He did not want me to file the certificate at all; neither did Miss Valencia. But it was the law, so I had to do it. I went to the health office. At that time Dr. * * * was in the office. * * * I asked him to keep that certificate from getting into the papers, so Mrs. Baird would not find it out. * * * David Baird asked me not to file the birth certificate so his mother would not find it out. I asked the man in charge of the health office to hold it up and keep it out of the newspapers, that David wanted it."

The deposition of the milliner was not offered on the second trial, but was read into the record on the third. Her testimony is to the effect that she saw decedent at the abodes playing with respondent; that they went by

the name of "Tyler," but that she did business with decedent under his true name and knew Miss Valencia as "Mrs. David J. Baird." This new evidence is clearly cumulative, as it is addressed to subjects concerning which a great deal of testimony had been received on the former trials.

Two real estate partners testified that about two months prior to decedent's demise he commissioned them to sell the place at 230 I street, and to secure a house north of the park in the Richmond district; but that decedent's death intervened to prevent the transaction from going through. In connection with the proposed property deal Miss Valencia testified that decedent was at that time planning "to take her and the baby away from San Francisco for good." This apparent inconsistency was sought to be explained on cross-examination. A shoe clerk testified that decedent told him he would marry Miss Valencia when they were settled at 230 I street.

Miss Valencia's additional evidence presents no new facts within the contemplation of the rule. The portion covering the asserted train incident, the meetings with Mrs. Baird in the physician's office, the episode at the taking of the deposition, the occasions at the dry-goods store, the arrest for vagrancy, and the action of the officers at 1310 Divisadero street, all tend to prove Mrs. Baird's hostility toward her, as did the statements made by Mrs. Baird to the physician, but, as will presently be shown, the hostility of Mrs. Baird and her daughter toward Miss Valencia was to be inferred from the evidence on the previous trials. The additional testimony of the physician covering his efforts to keep the contents of the birth certificate out of the newspapers is along the line of his previous statements that decedent did not want his mother to know about respondent and that he thought it was the fault of the board of health the certificate was not seasonably filed.

[8] At this point we will state the legal test by which it is to be determined whether the change in the evidence is sufficient to avoid the rule of the law of the case.

The authorities use such expressions as that the new evidence must be "materially," "essentially," or "substantially" different before it can be held the doctrine does not apply. (2 Cal. Jur. 557 et seq.; *Brett v. S. H. Frank Co.*, 162 Cal. 735, 124 Pac. 437; *McEwen v. New York Life Ins. Co.*, 187 Cal. 144, 201 Pac. 577, cited in *Burns v. Jackson*, 53 Cal. App. 345, 347, 200 Pac. 80; *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 Pac. 259; *In re Cook*, 83 Cal. 415, 23 Pac. 392; *Heidt v. Minor*, 113 Cal. 385, 45 Pac. 700; *Daniel v. Smith*, 75 Cal. 548, 17 Pac. 683; *Muller v. Swanton*, 17 Cal. App. 232, 119 Pac. 200; *Morrell v. San Tomas Drying, etc., Co.*, 30 Cal. App. 194, 157 Pac. 818. The rule is binding as to questions which involve and

are controlled by the same principles. *Tally v. Ganahl*, 151 Cal. 418, 90 Pac. 1049.)

"Additional evidence merely cumulative to evidence of the same class given on the first appeal, will not carry a question outside the operation of the rule as to 'the law of the case,' but to successfully escape the rule a new and substantive fact must be brought into the case on the subsequent appeal." *Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 27 Am. St. Rep. 363.

[9] None of the additional evidence is essentially different from that received on the second trial. It does not present any new substantive fact, it involves no new principle, and where it supplements the former evidence it comes under the cumulative rule.

4. We will pause at this point to consider respondent's contention that the additional evidence answers paragraphs H and I of the law of the case, *infra*. Concisely stated, the claim is that because of the hostility of the Baird family toward the mother and child decedent did not acknowledge his paternity nor introduce respondent to his relatives.

After quoting from paragraph I of the law of the case, *infra*, the brief continues:

"In the former appeal it was ruled as one of the grounds of reversal that the illegitimate child was not introduced to and known by the decedent's mother and his blood relatives. In the present case evidence was introduced to show why the child was never taken to decedent's mother. This evidence related to the hostility of the mother and of decedent's family toward the child's mother and to the child itself, and to the necessity which the decedent was under of keeping the child and its mother away from his family."

First, with respect to the animus of the Baird family toward Miss Valencia: Notwithstanding the evidence is not new on this trial, we will describe in this connection certain episodes asserted to have occurred in 1903-4, which may be conceded to be the basis of such hostility as Mrs. Baird and her daughter entertained for Miss Valencia.

Early in the litigation the depositions of Mrs. Baird and her daughter were taken. They were read in evidence on each of the three trials. It appears from these depositions that the sister of decedent testified that in the fore part of 1903 she was notified over the telephone to come to 318 O'Farrell street—"the Kingston"—to get decedent or he would be turned over to the authorities. The witness testified she found him suffering from delirium tremens in a room in which she afterward learned Miss Valencia lived and that when decedent saw her he exclaimed, "Oh, my God, have they brought you here?" He was taken to the residence at 2513 Pacific avenue, where he was then residing with his sister, and on the following morning he appeared to her as being in a more rational state of mind. However, she observed, as he lay in bed, a pistol on his

mattress, as he declared, "Those thieves have taken my watch and I am going after them." She became alarmed and reported the matter to the police commissioner, a friend of the Baird family. It was this and other circumstances that led us to the conclusion that the jury would have been justified in inferring that the charge of vagrancy emanated from the police commissioner and decedent's sister. The witness also testified that not long after the above incident she was informed over the telephone by a Mrs. Rogers, residing at 1776 Pacific avenue, that a plot had been hatched to marry decedent to Miss Valencia. She quotes Mrs. Rogers to the effect that the ceremony was to be performed at a beach resort, and that a colored minister was to officiate. The witness enlisted the aid of her brother, who, with a friend of the family, called at 1776 Pacific avenue; but it appears Mrs. Rogers was not in. Nothing further appears in the record concerning the incident.

According to the witness it was about this time decedent tried to borrow the \$5,000 from her to buy Miss Valencia off. Concerning this proposal a meeting was held in the office of the family attorney, and evidently the money was refused; the witness declaring she did not believe Miss Valencia would go away. The sister testified this was the first time she ever heard of Miss Valencia. As we understood the record, the next event which was brought to the attention of decedent's relatives was when an account of the asserted stabbing of decedent by Miss Valencia appeared in the newspapers. Miss Valencia's version of decedent's injury was that he was cut by a piece of glass; the physician described it as a lacerated wound. Decedent's sister discussed Miss Valencia with her brother and said that he "ought to quit, * * * that he had given us enough notoriety."

It would appear from the evidence that Mrs. Baird was in Europe at the time of decedent's attack of delirium tremens, the marriage plot and the money matter. She testified to a conversation with her daughter on her return, however, and stated:

"She told me that David was going with some woman by the name of Valencia; that she didn't think she was a very nice woman."

The witness asserted this was the first time she ever heard of Miss Valencia. Mrs. Baird was in San Francisco, however, when decedent was taken to the hospital, and upon reading about it in the newspapers she visited him at the sanitarium. He told her he had been "cut by this woman"; begged her pardon and said he was "very sorry such a thing had happened to him, that he was quit of this woman, and he promised he would never have anything more to do with her." We will presently discuss the testimony of Miss Valencia and the physician,

from which it appeared decedent did not intend to keep the promise to his mother.

Mrs. Baird testified that when she was in Europe in 1905, Mrs. Hopkins, a friend of the family, quoted the sister to the effect that the Baird estate advanced money to decedent to get rid of Miss Valencia. The Baird estate collected a claim against decedent's estate for \$7,700, represented by his promissory note dated November 1, 1905. There is no other testimony connecting Miss Valencia with this money and it does not appear she was questioned about it. The note must have been executed after decedent returned with his mother from the European trip of 1905, when it is claimed the train incident occurred.

Decedent's sister also testified that in 1904 a warrant of arrest was caused to be issued to take decedent into custody on a charge of insanity, and that after the San Francisco disaster, and up to the time of decedent's demise, she was not aware the couple kept up their relations.

Whatever the merits of the evidence touching these episodes may be, we do not attempt to decide. Our purpose in referring to this evidence is to show that Mrs. Baird and her daughter had learned of Miss Valencia as early as 1903; that they must have condemned her association with decedent, and that their attitude toward her has been a part of the evidence on all the trials.

Now, with regard to the claim that the members of the Baird family were hostile to respondent: There is no evidence tending to dispute the testimony of Mrs. Baird and her daughter that the first time they heard of the child was after decedent's death. Of course, if they did not know of the baby before that event respondent's present contention must fail.

Upon this point we will review the evidence as to each member of the Baird family. The testimony of Miss Valencia is that when Miles T. Baird called at the St. Helen Apartment in April, 1907, before leaving for Australia, the child was asleep in another room, and that decedent remarked to him, referring to respondent: "Miles, he is a dandy. He beats your boy all hollow." The connection of this brother with the case is singular, to say the least, and upon the surface of things unaccountable. He never testified for either side, and respondent offered evidence that he was in King City at the time of the last trial. In one part of the record there is a mention of his deposition, but if one was taken it has not appeared in evidence. Some time following his departure for Australia, in 1908 it appears, his mother joined him at Hull, England, and together they journeyed to San Francisco, arriving after decedent's death.

It appears that this brother had transactions with Miss Valencia following decedent's demise. It was suggested that Miss

Valencia knew Miles T. Baird before the relationship with his brother was formed. A question was put to her and she answered: "That has always been the opinion, but I did not." By way of supporting the claim that decedent had his residence with the mother and child, it was testified he kept his clothes in those places. The wardrobe was not produced by respondent at the trial, and there is evidence that an extensive wardrobe was found in decedent's room at the Fairmont Hotel after his death. Accounting for her failure to produce the wardrobe at the trial, Miss Valencia explained that when Miles T. Baird was prosecuted on a criminal charge after his return to San Francisco and was released, he had no money and appealed to her for decedent's clothes, which she gave to him. The other side submitted evidence that about this time he gave Miss Valencia a check for \$150, which check was not honored. It also appears from her testimony that there were other money transactions between them. At all events, it is not claimed that Miles T. Baird was hostile to respondent.

Benjamin H. Baird related a conversation he had with decedent at the Hotel Robins in September, 1908, at which time the witness stated decedent had been drinking and seemed greatly worried. We quote: "I am ashamed to walk the streets"—owing to Miss Valencia's claim that he was the father of respondent. When asked why he drank so much, he answered:

"That is the only peace I have, is when I am drinking. * * * This woman, Dodie Valencia, has gotten it all around that a child she has is his.' I said, 'Why don't you put a stop to it?' and he said, 'I am cut up enough now.' * * *"

It is not claimed that Thomas R. Baird ever heard of the relationship or of respondent before decedent's death.

Notwithstanding the evidence to the contrary, it is claimed that Miles T. Baird and Benjamin H. Baird must have informed Mrs. Baird and her daughter of the child after they learned of its existence. As already indicated, Miles T. Baird talked with decedent about respondent in April, 1907, and joined his mother in England in 1908; but there is absolutely no evidence that he mentioned the child to her, to his sister, or to his half-brothers. In the state of the record, to hold to the contrary would be to draw one inference from another. So, too, as to Benjamin H. Baird. He testified he did not repeat to his relatives the conversation he had with decedent at the Hotel Robins about the mother and child. Moreover, his mother was in Europe and his sister in New York from the date of the conversation until after decedent died. It is also claimed that the colored family coachman or his wife must have mentioned respondent to Mrs. Baird. The records show the coachman testified on

the first and second trials but not on the last trial. His wife did not testify at all. His testimony was to the effect that a member of a well-known San Francisco family told him it was being claimed decedent was the father of a child; also, that a downtown merchant said to him: "Well, Miss Dodie Valencia claims that she has a baby by David." The witness describes himself as backing away and refusing to listen. He testified that about a month after the incident with the merchant he repeated the charge to decedent who denounced it as a lie and concluded with an aggressive remark about the merchant. The witness denied mentioning the matter to Mrs. Baird. He served the family for 35 or 40 years and it is stated in respondent's brief that because Mrs. Baird presented him with a home he was no doubt influenced in his testimony. Here, again, there is no foundation for an inference that the witness repeated to the other members of the Baird family what had been said to him about the baby. The same rule applies to other testimony. It was shown there were photographs of respondent in decedent's room at the Fairmont Hotel at the time of his death and it is claimed an inference is justified that Mrs. Baird saw the photographs, that she inquired about them and thus learned of respondent's existence. But here, too, to draw an inference from this circumstance alone would be to enter the realm of speculation and conjecture.

The testimony of the masseuse that the couple used the name of "Tyler" because of the hostility of Mrs. Baird to the mother and child is open to the objection that it was hearsay. At most, it was a conclusion of the witness. It does not appear that she ever saw or came in contact with Mrs. Baird or had any knowledge of her bearing toward the mother or the child. The testimony of the milliner as to Mrs. Baird's attitude and the reason for the use of the name "Tyler" is objectionable upon similar grounds. Miss Valencia's testimony touching the asserted visits of Mrs. Baird to the dry goods store is essentially a conclusion of the witness and is not evidence that Mrs. Baird knew or recognized them or either of them.

Another point is made in this connection. Answering the statement in the last department decision that decedent was not estranged from his relatives, the claim is made that from the time the association of Miss Valencia and decedent began he separated himself from his blood relatives, was estranged from them, and that their intercourse thereafter was confined to business matters connected with the Baird estate. The claim of separation and estrangement is entirely without foundation. No evidence has been offered to controvert the statement in the opinion that the relations between decedent and his mother were of the most intimate and affectionate character. When John R.

Baird, his eldest brother, died in December, 1905, decedent was most solicitous for his mother in her bereavement. For a time he slept in the same room with her and constantly showed her every attention. We have stated he was with her in Europe in 1905. He joined her and Benjamin H. Baird in the home of his sister in New York in the winter of 1907-08 on their return from Europe. The relations between decedent and his sister and brothers were such as usually obtain between relatives of that degree. His half-brothers, when they were in San Francisco, were frequently in his company and were entertained by him. In support of the claim of estrangement the point is made that decedent's sister had urged the mother not to give money to the boys, but there is no intimation that she sought any advantage for herself in making this suggestion. The mother was, nevertheless, generous with her sons. It is shown that there was a difference of opinion between decedent and his sister as to two business matters. When she was keeping house for her brothers at 2513 Pacific avenue, the decedent refused to pay what she regarded as his proportion of the cost of some concrete and other work about the premises. He took the position that the regular monthly sum he paid was in full for everything. They failed to agree on this point and decedent gave up his room and went to live at the Grand Hotel, which was his home at the time of the asserted stabbing. The second incident occurred on January 4, 1908, while visiting his sister in New York after the European trip of his mother and Benjamin H. Baird. He tried to sell his sister a portion of his stock in the Baird estate. She declined the offer and said she would advise her mother not to buy it, but that they each would give him \$1,000 to help him along. He became angry at this, and, according to her testimony, his relations with her were somewhat strained during the remainder of the visit. His mother decided to purchase the shares. The party remained in New York until January 9, when they started for San Francisco, arriving on January 13. It is these three incidents upon which respondent must base the claim that decedent was estranged from his relatives. There is evidence that decedent corresponded with his sister and that when he was abroad in 1905 he sent her a gift. The briefs of appellants do not question that following the episodes referred to both the daughter and her mother were opposed to decedent's relations with Miss Valencia, but it nowhere appears that the disclosures ever disturbed the affectionate regard the members of the family had for each other; and there is no trace of proof to the contrary. When the relatives were in San Francisco decedent was frequently in their company and their relations with him appeared to be harmonious. On Christmas Day, 1906, less than

three weeks after the birth of the child, Mrs. Baird had her sons at dinner, and until she left for Europe in April, 1907, the decedent was often in her company. He provided for his mother and half-brothers in his will and expressed himself as satisfied with it in 1907, nearly a year after the birth of respondent and at the very time it is claimed he was estranged from his relatives.

Finally, it may be assumed in the light of the evidence that apart from the child decedent's relatives would be opposed to any kind of relations between him and Miss Valencia. But this has appeared to be the fact ever since the litigation was entered upon. It would, however, require something more than the bare assertions in respondent's brief to justify us in holding that if decedent evinced a desire to adopt the innocent child his relatives would have been hostile to the idea, or, if they were, it would prevent him from making him his heir. There is no phase of the evidence in this case which would justify us either in concluding that in addition to Miles T. Baird decedent's other relatives knew of the child, or that their attitude in respect to it was responsible for decedent's failure to treat respondent as the father of a legitimate child would treat his offspring.

[10] 5. It is claimed by appellants that certain instructions proposed by respondent and given to the jury ignore the principles of law laid down in the last department decision on the issues of receipt into family and otherwise treating the child as legitimate. In this connection it is argued that when these instructions are compared with other instructions that were given in accordance with the principles laid down in the decision "it is impossible to tell which was adopted by the jury in reaching their verdict (*Rathbun v. White*, 157 Cal. 248, 253, 107 Pac. 309)." We are satisfied appellants' contention must be sustained.

Upon the last appeal it was necessary to lay down certain principles of law and to determine whether or not the evidence in the case satisfied those principles, failing in which it was declared that the evidence was insufficient to sustain the judgment. These principles were not only announced in the last department decision in plain and unmistakable terms, but were embodied in the instructions given to the jury upon the trial now under review.

The court on the last trial gave to the jury paragraphs F, G, and I of the law of the case, *infra*, substantially in the language of the decision.

That the last department decision established these principles as a matter of law was clearly recognized by the respondent in the petition for hearing in bank filed upon the second appeal. We will quote from that petition some of the statements therein set forth in black-faced type, not for the pur-

pose of binding the respondent by the more or less hastily prepared petition, but for the purpose of showing that the respondent then recognized that the decision did establish certain principles of law which, of course, would be controlling upon a new trial. It was asserted in the petition for hearing in bank after the last department decision:

"The record establishes that the decedent received the petitioner into his family as his child and a member of his family. * * * Any objection that the existence of decedent's family with petitioner was concealed from decedent's mother and other blood kindred goes to the point of public acknowledgment, and it has no force in respect to the condition of reception into family and treatment as a legitimate child where paternity and public acknowledgment of paternity are admitted. * * * The department opinion erroneously rules that decedent's reception into his family of petitioner as his child, was invalidated for the purposes of section 230, Civil Code, by reason of concealment of the existence of the family from decedent's mother and other blood relations. * * * The decedent's attitude and conduct toward petitioner establish his receipt of petitioner into his family as his child and member of his family. * * * The department opinion erroneously declares a rule that in cases arising under section 230 where the father is a bachelor, proof of his treatment of his child as if it were a legitimate child is not complete unless it includes evidence that the father informed his blood kindred of the child's existence and his family with the child. * * * The department overlooked, or failed to consider as material, a condition of the evidence showing that during a period of nine months while decedent was living with petitioner and petitioner's mother, in a household and home in San Francisco, and decedent performing daily acts evidencing that he had received petitioner into his family, and was in every way treating petitioner as if he were a legitimate child, the decedent's mother, sister, and brothers were without the State of California, and that during such period the adoption of petitioner was complete, and under circumstances where objection on account of any charges of concealment would be untenable, if such an objection could be tenable in any case. * * * The opinion concedes that decedent did not attempt to conceal his relations with petitioner and petitioner's mother, and that there was evidence that he freely, frequently and publicly proclaimed their relations. * * * The weight of the testimony concerning decedent using the assumed name of Tyler and his alleged concealment of the existence of petitioner and of decedent's family with petitioner, was a question specially considered in the trial court. * * * The opinion assumes a different state of facts concerning alleged cordiality between decedent and his kindred than is shown by the record, and gives such assumption false weight in overturning the verdict and judgment of the trial court. * * * The department opinion overlooks the force of evidence of public acknowledgment in eliminating all idea of concealment, and in its bearing on receipt into the family and otherwise treating the child as a legitimate child."

With this statement by the respondent before it, as to the nature and effect of the last department decision, the court in bank denied the petition for hearing therein. Having thus unsuccessfully petitioned this court in bank for a rectification of the asserted errors in the decision in department, the respondent was apparently more successful in the trial court, for that court instructed the jury in accordance with some of the contentions advanced in his petition for hearing in bank and in his briefs upon the previous appeal, which instructions he now seeks to justify and uphold upon the ground that the last department decision was erroneous, and that it was therefore unnecessary for the trial court to follow it. The instructions we are about to quote are inconsistent with those we have heretofore referred to in this opinion, also given by the trial court, and are, in part, as follows:

"If you find from the evidence that the deceased is petitioner's father and that deceased had no home but that of Lydia Valencia, and that the deceased and petitioner and petitioner's mother constituted the family of deceased, and that they resided in one house as a household and family, and that the deceased did receive the petitioner into his family and otherwise treat said petitioner as if he was a legitimate child, and if you find further that the deceased did at any time publicly acknowledge the petitioner as his own child, then your verdict should be for the petitioner."

This instruction entirely ignored the main point in the case, namely, the clandestine character of the family and the concealment and dissimulation practiced by the decedent in his relations with the child and its mother.

Another erroneous instruction was given upon the same subject, as follows:

"The court instructs you that a father, and his illegitimate child living with and supported by him, constitutes a family such as contemplated under section 230 of the Civil Code. Therefore, if you find from the evidence that David J. Baird, the deceased, and David Jennings Baird, Jr., the petitioner herein, resided together under such circumstances would be sufficient receiving into the family under the provisions of said section, notwithstanding the fact that the deceased and the mother of the petitioner were not married."

This instruction also wholly ignores what was declared in the last department decision as to the clandestine character of such "family" and the concealment and dissimulation practiced by decedent as the rule upon that subject was established by the said decision.

Another erroneous instruction was given which covered not only the subject of whether or not decedent received the child into his family, but also the question of public acknowledgment and the subject of otherwise treating the child. We will, for convenience, italicize portions of the instruction

to be subsequently quoted and referred to. The instruction is as follows:

"The law of this state establishes that an association between an adult unmarried father and his illegitimate child and the child's mother may constitute a family. This family is established by the living together as a household in like manner as legitimate families abide together, and are established and maintained. Therefore, *if such father and child and mistress establish a household and home maintained by the father, where they abide together apart from the father's blood relatives, and this association and manner of living together is proved by competent testimony, the status of family is impressed upon such association. And if such association is made publicly by the conduct of the father in his manner of living with his child and mistress, and he publicly acknowledges the child to be his own child, and receives and harbours the child as his own in such family association, and otherwise treats the child in the manner that fathers of legitimate families treat their children, and this public acknowledgment of paternity and association, between the father and child, is proved by the testimony of strangers, neighbors, tradesmen, and friends and acquaintances of the father, the law determines from such evidence that the father has effectually adopted his child under the provisions of section 230 of the Civil Code. In such a case, the failure of the father to advise his blood relatives of his relations with the child, or his denial and concealment of such relations from his blood relatives, would not prevent a complete adoption under section 230 of the Civil Code.*"

This instruction in its effect under the evidence may be epitomized as follows: Where an unmarried man, his illegitimate child, and the child's mother live together as a household in like manner as legitimate families abide together and are established and maintained; where they abide together apart from the father's blood relatives, they constitute his family, even if the family is a clandestine one living under an assumed name, and if he receives and harbors the child as his own in such family association he receives the child into his family within the meaning of that phrase as used in section 230 of the Civil Code. In such a case the denial and concealment of such relations from his blood relatives would not prevent a complete adoption under section 230 of the Civil Code if he publicly acknowledges the child as his own, and by his conduct such association is made public.

It will be observed that this instruction is complete in itself, for, after stating the various considerations which may result in adoption, it is said under such circumstances "the father has effectually adopted his child under the provisions of section 230 of the Civil Code."

This instruction is directly in the teeth of the decision of this court upon the previous appeal. It not only completely ignores the clandestine character of the family in determining whether or not the relationship under consideration is sufficient to constitute a

family within the rule announced in the previous decision, but it is also for that reason inconsistent with the other instructions to which we have referred.

The instruction not only permits the jury to determine that the relationship between the decedent, the child, and its mother constituted a family, although that relationship was clandestine, as above stated, but it also deals with the question of the public acknowledgment of the child and the question of whether or not it was otherwise treated as his own.

The instruction now under consideration upon the latter subject is as follows:

"And if * * * the father * * * otherwise treats the child in the manner that fathers of legitimate families treat their children, * * * the law determines from such evidence that the father has effectually adopted his child under the provisions of section 230 of the Civil Code. *In such a case, the failure of the father to advise his blood relatives of his relations with the child, or his denial and concealment of such relations from his blood relatives, would not prevent a complete adoption under section 230 of the Civil Code.*"

The instruction as a whole is in accordance with the view of the law unsuccessfully contended for by respondent in his petition for hearing in bank above quoted as follows:

"Any objection that the existence of decedent's family with petitioner was concealed from decedent's mother and other blood kindred goes to the point of public acknowledgment, and it has no force in respect to the condition of reception into family and treatment where paternity and public acknowledgment of paternity are admitted."

Respondent does not seek to justify these erroneous instructions otherwise than by attacking the last department decision, which criticisms we will consider under the next head.

We have held that the law laid down in the last department opinion became the law of the case. The principles thus declared are in accord with the evidence and the law. But even if this were not so, those declarations were binding on the trial court as they are binding here. The trial court had no alternative in ruling on the evidence and in instructing the jury but to follow the law declared in the last department decision. It was no part of the trial court's function to determine whether the former appeal had been correctly decided; its sole duty was to follow without question the principles established by that decision. This the trial court failed to do, and the instructions we have condemned are therefore prejudicially erroneous within the meaning of the Constitution (section 4½, art. 6).

6. We will, before bringing to a close the consideration of the general subject of the law of the case, and as in a sense entering into it, take up respondent's attack on the

last department decision as indicated by the following quotations from his brief:

"A perusal of the transcript will, however, demonstrate that one of two things is certainly true: (1) Either the evidence is essentially different on this appeal, or (2) this court upon the former appeal made a grave mistake in its decision by overlooking evidence establishing the fact that decedent did receive petitioner into his family and did treat him as if he were a legitimate child. Without any intended reflection upon this court, we will hereafter point out that the author of the decision in the Estate of Baird, 182 Cal. 338, 188 Pac. 43, not only overlooked much testimony favoring the contention of petitioner and which the trial court and jury found to be true, but the decision gave a false coloring to the testimony in spite of the fact that the opinion says: 'We shall resolve every question of fact in favor of petitioner.' We respectfully take issue with any claim that the opinion correctly or fairly sets forth the conditions of the evidence, and we submit that a fair consideration of the record in that case will convince that the opinion has resolved all questions of fact adversely to the petitioner even against the accumulated testimony of numbers of witnesses upon single points, and against the finding of the trial court and jury, that such testimony is true. * * *

We have purposely refrained from quoting the entire brief upon the subject, because if the attack does not pass beyond the bounds of just criticism, it is in any event entitled to a place in the opinion of this court. There is nothing new in this contention now advanced by the respondent, for exactly the same contention was presented by the petition for hearing in bank upon the former appeal and determined against respondent by a denial of that petition, all of the justices concurring except Kerrigan, J. pro tempore, who did not act. It is, for instance, stated:

"It thus appears that the department ignores the rule that in appeals the decision of the trial court is final on the question of credibility of witnesses and the weight of testimony. That the decedent gave the utmost publicity to the fact of his paternity of petitioner; and that his family consisted of himself, petitioner and petitioner's mother, and that he abided and had his home with his family at the St. Helen's Apartments and afterwards at the Octavia Apartments, and then at 230 I street from October, 1907, until his death on November 25, 1908, is established by such a large mass of testimony, determined by the trial court and jury to be true, that it is compelling on this court, under the law and practice governing the decision of appeals, to give full credit to such testimony to support the judgment appealed from."

This objection thus stated in the petition for hearing in bank and now repeated in the briefs upon this appeal was not considered by the court of sufficient importance to require another hearing or a modification of the opinion. Inasmuch, however, as the respondent has persisted in his views, and as

the trial court apparently accepted that view on the trial, we will further consider the contention.

The statements and discussion of the evidence in the petition for hearing in bank involve the following paragraphs from the opinion, which we will designate herein as paragraphs A, B, and C, respectively:

A. "A mass of evidence was introduced in support of and against the claim of adoption, but in the consideration of the question here we shall assume that upon the evidence, the verdict of the jury and the findings of the court, it was established that the decedent was the natural father of petitioner, and that he publicly acknowledged him as his own child. We will therefore discuss the evidence with special reference to the remaining propositions—whether petitioner was received into the family of the decedent, and by him otherwise treated as a legitimate child, and view it in the light most favorable to petitioner."

B. "In this summary of the evidence we have not attempted to cover every phase thereof, nor the numerous inquiries on cross-examination, nor the many apparent contradictions and inconsistencies as shown by the voluminous record before us, for the reason, as already indicated, that we shall resolve every question of fact in favor of petitioner. It may, however, contribute to a more complete understanding of the evidence to mention that the decedent in his relations with the mother of the child led a life of reckless dissipation, being habitually under the influence of intoxicants, and otherwise showing great demoralization; that for the most part the persons who figured prominently in their illicit relationship (excluding neighbors and those with whom they had business dealings), and upon whose testimony the case of petitioner very greatly depends, came into the life of the decedent through such relationship, some of them of loose morals and just the kind of characters it might be expected would be their mutual companions, associates, and friends. There are frequent references to lively automobile parties, the bill in one month for automobile hire amounting to over six hundred dollars, and, according to the evidence, only one man ever sharing with the decedent the expense of such entertainment; and to trips to the beach, to roadhouses, to cafés and the like, on occasions the entire night being given over to that kind of diversion."

C. "In this case the couple masqueraded as man and wife under a fictitious name assumed by the father and mother and given to the child in order to keep the decedent's family in ignorance of the meretricious relationship and of the child. As we have seen, the decedent was on cordial and intimate terms with the members of the Baird family. He constantly canvassed the affairs of the Baird estate with them, had other interests in common with them, corresponded with his mother and sister, arranged for the schooling of his half-brothers, and one year made a trip to New York to meet his mother on her return from Europe so that he might journey to San Francisco with her and other members of the family. In short, the relations between the decedent and his relatives clearly appear to be such, considering their respective modes of living, as usually obtain be-

tween a bachelor son and his relatives with whom he is on terms of cordial and affectionate intimacy, and plainly suggest that the motive for his course of conduct towards petitioner was to spare the Baird family humiliation. We think this is true in spite of the testimony of several of respondent's witnesses, from which it might be inferred that the decedent seized every opportunity to proclaim his shame, going so far, according to the testimony of the attending physician, as to name the child 'David Jennings Baird.' This witness, who had known Miss Valencia and the decedent for several years before petitioner was born, stated that he obtained the data for the birth certificate from the decedent, who was reluctant to give the information because 'he wanted to keep it from his mother.' It is worthy of mention that the birth certificate was not filed until February 14, 1907—more than two months after the birth of petitioner. This physician also stated that when he sent bills for his services to the decedent to the apartment or to the house he used the name 'Tyler,' and when to the Palace Hotel or the Fairmont Hotel, the name of 'Baird.'"

We quote the following paragraphs from the law of the case and refer to them herein as paragraphs D, E, F, G, H, and I, respectively:

D. "If this was a family, it was a clandestine family, using the word 'clandestine' to describe the character of the family rather than the relationship that existed between the father and the mother of the child."

E. "It is the attitude of the father toward and his conduct in respect to the child, and not the character of his relationship with the mother, which is the true test in determining whether the child was received into the family of the father."

F. "It would be a violation of the letter and spirit of the statute to hold that 'the father of an illegitimate child' has received it 'into his family,' where the existence of the 'family' rests upon concealment and dissimulation well calculated to keep from his own relatives, who are living in the same community and with whom he is on terms of intimacy, all knowledge either of the child or of 'his family.'"

G. "The evidence leads us to the conclusion that where the unmarried father of an illegitimate child lives in the same community and maintains constant relations with his own legitimate family, and at the same time, under an assumed name, maintains the illegitimate child clandestinely in another home with its mother, with whom he lives in illicit relations a great part of his time, he is not receiving the child as his own 'into his family,' within the meaning of section 230 of the Civil Code."

H. "But, even if it be true from the testimony on behalf of respondent, that the decedent maintained an establishment at the places where the mother and the child lived which had something of the character of a family in the sense in which that term is used in some of the decisions, although clandestine with respect to his legitimate family, it cannot be denied, on the other hand, that he did not treat the child as if it were a legitimate child. A father of a legitimate child, under such circumstances, does not cause or allow it to be known by an assumed

name. If he wanted the child to be deemed legitimate, he would have it known by his own name, he would naturally refer to it when associating with his own mother, sister, and brothers, and he would either take the child to see them or have them see the child. If he had been estranged from his own family he might not have done so, but that was not the case. When his relatives were in San Francisco he was associating with them as a member of the family during all of the time, yet he never in any sense treated the child as he would a legitimate child so far as they were concerned. It is a circumstance proper to be considered in determining this question that when the decedent discussed his will with I. I. Brown, whom he named as his executor, some time after the birth of petitioner, he made no change therein."

I. "Where the father of an illegitimate child has members of his own family living in the same community with whom he is in almost constant association and maintains cordial relations, he does not treat the child as if it was a legitimate child, if he conceals its existence from such members of his real family, never has them visit the child or has the child visit them, or in any other manner acts toward the child with regard to his own legitimate relatives as any father reasonably would do if he intended to adopt the child as his own and treat it as his legitimate child. Such treatment is contrary to the sense in which section 230 of the Civil Code uses the phrase 'otherwise treating it as if it were a legitimate child.' The treating it as if it were legitimate is as essential to a legal adoption under that section as any of the other elements therein mentioned. Because of the want of such treatment we are of the opinion that there was no adoption."

The evidence on the issues of paternity and public acknowledgment thereof was assumed for the purposes of the last department decision to be sufficient. This dispensed with the necessity of describing the evidence particularly addressed to those issues, or even of making a close summary of it. Touching the other issues of adoption—receipt into family and otherwise treating the child as legitimate—it was not so much a question of what facts must be held under the rule of decision on appeal to have been established by the evidence for respondent as it was a lack of facts to satisfy the requirements of section 230 of the Civil Code on those issues. And yet, in the face of this legal situation, plainly appearing in the decision, the brief for respondent is largely made up of repetitive statements and discussion of the evidence under all the issues, except paternity, of criticisms of the opinion and of the testimony of the witnesses for the other side. It has been shown in division 1 of this opinion that the law laid down in the decision became the law of the case on those two issues—that is to say, the evidence was not sufficient as matter of law to establish receipt of respondent into the "family" of decedent or that he otherwise treated the child as legitimate. The law thus stated remained the law of the case on the third trial until or unless

new facts were presented sufficient to put the case at large. Yet it is argued in respondent's brief that the judgment was reversed on a question of fact, and not one of law, and that the first decision (*Estate of Baird*, 173 Cal. 617, 160 Pac. 1078), notwithstanding its own clear statement that it did not pass on the above issues, established the law of the case. As we have stated, no attempt was made by appellants to segregate the additional from the other evidence. The brief, in dealing with the question of the additional evidence, did not show as a distinct proposition whether or not the principles of law declared under the evidence on those issues governed the third trial. Of the 247 pages of the brief, the discussion of the doctrine of the law of the case occupies 16, and the assignments of error in the rulings and in the instructions 14 pages, the remaining pages being devoted principally to a review of what is claimed is all of the evidence on the said three issues of adoption, and to criticisms of the opinion and of the witnesses for appellants. But notwithstanding we have held the law of the case did apply to the last trial, we will consider generally the criticisms of the decision.

As to the first criticism it is sufficient to say that we have shown in division 3 of this opinion that the evidence on the third trial is not essentially different. With reference to the second contention that the decision overlooked much testimony favoring respondent and gave a false coloring to that bearing on the issues of receipt into family and otherwise treating the child as legitimate, it will be noted that paragraph B of the facts, supra, states that the opinion did not attempt to cover every phase of the proof. It is also to be noted that the evidence concerning the "family" and decedent's attitude toward and his conduct in respect to respondent, including the use of the name "Tyler," and the conditions that marked the places where the child was kept came almost entirely from the witnesses for that side. The difficulty was not the failure to take the evidence into account and present it in its true color, but the failure of counsel for respondent to present the evidence as it is and to give legal effect to its import. For instance, it is claimed the child was always known by decedent's true name, and yet the witnesses for respondent contradict such claim. This contention is on par with the statement "that decedent gave the utmost publicity to the fact of his paternity" when the record shows that with the exception of Miles T. Baird he never acknowledged the child to his relatives or to his friends.

A comparison of the testimony summarized in the opinion with that presented by the record of the second trial makes it clear that no phase of the evidence important to the issues upon which the decision turned was ignored, but that it was stated, considered,

and applied subject to the rule of decision on appeal. It appears from the decision that the evidence as to decedent's attitude toward the child and his conduct with respect to it in the environments where it was kept was accepted as true, but that even accepting the evidence as true it was not sufficient, in the face of the clandestine "family" and the isolation of the child from decedent's relatives, to establish the issues to which the evidence was addressed. The evidence as to decedent's life among his relatives, the places he held out to the community as his residence before and after the birth of the child, and as to whether his relatives knew of its existence was supplied by the witnesses for appellants, some of it taking the form of documentary evidence, hotel books of account, checks, bills, vouchers, and the like. To put it in another way, generally speaking, respondent's witnesses depicted decedent's relations with the mother and his attitude toward and his conduct touching the child, and appellants, his relations with his relatives and friends and the friends of the Baird family. It is clear from the decision that the rule applied in *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 86 Pac. 178, cited by respondent, was followed; that—

"It is the duty of the appellate court to sustain the verdict when there is a substantial conflict of the evidence, no matter how much it may preponderate upon the other side."

This rule was observed upon every question of fact. Every fact which, under that rule, would be deemed to exist in favor of respondent was so applied. And where the evidence of either side was not contradicted, either directly or indirectly, it was accepted under the familiar rule that, where uncontradicted evidence is not inherently improbable, it will be held sufficient to decide a question of fact. And no fact was deemed established by appellants, even when not directly involved by counter evidence, if under the rule of decision on appeal it stood opposed to the facts established by respondent, or to the inferences arising therefrom.

It is plain the opinion did not question the testimony of respondent's witnesses, but that it was accepted as true and given proper legal effect. The theory of the opinion was that conceding to have been established every fact claimed by respondent from the testimony of his witnesses, as matter of law decedent neither received the child into his family nor otherwise treated him as legitimate. This will be made plain by what will be said in division 7 of this opinion on those issues.

To illustrate the manner of considering the evidence in the opinion: The decision assumed as true the testimony of the physician that decedent gave him the legal data for the birth certificate, including the name

for the baby, and as to the circumstances attending the filing of the birth certificate. It also accepted as true Miss Valencia's testimony, variant as it was in many particulars, including the statement that decedent always intended to marry her, and this notwithstanding the uncontradicted testimony of Benjamin H. Baird as to decedent's declarations concerning her character. And the many statements imputed by Miss Valencia and other witnesses of respondent to one whose lips were sealed in death (Estate of Emerson, 175 Cal. 724, 167 Pac. 149) were not questioned under the rule.

It is apparent from what we have said in answer to the criticisms of the decision there is no warrant for respondent's contention that the decision resolved all questions of fact adversely to respondent, even against the accumulated testimony of his witnesses. The opinion itself demonstrates that it did not resolve all questions of fact adversely to respondent or ignore the rule that the decision of the trial court is final as to the credibility of witnesses and the weight of testimony.

Now, with regard to the statements in paragraphs B and C of the facts, *supra*. It is not to be questioned that decedent in his relations with Miss Valencia was reckless and dissipated, that he was frequently under the influence of intoxicants when he was with the mother and child and that he otherwise became greatly demoralized. Nor can there be any dissent from the statement that some of their associates were persons of loose morals and the kind of characters it might be expected would, under the circumstances of the relationship, be their companions and friends. There are many references in the evidence to drinking places where women keep appointments with men; visits to and drinking at the race track. There are allusions to meetings in saloons, cafés on the beach and elsewhere, when there was much drinking; to well-known characters, bartenders, saloon-keepers, café proprietors and habitués of a certain section of the city before the great fire. For a considerable time the mother and child took their meals in a well-known café. The proprietor of one of these places frequented by the couple figures in the testimony in connection with the effort of decedent to borrow \$5,000 from his sister with which to buy Miss Valencia off in 1903, and he is numbered with other men as being on intimate terms with her. We will not pause to review the testimony as to the automobile parties in and out of San Francisco when, as one of the chauffeurs testified, they did not "miss many places where there was a good deal of liquor." Respondent's witnesses gave accounts of trips to the beach, to points in the interior, when the couple registered by the name of "Tyler," and when there was much drinking and dis-

sipation, decedent practically paying all the bills. It is not too much to say that when the couple were together, much of their time and that of their mutual friends was spent in that way. It appears from the record that several of their associates and friends were not called as witnesses for respondent, although it is in evidence they were closely identified with the relationship and evidently in touch with every phase of it. We have in mind, for instance, the two women, each of whom lived with a man out of wedlock. These women were close associates of Miss Valencia, and one of them, as already indicated, became the bride of her lover in Redwood City a short time before decedent died, in connection with which it was proposed that Miss Valencia and decedent do likewise. The record leaves the impression that the woman who engaged the St. Helen Apartment before the birth of respondent was a guiding spirit in all that affected the relationship and the child as will later more fully appear. Instead of overstating the facts as to the "family," an examination of the record will make it clear that the opinion kept well within the bounds of moderation in describing the manner of life decedent and Miss Valencia led together from the beginning to the end, and some of the people who figured in their relationship. No mention was made of the testimony as to Miss Valencia's reputation in the community nor to other phases of the proof dealing with the character of their relations.

In the light of the evidence later set forth we fail to understand upon what theory respondent questions the testimony of his own witnesses which justified the statement that the couple masqueraded as man and wife under an assumed name, which was given to the child. Miss Valencia insists they always lived together as man and wife, but she admits they used the fictitious name at times. The evidence shows that she was known in the community as "Lydia M. Valencia" and "Dodie Valencia," and in and around the abodes as "Mrs. Tyler," "Mrs. D. V. Tyler," sometimes called "Mrs. Baird." Yet it is contended the child, less than two years of age when decedent died, was only known as "David Jennings Baird," although in the abodes decedent was also known by the name of "Tyler." It is not, we have said, claimed the name "Tyler" was never used, but it is insisted it was resorted to because of the pursuit of the couple by decedent's relatives, when there is positive evidence tending to show that neither Mrs. Baird nor her daughter ever heard of Miss Valencia prior to the episode of 1903, and the evidence is that the name "Tyler" was used by the couple from the beginning of the relationship. It also appears that among their companions and friends it was known by some they were not married, while the uninitiat-

ed assumed they were; occasionally decedent declared that they were married; on other occasions that they were going to marry. To the neighbors and to some of the visitors to the abodes they passed as man and wife. Deceit was systematically practiced both as to the character of the relationship and of the "family," and this from the birth of the baby to the death of decedent. It cannot be disputed that decedent adopted the fictitious name and used it as a part of the deception, and it is idle to argue that the relationship, the "family," and the child were not kept secret as far as decedent could accomplish it.

There is no merit in the criticism that the decision assumed to weigh the evidence in the statement that decedent's motive for his course of conduct toward respondent was to spare the Baird family humiliation, which was followed by the conclusion:

"We think this is true in spite of the testimony of several of respondent's witnesses from which it might be inferred that the decedent seized every opportunity to proclaim his shame."

The statement was based on two general propositions: First, that if the relationship constituted a "family" it was a clandestine family; and, second, that the relations between decedent and his relatives "appear to be such, considering their respective modes of living, as usually obtain between a bachelor son and his relatives with whom he is on terms of cordial and affectionate intimacy." First, did it trespass on the function of the jury and trial court? It is apparent the opinion was not in that connection reviewing the evidence. The evidence had been summarized in the preceding pages, and the excerpt complained of was made in connection with paragraphs D, E, F, and G of the law of the case, supra, on the subject of the "family," and precedes H and I of the law of the case, supra, on the issue of otherwise treating the child as legitimate. The statement does not suggest that "the testimony of several of respondent's witnesses" was not to be accepted as true; what it does declare is that the propositions of fact are true in spite of such testimony. We shall presently show that this conclusion is not to be questioned. In view of the context it would be giving a forced interpretation to language to contend that the words "it might be inferred" meant it could be inferred that decedent proclaimed his paternity and the "family" to his relatives and friends, as well as to those whom he met where he kept the child. The plain purport of the language is that because he proclaimed his paternity to several of respondent's witnesses it might be inferred he was no less reticent among his relatives and friends, when the fact, as we have shown, is otherwise. In other words, it might be inferred from

the fact he spoke of the situation of the "family" and the child in one environment he must have done so in the other, for the expression "the testimony of several of respondent's witnesses" plainly had reference to declarations made to them by decedent in the environments of the mother and child.

The justification for the statement complained of is based on the recited facts. What were the propositions of fact stated to be true in spite of the testimony of respondent's witnesses? (1) That the couple masqueraded as man and wife; (2) that they assumed a fictitious name; (3) that they gave such name to respondent; (4) that the purpose was to keep the Baird family in ignorance of the relationship and of the child; (5) that the relations between decedent and his relatives were such as usually obtain where a bachelor son and his relatives are on terms of cordial and affectionate intimacy; and (6) that the motive for his course of conduct toward respondent was to spare the Baird family humiliation.

We will not repeat what we have said as to the first three propositions of fact. The statement in the opinion as to the attitude of decedent and his relatives toward each other was correct. Respondent denies the "family" was clandestine and affirms decedent was estranged from the Baird family. Neither proposition can be maintained. A point is made on the evidence that decedent kept up the association after he promised his mother he would have no more to do with Miss Valencia, following the episode in which it was claimed he was stabbed by her. The testimony of Miss Valencia and the physician on the point would seem to indicate that decedent did not intend to keep his promise to his mother, but that would only be further evidence that out of regard for her sensibilities he sought to delude her. When the uncontradicted evidence of his attitude toward his mother is considered, no doubt will remain that it was his definite purpose to prevent his reckless and immoral conduct from causing her humiliation and pain. Apparently the relatives endeavored to keep from her the truth as to the life he was leading, for she states in referring to a certain point of time she did not believe the relationship was "then" being carried on. In considering the motive for decedent's attitude toward his relatives with respect to the child, it is to be kept in view that he was financially independent of his relatives and that in a material sense he could follow the bent of his will.

There is therefore no merit in respondent's contention that the statement in the opinion following the above propositions of fact involved an assumption of the functions of the jury. The point is made that the statement in the opinion that the father of a legitimate child would not allow it to be known by an assumed name is contradictory of the other statement that according to the physician

decendent gave respondent his own name. The answer to this is: First, that the evidence of respondent's witnesses shows he was known by an assumed name; and, second, that the testimony of the physician makes it clear that in no real evidential sense did decendent intend to give his own name to respondent, at least so far as Mrs. Baird was concerned, and it would seem that in keeping knowledge of the child from her it would be kept from his sister and his half-brothers. It is plain from the physician's testimony that through his action the data contained in the birth certificate "never came to light," and it would appear it was never intended to thereby proclaim the birth of respondent. It must be concluded from his testimony that in giving any data for the birth certificate decendent acted under what he was led to regard as legal compulsion, for the reason that there is no dispute that he wanted the existence of the child kept a secret from his mother. There is not a trace of evidence in the record that the fact of the child's birth ever became known through the filing of the certificate. Hence all that can be claimed from the filing is that it was a constructive proclamation of the birth of the child. What is concerned here is not the legal effect of filing the certificate, but the question of fact whether decendent ever intended to give respondent the name of Baird. In short, the question is one of intention, and it must be regarded as settled against the claim of respondent by his own witness, whose testimony on the point is self-effacing.

Respondent questions the statement in the last opinion that the facts of the cases of *Estate of Gird*, 157 Cal. 534, 108 Pac. 499, 137 Am. St. Rep. 131, and *Estate of Jones*, 166 Cal. 108, 135 Pac. 288, and *Estate of McNamara*, 181 Cal. 82, 183 Pac. 552, 7 A. L. R. 313, "differ so widely from those in the case at bar that we do not think it is necessary to discuss them, for in no case has it been held that a family constituted as this 'family' was, as shown by the uncontroverted evidence in the case, would come within the meaning of the statute." It is sufficient to distinguish those cases from this to point out that in the former the place where the child was received was the home and the only home of the father, that he was the head thereof, and that he always went by his own name. *Gird* never married and he lived on the *Gird* ranch; that was his only home. He always lived under his own name, but the children were known by the mother's married name. *Jones* had no other name; he was unmarried and lived alone for long periods on his cattle ranch in the mountains, which was his fixed abode; he had no other home and there is no suggestion of any other "family." The father in the *McNamara* Case did not attempt to keep knowledge of his paternity from his relatives, friends, or the community at large either in connection with the birth

certificate or otherwise, and what we are about to quote from the opinion will plainly distinguish the case on the facts:

"A more public acknowledgment than the act of *McNamara* in signing the child's birth certificate describing himself as the father, it would be difficult to imagine. In addition, the child was with him and its mother most of the time after its birth and the evidence shows that the relation openly assumed by him was that of father. His statements and his actions were both a public acknowledgment of the child as his and a consistent treatment of it as if it were legitimate. It was also received into his family within the meaning of the Code. It has already been decided by this court that the word 'family' as used by the Code in this connection does not necessarily mean relations, but may mean the family in which or as part of which the father abides. (*Estate of Gird*, 157 Cal. 542 [137 Am. St. Rep. 131, 108 Pac. 499]; *Estate of Jones*, 166 Cal. 108 [135 Pac. 288].) In this sense the only family *McNamara* had after the birth of the child was the child and its mother with whom he abided with occasional absences until his death with full assumption of the relation of father, mother, and child. It is worthy of note in this connection that while *McNamara* was so living with Mrs. Bettencorte and her child, his sister, one of the appellants, visited and stayed with them for some days. * * * It is attempted to distinguish this case from *Estate of Jones*, supra, where the facts establishing an adoption were much weaker, on the ground that *McNamara* had no fixed habitation. The parties did change their abode several times, but it was a change of abode. They were not mere wanderers or travelers. Where they were, they made their home. When they finally moved to the place where *McNamara* died, they did not rent the place but actually arranged to purchase it."

Respondent relies on *Estate of Garr*, 31 Utah, 57, 86 Pac. 757, to support his claim of receipt into family. The adoption in that case was under a statute identical with section 230. One witness testified he heard John T. Garr, the father, declare, and several others, that they heard his brothers charge that the father of the boy was a man named Jones. The court said:

"If that evidence is all true, it cannot overbalance the weight of his deliberate admissions to those not of kin, and of his acts and conduct toward the boy and his family. The conclusion upon all the evidence in the case is irresistible that he was in fact the father of the child."

The controlling question in that case was whether Garr was the father of the child. It was held he was and that upon all the evidence there was a public acknowledgment. It was not disputed that the child was openly received into the home of Garr, who called it "Johnnie Garr," and that he took care of and raised him "as was natural for a father to do." Here, too, the facts distinguish the authority.

It is also argued that *In re McGrew*, 183 Cal. 177, 190 Pac. 804, is authority for the proposition that the name of the child is immaterial, referring to what was said in the last department decision concerning the use of an assumed name. The parties lived in Sonoma county and the father's name was Zimmerman—he used no other—and the mother continued to use her family name, McGrew, which was given to the child. Zimmerman tried to marry the mother, but her mother protested. Under her own name the mother of the child engaged the lodgings in San Francisco where the child was born. In holding the father adopted the child the opinion declared that ever since its birth the father at all times publicly acknowledged his paternity; that he received the child with the consent of its mother into his family, where he and its mother resided and kept house together; and that at all times he supported and otherwise treated the child as if it were legitimate. As indicating that the "family" was not clandestine and that the truth was not concealed from the relatives is the fact that the child was adopted in the city and county of San Francisco under section 226 by the sister of the mother while the father was away from the mother and the child working in Lassen county. The court held the father had previously adopted the child under section 230, and the order of adoption under section 226 was vacated on his motion upon the ground that the sister was not a resident of San Francisco when the order under the latter section was made. In that case there was one "family," and, except when the parents stopped temporarily in the lodgings during the mother's confinement, no attempt was made to disguise the situation. There is nothing in that case opposed in principle to the law laid down in the case at bar.

[11, 12] 7. This brings us to consider respondent's contention that the evidence received on the last trial establishes a case of adoption apart from any question of the law of the case.

Appellants do not argue on this appeal that the evidence is not legally sufficient to sustain the special verdict on the issue of paternity. We will therefore confine our discussion under this head to the remaining elements and adopt as far as they will serve the statements of the evidence contained in the last department decision and in the preceding pages of this opinion.

Section 230 of the Civil Code provides:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

Within the meaning of this section, each of the foregoing elements must be established by a preponderance of the evidence, and if the proof fails as to any one of them a case of adoption is not made out. The proceeding to establish an adoption under section 230 partakes of the nature of the contest of a will. If the issues are tried by jury, they must make conclusions of fact in the form of special verdicts. "The special verdicts must pass on all the issues by presenting the conclusions of fact bearing on all," and the issues "must be such that the determination of them will leave to the court no office except to enter a judgment" for or against adoption. Sections 624 and 1314, Code Civ. Proc.; *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753; *Estate of Benton*, 131 Cal. 472, 63 Pac. 775; *Estate of Baird*, 173 Cal. 617, 160 Pac. 1078. The issues submitted to and found by the jury herein purport to cover the four elements of adoption according to the terms of section 230, with the exception of special verdict No. 3, which, in finding that respondent was received into the family of decedent, does not state he was so received as his own child.

[13] (a) First as to the issue of public acknowledgment: The term "public acknowledgment" of paternity is the opposite of "private acknowledgment." It means the same kind of acknowledgment a father would make of his legitimate child. It was said in *Estate of Gird*, 157 Cal. 534, 542, 108 Pac. 499, 503 (137 Am. St. Rep. 131):

"The language of section 230 of the Civil Code is simply 'by publicly acknowledging it as his own.' There is no provision as to what shall constitute a 'public acknowledgment,' and the words of the statute must be taken in their ordinary sense. * * * In the face of circumstances which might well be accepted as calling for explanation as to the true situation if he was not the father of these children, he never expressly denied that he was such. * * * Nor is the fact that he did not say anything about the matter to his brother when he visited his home shortly before his death of such importance, under the circumstances, as to forbid the conclusion of public acknowledgment." *Gird's* brother never resided in California. The rule is thus stated in the syllabus of *Estate of Jones*, 166 Cal. 108, 112: 'It was also shown that the decedent acknowledged Lester to be his own child many times, *willingly and on all occasions, as the father of a legitimate child would naturally do.*'" (Italics added.)

The following statement in *Estate of Jessup*, 81 Cal. 408, in holding there was no public acknowledgment, applies to the conversation between decedent and Benjamin H. Baird at the Hotel Robins (page 429):

"The fact of the boy's existence, and that Jessup was supporting him, was communicated to his brother while yet the child remained in San Francisco, by the nurse in whose charge he was. A few days afterward the brother asked Jessup about it, and asked him if it was

his boy, to which Jessup replied: 'No, it ain't my boy.'

Concerning the witnesses to whom it was claimed Jessup acknowledged his paternity, the opinion further says (page 430):

"None of these witnesses were members of Jessup's family, and with a single exception they were not persons likely to come in contact with his family. None of them were his business associates, and such of them as could in any sense be called his companions were only so during such portions of his time as he was in hiding from society. They were not persons likely to make public what he had said to them on such a subject, but rather to accept it as a matter of confidence, to be kept secret."

Concerning this authority it was said in *Blythe v. Ayres*, 96 Cal. 532, 579:

"It was held in the Jessup Case that the father had a family, in the sense of brothers and sisters, with whom he was brought into frequent contact, and from whom he concealed and denied the paternity of the child, and for these reasons, and others, the court held there was no adoption."

The following from *Estate of De Laveaga*, 142 Cal. 158, 168, just as aptly applies to the case at bar:

"In fact, it seems to have been his studied purpose not to refer to or introduce the subject of his illegitimate child in his intercourse or correspondence with his parents."

In *Blythe v. Ayres*, 96 Cal. 532, 577, 31 Pac. 915, it was said in the main opinion signed by three of the justices that this acknowledgment was also public, "for as we have seen, the thought of concealment of the paternity of the child never entered his mind."

[14] While it is not required in order to constitute public acknowledgment that the father declare his paternity under all circumstances, it would be opposed to the idea of public acknowledgment if he deliberately refrained from declaring his paternity when the occasion would naturally demand it; or misrepresented the fact, or remained silent when he would reasonably be expected to announce he was the father of the child, as, for instance, in the case of immediate relatives. A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. In this case we have shown that with the exception of Miles T. Baird decedent never acknowledged his paternity to his relatives, his friends, or business associates, or to the friends of the Baird family.

According to the evidence, decedent acknowledged his paternity to numerous persons in the places where he kept and supported the mother and child, in cafés, in

stores, on automobile rides, to chauffeurs, to neighbors, to visitors in the abodes, and to others, nearly all of whom it may safely be said were persons who knew the couple and learned of the child through the illicit relationship, and who would not be likely to meet or mention respondent to decedent's relatives, friends, or business associates. With the exception noted, the evidence shows that decedent limited his acknowledgments of paternity principally to such persons as were not acquainted with the Baird family and who were removed from the surroundings where his relatives and friends would be likely to hear of the child.

Each case depends upon its own circumstances (*Estate of Gird*, supra, 157 Cal. page 543, 108 Pac. 499, 137 Am. St. Rep. 131) and the circumstances in this case were such as to call upon decedent to acknowledge or otherwise disclose his paternity to the members of his own family, especially to his mother. He constantly associated with his half-brothers, and when his mother and sister were in San Francisco he spent much of his time in their company; yet he never spoke of respondent. It is in evidence that neither at the Christmas dinner in 1906, when respondent was less than three weeks old, nor in New York in January, 1908, after the baby had turned its first year, did he mention the child. *Estate of De Laveaga*, 142 Cal. 158, 75 Pac. 790, comments on the circumstance that the father in that case did not take the child among his kindred, and the italicized expression in the *Jones Case* indicates that in order to establish an adoption the father of an illegitimate child must willingly acknowledge his paternity on all occasions.

We have seen that to Benjamin H. Baird and to the family coachman decedent denied his paternity. To the former he expressed his opinion that another man, whose name he gave, was the father, and to the latter he spoke with vehemence in denying his paternity. The testimony of Thomas R. Baird that he never heard of the baby until decedent passed away is not denied. Mrs. Baird denied any knowledge of respondent prior to decedent's death and the sister stated she never learned of the child until after decedent died, when word came to her in New York in the form of letters and telegrams. There is no contradiction of the testimony of a number of persons that while decedent discussed matters relating to the Baird family he never mentioned the baby to any of them, and that they never heard of the child before decedent's death. These persons consisted of friends, business associates, acquaintances, including a couple residing in New York, Mrs. Amelia Hutchins, at whose house at 1611 Vallejo street decedent and Benjamin H. Baird lived for a time, and where Thomas R. Baird was sometimes a visitor; the persons with whom decedent had business dealings for the Baird estate at the very time the

child was born, real estate agents, and a number of others; the employees of the hotels where he stopped, the servants of the Baird family, and other individuals whom he frequently met and with whom he was on business or friendly terms. The contractor who did work for the Baird estate and lived near decedent at 1611 Vallejo street testified he often drove decedent home and visited him in the evenings, especially during 1906-1908, but that he never mentioned the child to him. A betting commissioner, whose deposition was taken on behalf of respondent early in the litigation and though never offered by that side, was introduced in evidence by appellants for the first time on this appeal, said, referring to the couple:

"I never heard them speak of the child with reference to the Baird family, the Baird estate or the Bairds."

The reticence of decedent as to respondent with respect to the friends of the Baird family, the business men whom he frequently met, his own personal friends, is opposed to every conception of public acknowledgment under the statute. The concealment of the fact that he was a father in the case of such persons is presumptive evidence that away from the environments of the mother and the child he purposely failed to acknowledge his paternity. Such conduct, under the circumstances, was the equivalent of a deliberate denial and a willful concealment of paternity.

The evidence of public acknowledgment relied upon by respondent is that relating to the birth certificate and to the testimony of the witnesses who knew the couple through the relationship and the child. Respondent's brief inquires: "Under the circumstances, how could he [decedent] have done anything more than he did do?" The answer is that he should not have refrained from making acknowledgment of his paternity to his relatives, friends, and business associates—the classes of persons to whom the father of a legitimate child would naturally speak of it. Effect could not be given to the statute if the father of an illegitimate child were thus permitted to discriminate between the classes and groups of persons with whom he is acquainted and who enter into the routine of his life, or who are related to him. Under the terms of section 230 and such cases as *Estate of Jessup*, supra, and *Blythe v. Ayres*, supra, it must be held that willful concealment of the fact of paternity by the father from relatives with whom he is in frequent intercourse and is on terms of affection is opposed to public acknowledgment of paternity.

[15] (b) In respect to the issue of receipt into family we will adopt the definition of "family" given in *Estate of Gird*, supra, as stated at page 545 (108 Pac. 504):

"As used in this section, the word 'family,' in our opinion, means no more at most than that the father must have a 'home,' a settled

place of habitation of which he is the head, into which he must receive the child."

It is said in *Estate of Jones*, supra, at page 114 (135 Pac. 290):

"In *Estate of De Laveaga*, 142 Cal. 169 (75 Pac. 794), the court held squarely that a man cannot adopt a child under this section unless he has a 'family, or at least a home, into which he can receive it.' In that case the father had parents, brothers, and sisters living, with whom he was on friendly terms, but he did not live with them. He also had a place of abode, but he never received the child therein or took it among his kindred * * * Jones had a residence and dwelling-house which was his fixed place of abode." (Italics ours.)

It was said in the case of *In re Jessup*, 81 Cal. 434, 22 Pac. 749, 6 L. R. A. 594:

"If he has a wife, he can only receive it into the family with her consent; but if he has no wife, he must still receive it into his family—that is to say, in such family as he has, the child must be acknowledged and treated as his—at least, he must not deny to the members of such family that it is his."

[16] It is plain from the authorities in this state that so far as the element of receipt into the family is concerned, the father, in order to comply with section 230, must have a home or habitation into which he shall receive his illegitimate child as his own, and that the place where he lives must be his settled or fixed habitation of which he is the head. It has been held that where the father of an illegitimate child lives in a home alone, such home may constitute a "family" into which he may receive the child, or where the father and mother of an illegitimate child live in a home or habitation of which the former is the head, although they are not married, the father has a "family" within the meaning of section 230, into which the illegitimate child may be received. *Garner v. Judd*, 136 Cal. 394, 68 Pac. 1026; *In re McGrew*, 183 Cal. 177, 190 Pac. 804; *Estate of Gird*, supra; *Estate of De Laveaga*, supra; *Estate of Jones*, supra.

Although the question whether the child was received into decedent's family involves the period between its birth and the death of decedent, it is proper to consider also the evidence dealing with the events and conditions that marked the relationship between decedent and the mother up to the time the baby was born. In other words, the entire history of the relationship should be considered if it will aid in determining whether, under the provisions of section 230, decedent had a family consisting of himself and Miss Valencia, of which he was the head and into which he received respondent.

As bearing on the question of the character of the "family" where the child was kept, it has been urged by appellants in all

(223 P.)

of the trials that Miss Valencia had lived the life of a prostitute and evidence was sought on the point. The question was put to several witnesses on this trial whether she had not been "one of the most notorious prostitutes in San Francisco," but in a number of instances objections to the questions were sustained. We shall not pause to discuss the exceptions to such rulings, or to go further than to declare that, within the rules of evidence, the fullest latitude should be allowed to prove the sort of life the couple led together, the incidents thereof, the character of Miss Valencia and her friends and associates, whether during the relationship she occupied relations with other men, the kind of places in which she and decedent lived together before the San Francisco disaster, and whether she was from the beginning to the end anything other than the mistress of decedent. Evidence of this general import would probably determine one way or the other the question of adoption more persuasively than any other form of proof. Therefore, under the record in this case when evidence of that character was competently offered it should not have been excluded. Of course, if the charge of prostitution were true, such a fact might have had a controlling effect on the special verdict of the jury on the issue we are discussing. Miss Valencia was asked on cross-examination whether she did not follow prostitution for a livelihood after the death of decedent. In the absence of any objection she declined to answer the question, but at a later session of the court her counsel brought up the inquiry again and then she said: "Absolutely not. No." On another occasion she declared she did not know what the word "prostitute" meant.

The physician was questioned as to the general reputation of Miss Valencia and of the houses in the neighborhood where decedent was claimed to have been stabbed by her. He answered that her reputation was "not very good," and the houses were "not good—loose houses." The betting commissioner referred to the characters who visited the abodes after the fire, told of the people he met at the different places, such persons as "Messenger No. 9," "The Count," bartenders, café and saloon proprietors, men and women who live that sort of life being included. Speaking of the St. Helen Apartment, he mentioned a saloonkeeper, a prize fighter, "and I remember some girls." On cross-examination, referring to Miss Valencia, this testimony was given:

"Q. Did you ever know of her being an inmate of a house of ill fame? A. I did, but I don't know if it was a house of ill fame. Q. Where was that? A. The Palmerlee."

He also stated that the woman who rented the St. Helen Apartment lived with her

at this place. Referring to "The Palmerlee," he said:

"I don't suppose it had as good a reputation as the Palace Hotel. Q. During those times that you knew Miss Valencia, what was her reputation? A. Her reputation wasn't very good."

The woman just referred to played a prominent part in the affairs of the couple, and she and Miss Valencia were on terms of the closest intimacy. The woman is referred to in the testimony by three different appellations and was the proprietress of the Kingston at 318 O'Farrell street, where it is claimed decedent was stabbed by Miss Valencia. The court, saying, "We are not trying other people here," sustained objections of respondent to questions as to whether this woman had not kept houses of prostitution in which Miss Valencia was an inmate. When she engaged the St. Helen Apartment she represented it was for "her sister" who was about to be confined, referred to the couple as "Mr. and Mrs. Tyler," and in giving her own name joined "Mrs." to the surname of her lover. This couple were guests at 1310 Divisadero street for two months, went on automobile trips with decedent, Miss Valencia, and the baby, and were frequent visitors at the other abodes. There is some dispute in the record as to the size of the St. Helen Apartment—whether there were more than two rooms. There is some evidence that it included a servant's room. At all events, according to the evidence, it was occupied by the two unmarried couples, the baby, and for a time the nurse. It was testified that decedent and the other man paid the rent. Thus it was claimed the "family" was constituted at the St. Helen Apartment where the child was born and where it remained with the mother until they moved to the Octavia Apartments.

The keeper of a beach resort, who testified in the case for the first time on this trial and whose place was visited by decedent when he was on the debauch which culminated in his death a few hours later, testified that Miss Valencia visited other cafés he owned before the fire, and that she and decedent visited his place at the beach and would sometimes bring the baby. The witness stated that in October, 1908, about a month before decedent's death, a party of them drove down to the Fourteen Mile House and from there to Redwood City, where the marriage previously mentioned took place. The bridal couple had been very intimate with Miss Valencia, and, as we have suggested, they too played a prominent part in the relationship, going with them on automobile trips, drinking parties, and spending much of their time in the abodes. As was to be expected, the bridal occasion continued in a spirit of romance, for the witness stated decedent then proposed that he

and Miss Valencia make it "a four-handed party," but that she refused. We quote:

"A. Yes, she said to him, 'You know your folks are very much opposed to me.' She said, 'I do not think they will accept me in any way, shape, or form on account of your mother. I know your mother is very much opposed to it.' Q. She said that? A. Yes. Q. What did Dave say when she made that statement? A. He said, 'Oh, yes, I know the folks object to you and object to this marriage.'"

The wedding plans had not matured when decedent died.

A married couple lived as guests for five months at 1310 Divisadero street. The wife was introduced to Miss Valencia in 1904 in a café kept by the proprietor mentioned in division 6 of this opinion. The couple testified for respondent, the wife stating he was known as "David Jennings Baird, Jr."; she made many extended visits to the abodes. In fortifying her testimony as to her knowledge of the actual relations that existed between decedent and Miss Valencia, she stated that on occasions at the Alexandria and the St. Regis Apartments she saw them undress and go to bed. The testimony concerning decedent's conduct toward Miss Valencia and the child in the various abodes, on the automobile trips to the country when the party would remain away over night, and to the road houses along the beach, comes in part from the six chauffeurs who were hired at the rate of \$5 or \$6 per hour, and who appeared as witnesses for respondent. The bill of one of them for a single month was \$600, and another collected several hundred dollars from the estate of decedent for automobile hire.

Referring again to the assumed name, the nurse for the baby said the couple used the name "Tyler" and that she continued to call Miss Valencia "Mrs. Tyler" after she learned decedent's true name. The woman who engaged the St. Helen Apartment for "her sister who is to be confined," spoke of her as "Mrs. Tyler," and this was believed to be the correct name by those in charge until a package came addressed in the name of "Baird." A neighbor and his wife did not know that "Baird" was the true name of decedent until after decedent's death. The physician testified the couple went by the name of "Tyler" at the St. Helen Apartment and 230 I street. Miss Valencia's milliner, and her seamstress, said they went by the name of "Tyler," the former stating the baby was called "David, Little David," and the latter asserting he was not called by any name at 230 I street. A house servant said they were known as "Tyler." The nurse who attended the confinement was told the mother was "Mrs. Tyler"; the grocery account was kept in the name of "Tyler," and the proprietress referred to the baby as the "little Tyler boy"; the betting commission-

er said they were "known as Tyler by almost everybody," and that at 1310 Divisadero street he saw a suit box addressed to "David J. Tyler." A neighbor who knew them as Tyler testified:

"They seemed to stay by themselves and no one seemed to know them. They were not acquainted with the neighbors. * * *"

One of the chauffeurs said Miss Valencia was known as "Mrs. Tyler" by the trades people and as "Mrs. Baird" by those who knew decedent's real name. The physician testified that when he sent his bills to decedent at the abodes he used the name "Tyler," and to the hotels "Baird." It is sought to overcome the effect of such testimony by references to evidence that the couple were known by some persons as man and wife, being called "Mr. and Mrs. Baird"; that decedent on occasions introduced Miss Valencia as his wife, referring to her as "Mrs. Baird"; that certain visitors to the abodes said the child was known as "David Jennings Baird, Jr."; that certain accounts, including the chauffeur's charges, were kept in decedent's true name; but in every one of these instances his real identity was known and credit may have been extended to him upon his known financial responsibility. It is true that in the case of some of these witnesses they undertook to give the reasons that led the couple to use the fictitious name; but, as we have said, such declarations would be hearsay and merely represent the conclusions of the witnesses. It is clear then that by design and by systematic practice the knowledge of the association and the existence of the baby were to be kept from decedent's own relatives, his friends, and the friends of the Baird family. In addition to what we have stated concerning the birth certificate, it appeared the filing was not made until February 14, 1907, more than two months after the birth of the child, and that in answer to what the last department decision said about the delay the physician stated that he appealed to a doctor in the board of health "to keep the certificate from getting into the papers so that Mrs. Baird would not find it out. Probably that is the reason it did not come to light. That is the only explanation I can make."

In the St. Helen and Octavia Apartments the things were insured by and in the name of the woman who engaged the former and owned and conducted the latter. The house at 230 I street was purchased by decedent on the installment plan and stood in the name of "Lydia M. Valencia." Decedent made two payments on the house of \$1,000 and \$500, respectively, and at the time of his death \$1,125 more had been paid at the rate of \$75 per month. The house was insured in Miss Valencia's name; the service of gas, electricity, and water was supplied

in the name of Lydia M. Valencia; and the furniture stood in the name of Miss Valencia. In the years 1907, 1908, and up to February, 1909, the telephone was listed in the name of "Mrs. D. V. Tyler."

It is clear that whether or not the attitude of decedent's relatives was responsible for the use of the name "Tyler," that was the name decedent planned to be known by in the relationship, and that was the name by which they were generally known among the uninformed in the several abodes where the child was kept. Under the evidence it is idle to contend that decedent did not seek to hide his identity under an assumed name in the surroundings of the mother and the child in order to keep his relatives and friends in ignorance of the relationship and of the child; but in such a situation it was inevitable that their identity should become known to some of those who came in contact with them, including the persons who served them in one capacity or another, such as the chauffeurs, the tailors, her milliner, her seamstress, her masseuse, the servants, and the storekeepers, who, as we have said, may have been concerned with the problem of getting their money. In addition to this, there is the testimony of Benjamin H. Baird that—

On the day decedent died "some woman's voice at the 'phone told me my brother was very sick and that I had better come out quickly. I said, 'Where?' She said, 'Well, out there on I street near Thirtieth avenue.' She said 'Ask at the grocery store for the name of Tyler and they will show you the house,' which I did."

Later he saw Miss Valencia at 230 I street. This testimony is not contradicted. Miss Valencia admitted she requested the attorney for the Baird estate over the telephone to come out to the house, and after being questioned on the point she finally denied she gave him similar instructions about locating the place. If decedent intended the abodes where he kept the mother and the child to be the residence or the home of his "family," he would give such places as his residence or home and would naturally live in them under his own name. The record is destitute of any evidence that decedent ever gave to his relatives, to his friends, or to the public, any of these abodes as his home or place of residence.

"Residence" has been defined as "the act, or state of being seated or settled in a place, * * * a place where a man's habitation is fixed without any present purpose of removing therefrom, * * * a place where anything permanently rests, * * * the abode or place where one actually lives," 34 Cyc. 1647 et seq. "Home" is defined as "the place of constant residence; the seat." Am. Univ. Dic. Before the birth of the baby and until the death of decedent, the latter had stopped alternately at the St. Francis,

the little St. Francis, the Palace, the Little Palace, the Fairmont, and the Majestic Hotels, and he had a room at the Fairmont at the time of his death. All of this was shown in part by the accounts of those hotels and by their employees. With respect to this evidence it is claimed by respondent that decedent kept a room as an office where the business of the Baird estate was conducted. The testimony of a number of witnesses is to the effect that when they addressed a letter to him it was to the hotels or to 1611 Vallejo street and that his letters to them were sent from those addresses. There is no evidence that any communication was ever sent to him at the abodes. A part of the time he stopped at those hotels his mother was living there with him, also his sister, and at times his half-brothers. Miss Valencia testified he sometimes told her he was going to dine with his mother at the hotel. His tailor testified he sent his clothes, after the fire, to the Hotel Majestic, where he lived for a while with his mother; his address was changed thereafter to 2513 Pacific avenue; then to 1611 Vallejo street; and later to the St. Francis Hotel. Three deliveries were made to the Fairmont in 1908; the last on August 11.

The city directories for the years 1907 and 1908 were introduced in evidence and contained these entries—1907, "Baird, David J. Residence. 1611 Vallejo street." And 1908 "Baird, David. Residence. Fairmont Hotel." The record of the post office from October, 1906, to July 30, 1907, gave his true name and showed his address was changed from 2513 Pacific avenue to 827 Eddy street (the office of the family attorney after the disaster), and from 1611 Vallejo street to the St. Francis Hotel. The addresses he left in the office of the attorney for 1907 and 1908 were the St. Francis and Fairmont Hotels. Changes of address were also given to the bank at which he kept his account, and where for a time Benjamin H. Baird was employed, from 2513 Pacific avenue to 827 Eddy street, and after the fire, from the St. Francis Hotel to the Fairmont Hotel. Executor Brown testified that when he met decedent in 1907 and asked him where he was living, he answered, "The Fairmont Hotel." He was living with Benjamin H. Baird in Mrs. Hutchins' house at 1611 Vallejo street when the baby was born, and at that very time and for several months thereafter his mother was in San Francisco. Mrs. Hutchins was a friend of the Baird family. She testified that while decedent was stopping there he would sometimes be away for several days at a time, and on such occasions would explain he had been in the country. Similar testimony was given by the night watchman at the Fairmont Hotel. This witness testified that decedent would on occasions come in late at night in such a condition of inebriation that he would have to watch him. It was also testified that up to January, 1903,

which was about a year after the relationship was formed, decedent kept seasonable hours at 2513 Pacific avenue, where he lived with his sister; but his habit thereafter was to remain out late, and on this account he was requested to leave.

Respondent's witnesses are divided on the question as to when decedent first appeared at the St. Helen Apartments. The betting commissioner testified that because of decedent's intoxicated condition he did not know for several days after Miss Valencia left 1310 Divisadero street that she had gone to the St. Helen Apartments. Her version is that decedent went with her to look at the place before it was engaged—which is opposed to other testimony for respondent—and that he appeared on the night of the second day following the event. The attending nurse testified she did not see decedent for two or three days after the child was born.

It would appear from the evidence that the life of reckless dissipation which decedent led contributed to his tragic and untimely end. He had several spells of sickness and was very ill from hemorrhages of the stomach during the months of August and September, 1907. Evidence of his dissipation abounds in the record. It shows such instances as his rushing excitedly into a shoe store and telling a clerk, who was a stranger to him, but a friend of Miss Valencia, that he was the father of a son and inviting him out to the house; making similar declarations to persons he met on the street, to a policeman in the neighborhood, to chauffeurs, to bartenders, to servants, and to strangers in the abodes, and to some of the characters already described. According to such persons he proposed to send the child to Paris to be educated, was going to make him president of the Baird estate; that he was on his way home to his wife and baby; that he was in a café the night after the child was born, "let everybody know he was the father of a baby," and made other declarations of similar import. It is only upon the theory of the immoral relationship and incidental habits of intoxication that he kept knowledge of the double life he led from his relatives and friends. A striking circumstance in connection with his dual existence is that his relative elected him president of the Baird corporation. In business matters he was bright and attentive.

[17] (c) What has been said on the issues of public acknowledgment and receipt into family applies largely to the remaining issue—whether decedent otherwise treated respondent as a legitimate child. "The criterion referred to in the statute is the treatment usually accorded to legitimate children." Estate of Heaton, 139 Cal. 237, 73 Pac. 186. What was said in the Estate of De Laveaga, 142 Cal. 158, 167, 75 Pac. 790, 794, applies here:

"But it seems, however, that the relations of affection between Jose Maria and his par-

ents did not cease, as the numerous letters produced at the trial written by him would show, and they also show that in none of them was any reference ever made to the respondent in this case. In fact, it seems to have been his studied purpose not to refer to or introduce the subject of his illegitimate child in his intercourse or correspondence with his parents."

It is established in the case that respondent was never taken to visit the Baird family, nor, except to Miles T. Baird, was he ever referred to by decedent as his child in his intercourse with the members of his family, that there was no form of communication or association between the child and decedent's relatives, and that decedent never brought the child to any of the places he held out to the community as his residence. While decedent is shown in pictures with Miss Valencia, he never appeared in one with the child. He sent a number of communications to Miss Valencia while he was in Europe in 1905, but no communication was produced as having been sent to her by him after the birth of respondent. Decedent had nearly two years to consider whether he would make financial provision for the child, but that natural duty of a father who contemplated adopting his illegitimate offspring was, we have seen, with apparent deliberation, left undischarged. The record is singularly free from any evidence to sustain the reiterated contentions of counsel that decedent intended to adopt the unfortunate child. On the contrary, it seems to have been his clear purpose not to assume any legal responsibility for him. The declarations of decedent contain nothing more tangible than such expressions as that he was going to make the child president of the Baird estate, or that he would send him abroad to be educated. Is this the attitude of the father of a legitimate child, or of the father of an illegitimate child intending to adopt it? We have shown there was no estrangement between decedent and his kin and that no reason appears other than decedent's concern for the Baird family why he should keep the child away from them. Such treatment is contrary to the sense in which section 230 of the Civil Code uses the phrase "otherwise treating it as if it were a legitimate child." The treating it as if it were legitimate is as essential to a legal adoption under that section as any of the other elements therein mentioned.

It may finally be declared that the evidence as to public acknowledgment of paternity, receipt into family, and otherwise treating the child as legitimate, does not, in any true sense, conform to the conception of adoption under section 230. The father of a legitimate child would not allow it to live in a clandestine family or to be known by an assumed name, or be the object of concealment and dissimulation. The father of a legitimate child would not hold himself out to the world as having a residence into which

he did not receive it. He would especially provide for the future of the child. Decedent's will, already referred to, was dated July 30, 1903. He gave half of his property to his mother and the other half to his half brothers. In 1907 Executor Brown called his attention to the will but he made no change therein. This item of proof is relevant to the question whether decedent was estranged from his mother and his half-brothers.

Decedent allowed the child to remain in the custody of his mother, where the law placed him. Section 200, Civ. Code. He could have legitimated the child by marrying the mother (section 215, Civ. Code), or he could have made him his heir by a writing under section 1387 of the Civil Code; but he did none of these things, nor anything else to indicate he was concerned with the future of the child. His entire course of conduct toward respondent precludes the idea that he intended to do more than support him, and his attitude is consistent with his denial of paternity, and inconsistent with the claim that he intended to treat respondent as the father of a legitimate child would do. With the exception of Miles T. Baird, no one connected with his life away from the abodes visited him or the child, or acted in the way relatives and friends usually act in such circumstances. Giving the evidence its fullest import in favor of respondent, there can be no dissent from the conclusion that the failure to publicly acknowledge his paternity, the clandestine nature of the "family," and the isolation of respondent from decedent's relatives and friends, represented a deliberate purpose on the part of decedent to keep them in ignorance of the child, and under the circumstances shown this alone is sufficient to defeat an adoption.

This court declined, in *Re Jessup*, 81 Cal. 459, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, to adopt the view of the dissenting justices that in cases of adoption under section 230 the only strictness required should be proof of paternity; and that the paternity being satisfactorily established by plenary proof courts should lean strongly in favor of a finding that the father had performed his duty and adopted the illegitimate child. It has been the rule ever since that the elements of paternity, public acknowledgment thereof, receipt of the child into the family of the father as his own, and otherwise treating him as legitimate, must each be established by a preponderance of the evidence, and that if the proof fails in respect to any one of them there is no adoption.

"There can be no compliance with section 230 in the absence of the conditions contemplated by that section, and absolutely necessary to give it effect." *Garner v. Judd*, 6 Cal. Unrep. 675, 64 Pac. 1076.

We hold that apart from the doctrine of the law of the case the evidence received on the last trial in insufficient to sustain the special verdicts or to support the findings, and that a case of adoption has not been established. We further hold that the court erred in denying the motion for nonsuit, in denying the motion for an instructed verdict, and in failing to enter judgment for appellants. This conclusion renders it unnecessary to consider the assignments of error in the rulings and the assignments of misconduct by the court.

The decree of partial distribution is reversed, and the trial court is ordered and directed to set aside the special verdicts and findings and to enter judgment for appellants, denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.

65 Cal. App. 306
PEOPLE v. KING. (Cr. 1110.)

(District Court of Appeal, First District, Division 1, California. Jan. 17, 1924.)

1. Infants ⇐20—Conviction of committing lewd act on female child sustained.

Evidence held sufficient to support a conviction of committing a lewd and lascivious act on a girl under 14 in violation of Pen. Code, § 288.

2. Criminal law ⇐1160—Verdict not set aside for insufficiency of evidence unless there is no substantial evidence supporting it on any hypothesis.

It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and a verdict approved by the court cannot be set aside on appeal for insufficiency of the evidence to support it, unless it clearly appears that there is no substantial evidence sufficient to support it on any hypothesis.

3. Infants ⇐20—Crime charged held sufficiently differentiated from similar crimes by instruction.

In a prosecution for committing lewd and lascivious acts on a girl under 14, in violation of Pen. Code, § 288, an instruction referring to the particular act charged held to have sufficiently differentiated between it and acts constituting other crimes against children.

4. Criminal law ⇐824(1)—Party asking no instructions cannot complain of error in not giving them.

A party failing to ask for instructions on a particular point cannot complain of error in not giving them.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Benjamin King was convicted of violating Pen. Code, § 288, and appeals. Affirmed.

M. H. Hernan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendant was charged and convicted of the crime defined in section 288 of the Penal Code. He appeals from the judgment and from an order denying his motion for a new trial. He contends that the evidence is insufficient to warrant the verdict and also that the trial court committed error in failing to make more specific an instruction given on a certain point of law.

The victim of defendant's alleged assault was a girl six years of age. The story of the offense was told by Thomas Murphy, a police officer, who was on duty in the old fair grounds, San Francisco. While walking through the high weeds he saw the little girl lying on the ground, and the defendant apparently lying over her. He grabbed the defendant and pulled him over. Defendant's pants were down, his privates were exposed, and the child was lying on her back, her coveralls were down over her feet, and her flesh exposed. "I asked him why he should be guilty of such a crime," testified the officer. "He said his only excuse was he had been drinking moonshine."

[1] It is argued on behalf of defendant, that the evidence does not support the allegations of the information in that it cannot be inferred from the evidence that "the defendant placed his hands and private parts upon and against the body and legs and private parts of the child." The facts in the instant case are somewhat similar to those in *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031. There, as here, the testimony revealed the fact that the defendant had first secured the confidence of the child, whom he led to a secluded place such as would be selected for the commission of the crime charged; that he had induced or placed the child in a position and he himself had assumed an attitude which clearly indicated his indecent purpose; that he exposed his own person; and that the child's clothing had been disarranged in a manner which comported with the theory of the prosecution regarding the defendant's guilt. All of this, coupled with the lack of consent on the part of the little child, was sufficient to support a verdict of guilty. See, also, the case of *People v. Smith*, 33 Cal. App. 195, 164 Pac. 609.

[2] It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on ap-

peal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. *People v. Tom Woo*, 181 Cal. 315, 326, 184 Pac. 389.

[3] Defendant's objection to the instructions of the trial court was that—

"They were not sufficient to cover the offense charged in the information. In other words, they were not specific enough to establish the rule of evidence in prosecutions under section 288 of the Penal Code. There was no instruction upon the distinction between the acts constituting an offense in section 288 of the Penal Code and the acts constituting other crimes which are excepted in said section."

This objection is not leveled at any particular instruction, nor is our attention called to any authority supporting any such objection. The record shows that defendant requested no instructions; it further shows that the trial court instructed the jury concerning the offense charged in the information as follows:

"The court instructs the jury that if you believe from the evidence beyond a reasonable doubt, that in the city and county of San Francisco, at or about the time mentioned in the information, the defendant did feloniously, willfully, and lewdly commit a lewd and lascivious act upon or with the body, or upon or with the members or private parts of the body of Anita Jones, by then and there touching, rubbing or fondling the body, or members, or private parts thereof, of the said Anita Jones, as charged in the information, with intent then and there of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the defendant, and the said Anita Jones, or either of them, as charged in the information, and that the said Anita Jones was then under the age of 14 years, then you should find the defendant guilty."

This instruction, by its reference to the particular act charged in the information to have been committed by the defendant, does, we think, sufficiently differentiate between this offense and the acts constituting other crimes against children, provided for in other sections of the Penal Code; and otherwise the instruction follows the language of the statute. We find, therefore, no merit in defendant's contention.

[4] Furthermore, our Supreme Court has enunciated a rule of law, applicable to this class of case, which provides that—

"Where a party in a criminal case fails to ask the court to give instructions to the jury upon a particular point, he cannot complain of error on the part of the court in not giving the instructions." *People v. Rogers*, 163 Cal. 476, 484, 126 Pac. 143, 146.

Judgment and order affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(65 Cal. App. 252)

PEOPLE v. DAMAZONI. (Cr. 734.)

(District Court of Appeal, Third District, California. Jan. 12, 1924.)

1. Indictment and Information $\S$ 138—
Grounds of motion to set aside information must be presented.

For defendant to avail himself of his right to have the information set aside under Pen. Code, $\S$ 995, the grounds therefor must be presented in the motion.

2. Criminal law $\S$ 241—Denial of motion to set aside information for commitment held not error.

Where the magistrate's commitment, on which an information in two counts charging sales of intoxicating liquor to different parties, was based, was in general language, and held defendant to trial for the "offense named in the within complaint," without specifying the different counts, the court did not err in denying defendant's motion to set aside the information on the ground that he was not legally committed. Pen. Code, $\S$ 995.

3. Criminal law $\S$ 238—Order of commitment held justified by defendant's admissions.

Defendant's admissions before a magistrate that he sold contraband liquor to a party named in the first count of an information having two counts charging sales to different persons held sufficient to justify an order of commitment as to such count, as well as the other, which was dismissed.

4. Criminal law $\S$ 238—Magistrate must commit for any offense disclosed by any testimony.

A magistrate must commit a person to trial in the superior court for any offense disclosed at the preliminary hearing by any testimony from any source.

5. Criminal law $\S$ 178—Dismissal of information to file new information not former jeopardy.

Dismissal of an information for the purpose of filing a new information does not bar further prosecution for the same offense.

6. Criminal law $\S$ 178—Particular matters held not to authorize plea of former jeopardy.

Dismissal of one count of an information charging sales of intoxicating liquors to different persons and withdrawal of defendant's plea of not guilty for the purpose of enabling him to move to set aside the information on grounds not in the record do not authorize a plea of former jeopardy.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

V. Damazoni was convicted of selling intoxicating liquor, and appeals. Affirmed.

E. S. Bell, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The information, following in that respect the complaint filed with the

magistrate, was originally in two counts, the first charging that the defendant, on or about the 7th day of March, 1923, in the county of Napa, did willfully and unlawfully sell and furnish to one Frank Martinetti intoxicating liquor containing one-half of 1 per centum or more of alcohol by volume, etc., and the second likewise charging said defendant with selling and furnishing to Gussie Johnson and Evon Thiel like liquor, containing one-half of 1 per centum or more of alcohol by volume, etc. Upon his arraignment, and after a futile motion to set aside the first count of the information, the defendant entered a plea of not guilty to each of the counts set up in the information. When the case was called for trial, the court, upon motion of the district attorney, and with the express acquiescence of the attorney for the defendant, set aside the second count of the information. Thereupon the attorney for the defendant asked that the defendant be permitted to withdraw his plea of not guilty theretofore entered by him to the information, and the request was granted. The defendant then made a motion to set aside the information as it then stood on grounds not stated in his motion, so far as this record discloses. The motion was denied and thereupon the defendant interposed a plea of not guilty to the charge contained in the information, as set forth in the first and only remaining count thereof, and also a plea of once in jeopardy.

The trial was thereupon proceeded with upon the charge stated in the first count, and the jury found against the defendant on his plea of once in jeopardy and also found him guilty as charged. He brings this case to this court upon an appeal from the judgment of conviction and the order denying his motion for a new trial.

The defendant complains that the court erred by not granting his motion to set aside the information.

[1] There is not before us a reviewable record upon the question whether the court did or did not err in denying the motion to set aside the accusatory pleading. As seen, the grounds of the motion are not stated, and it is, of course, impossible for us to say whether the court committed error in its action in denying the motion. All that the record shows as to this matter is the following:

"The defendant now interposes a motion to set aside the first count of the information."

Section 995 of the Penal Code provides, among other things, that an information must be set aside when it is made to appear:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate.

"2. That it was not subscribed by the district attorney of the county, or city and county."

[2] It is a proposition requiring no discussion that in order that a defendant may avail himself of the right to have an information filed against him set aside, the ground or grounds upon which he bases that right must be presented so that the court may know whether the point thus made by him is or is not well taken. It would seem that authorities in confirmation of this proposition need not be cited. It may not be improper to say, however, that, the entire proceedings before the committing magistrate culminating in the holding of the defendant to trial having been admitted in evidence in purported support of the motion, it is probable that the ground upon which it was the intention of the defendant to press the motion was that he was not legally committed by the magistrate. Indeed, in the brief of counsel for the defendant it is so stated. Assuming this to be true, and the record was such as to make the point reviewable, still we would find no reason for upholding the position of the defendant that the court erred in denying his motion to set aside. The commitment issued by the magistrate and upon which the information was founded is in general language and holds the defendant to trial for the "offense named in the within complaint." It will thus be noted that the commitment was not specific as to the two different counts charged in the complaint.

[3, 4] It is contended that, while the depositions taken before the magistrate disclosed that probable cause existed for holding the accused for trial on the second count of the information (the count that was dismissed), there is no proof whatsoever revealed by said depositions tending to establish probable cause for holding the accused on the first count and it is hence argued that the commitment must be construed to refer to and embrace the second count only. There is no merit in the contention. The depositions taken before the magistrate clearly establish probable cause or reason for believing that the defendant committed both offenses at the times and places stated in the complaint and in the information. While it would perhaps have been the better practice for the magistrate to have specifically referred in his commitment to both offenses, it cannot be doubted that the order of commitment, considered by the light of the depositions, was sufficient to meet the requirements of the statute. It appears from the depositions that the defendant, when testifying in his own behalf before the magistrate, expressly admitted, in reply to a question by the district attorney, that he sold contraband liquor to the party named in the first count on the occasion stated therein. Manifestly, the magistrate was justified in making the order of commitment as to said count upon that admission. Indeed, a magistrate

is enjoined by law to commit a person to trial in the superior court for any offense which may be disclosed at the preliminary hearing by any testimony, from whatsoever source it may come, given before him.

[5, 6] We do not understand what application the plea of once in jeopardy had to the case as it stood before the superior court after the dismissal of the offense charged in the second count of the information. Even if the mere fact of the dismissal of an information would have the effect of barring a further prosecution for the same offense (which is not the law where the information is dismissed for the purpose or with the intention of filing a new information), the plea of once in jeopardy in this case could under no conceivable circumstances be available to the defendant. As seen, the information was to all practical intents and purposes merely amended by eliminating therefrom one of the counts therein contained, and the withdrawal of the plea of not guilty was for the purpose of enabling the defendant to move to set aside the information on some ground or grounds which, as stated, are not made to appear in the record here. Obviously, jeopardy cannot attach under such circumstances.

We see no merit in this appeal. The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

65 Cal. App. 234

PEOPLE v. GREEN. (Cr. 1024.)

(District Court of Appeal, Second District, Division 2, California. Jan. 10, 1924.)

1. Indictment and information $\S$ 110(25)—Charge in language of statute held sufficient.

It is ordinarily sufficient to charge an offense in the language of a statute defining same or which describes acts constituting the offense, and *held*, that charge of assault with intent to commit the infamous crime against nature was sufficient under Pen. Code, $\S$ 220.

2. Indictment and information $\S$ 191(1)—Sodomy $\S$ 5—Information charging assault with intent to commit held not to charge lesser offense not required to designate intended victim of infamous crime.

If an information charging that accused "did willfully, unlawfully and feloniously commit an assault upon the person of P. M. with the intent then and there to commit the infamous crime against nature" can be deemed to include a charge of simple assault upon P. M. for the purpose of ridding accused of P. M.'s opposition in order that he might accomplish his purpose upon the person of another, such latter offense is nevertheless within Pen. Code, $\S$ 220, and would not amount to a lesser offense, and it is not necessary, on any theory of such inclusion, to designate in the information the intended victim of the infamous crime constituting the object of the assault.

3. Indictment and Information § 110(3) — Essentials of information charging offense under statute, stated.

The charge of an offense is sufficient if it shows the language of the statute prohibiting same and alleges all the facts and acts which the Legislature has said shall constitute the offense and is direct and certain as to the party charged and the particular offense charged.

4. Sodomy § 1—Offense of assault with intent to commit complete, though person assaulted was not assailant's objective.

Under Pen. Code, § 220, defining the crime of assault with intent to commit the infamous crime against nature, the offense is complete when the assault has been committed with such intent, whether accused's objective was the person assaulted or another.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

W. S. Green was convicted of assault with intent to commit the infamous crime against nature, and he appeals. Affirmed.

K. E. Schwinn and Miguel Estudillo, both of Riverside, and L. W. Blodget, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. Appellant was convicted in the superior court upon an information charging him with assault with intent to commit the infamous crime against nature, denounced by section 220 of the Penal Code; the charging part of which information, essential to this appeal, read as follows:

"W. S. Green is accused by the district attorney of Riverside county and state of California, by this information, of the crime of a felony committed as follows: The said W. S. Green on or about the 20th day of March, 1923, at the said county of Riverside, state of California, and before the filing of this information, did wilfully, unlawfully and feloniously commit an assault upon the person of Paul Maupin, with the intent then and there to commit the infamous crime against nature."

Two grounds are urged for reversal of the judgment and order denying appellant's motion for new trial: (1) That the information does not state facts sufficient to constitute an offense amounting to a felony, in that it fails to charge an attempt to commit an offense upon the person of a named individual; and (2) that the information therefore charges no more than assault, a misdemeanor, of which the superior court did not have jurisdiction.

Section 220, Penal Code, provides that—

"Every person who assaults another with intent to commit rape, the infamous crime against nature, mayhem, robbery, or grand larceny, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The question presented by appellant, and which is decisive of both grounds of this appeal, is as to the necessity of designating in the information the intended victim of the infamous crime which constituted the object of the assault. Appellant cites authority to maintain the proposition that an accusation must contain all of the ingredients of the offense with which the defendant is charged, in direct language, leaving no essential to be reached by inference or argument. This is admittedly a correct statement of the law. It is also true that a charge is insufficient which states mere legal conclusions; but the distinction which is vital here is that between a mere legal conclusion and an ultimate fact. In 31 Corp. Jur. p. 711, § 266, it is said:

"Where a charge in the language of the statute charges a mere legal conclusion, or where it connects accused with the crime by mere inference or argument, a more particular statement of the facts is necessary. But a charge following the statute is sufficient where it states ultimate facts."

[1] It is ordinarily sufficient to charge an offense in the language of the statute if the latter defines it or describes the acts constituting the offense, especially where the words used have a well-recognized meaning. *People v. Silva*, 8 Cal. App. 349, 97 Pac. 202. The infamous crime against nature is not defined by the Penal Code, but every person of ordinary intelligence understands what that crime is. *People v. Erwin*, 4 Cal. App. 394, 88 Pac. 371.

[2] In the instant case the information charges in the language of the statute, and in so doing charges ultimate facts. It alleges a felonious assault upon the person of Paul Maupin, and also that this assault was with intent then and there to commit the infamous crime against nature. Extensive argument is advanced in support of the theory that had appellant intended committing a simple assault upon the said Maupin for the purpose of ridding himself of the latter's opposition, in order that he might accomplish his purpose upon the person of another, he might be guilty under this information, and it is assumed that the statute does include his situation. The evidence shows that such was not the case, but were this true we think it would fall within the scope of section 220, Penal Code, and would amount to no lesser offense.

Cases cited in behalf of appellant in support of the proposition that it is necessary to designate the intended victim of the assault arose under statutes by whose language the identity of a particular person was essential to a prosecution. In *People v. Shaber*, 32 Cal. 36, the defendant was charged with having broken into and entered the house of Jackson and Wood, with intent then

in said house to commit larceny. It was urged that the indictment was defective, in that it failed to state that the defendant intended to steal property of said persons, or that there was any property in the house. The Supreme Court said:

"As a larceny actually committed is not made an element in the offense, it cannot be needful to allege one, either generally or by an averment of the facts entering into and constituting its definition. And as a forcible entry, etc., with a larcenous intent, is all that is made essential to the crime, we consider that a conviction would be due, even though it should appear that there were no goods in the building at the time the entry was made. The forcible entry and the intent being found or given, the crime would be complete, even though it should turn out that, contrary to the calculations of the burglar, the building was empty. The sting of the crime is, in short, the guilty purpose, without reference to the possibility of accomplishing it, in any given instance."

People v. Holland, 59 Cal. 364, and People v. Wells, 145 Cal. 138, 78 Pac. 470, are to the same effect.

[3] An information is sufficient if it follows the language of the statute, and alleges all the acts and facts which the Legislature has said shall constitute the offense, and is direct and certain as to the party to be charged and the particular offense charged. People v. Fowler, 88 Cal. 136, 25 Pac. 1110; People v. Patterson, 102 Cal. 239, 36 Pac. 436; People v. Girr, 53 Cal. 629.

[4] In the case at bar the assault, with the specific intent contemplated by the statute, was alleged and proven. The ultimate fact constituting the offense, as defined by section 220, Penal Code, was an assault upon the person of Paul Maupin, with such intent, and if appellant's objective were Maupin or another person the statute was nevertheless violated, and no allegation of the other intended offense except by way of naming its was necessary.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

65 Cal. App. 283

MUSACHIA v. JONES et al.
(Civ. 2591, 2592.)

(District Court of Appeal, Third District,
California. Jan. 16, 1924.)

1. Master and servant — 330(3)—Evidence held to show truck was taken by employees for pleasure without master's consent.

In an action for injuries from being struck by a truck driven by an employee of defendant, evidence held to show that such employee and another took the truck for their own purpose to attend a dance without obtaining permission.

2. Master and servant — 302(6)—Master not liable for accident arising from return of automobile wrongfully taken.

Where automobile truck was wrongfully taken by employees for pleasure purposes without permission, it was their legal duty to return it, and for any act of negligence on their part in returning it neither the master nor any one else would be liable because of having directed or requested its return.

3. Master and servant — 330(1)—Agency not presumed when owner's car is not used in service.

As respects owner's liability for injury from negligent operation of his automobile by another, where it appears that the automobile was not being used in the service of the owner, the presumption of agency, which otherwise arises from the mere fact of ownership, does not arise.

4. Master and servant — 302(6)—Employee must be acting for master to render him liable.

If it appears that an employee in using an automobile was seeking exclusively his own ends of business or pleasure, the master is not liable for injuries to others from the operation of the automobile, and this is true, no matter how short a time the employee is acting in matters disconnected from the master's business, if the injury occurs during that time.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Lillian Musachia against C. W. Jones and others. From a judgment against all defendants, the named defendant and A. S. Goodman appeal. Reversed.

Driver & Driver, and C. E. McLaughlin, all of Sacramento, for appellants.

Elliott & Atkinson and Wm. A. Sitton, all of Sacramento, for respondent.

PLUMMER, J. The two actions herein were tried as one, consolidated upon appeal, presented upon one transcript and one set of briefs, and will be considered and determined as one case.

[1] The cause of action arises from an injury received by the plaintiff by reason of being run into by a Ford automobile truck driven by the defendant William Nunes. Plaintiff had judgment against all the defendants, and Goodman and Jones appeal.

On Sunday, May 23, 1920, while on a public road near Walnut Grove in the county of Sacramento, the plaintiff was injured by a Ford truck then owned by C. W. Jones & Sons, and being driven by the defendant William Nunes. C. W. Jones & Sons as a copartnership consisted of defendant C. W. Jones, Fred C. Jones, and G. D. Jones, then engaged in farming a tract of land in the Delta region of the Sacramento river. Another copartnership mentioned and referred to in the testimony consisted of Goodman and

Jones, the members of which were A. S. Goodman, Fred C. Jones, and G. D. Jones. This copartnership was engaged in farming another and separate tract of land in the same locality. The defendant Nunes testified at first that he was working for C. W. Jones on the Saturday preceding and the Monday following the accident. Later his testimony shows that he was uncertain as for whom or which partnership he was working. The time books introduced in evidence and other evidence in the case indicate that he was working for the partnership of Goodman & Jones. On the Saturday evening preceding the Sunday on which the injury occurred it appears from the testimony that the firm of C. W. Jones & Sons had decided to retire the Ford truck from further use, and to this end the witness C. D. Jones, in conversation with the defendant A. S. Goodman, made the following request:

"If you come over Saturday night, I wish you would bring the Ford truck over and leave it at C. W. Jones' place."

This place is otherwise mentioned in the testimony as the Jones home place. In compliance with this request, according to the testimony of defendant Goodman, the defendant A. S. Goodman on the Saturday evening preceding the injury took the Ford truck to the C. W. Jones home place, and left it there. On his way to the Jones home place with the truck it appears from the testimony that A. S. Goodman took with him Victor Goodman, the defendant William Nunes, and two workmen named King and Wolf.

It further appears from the testimony that a dance was to be given at Walnut Grove, a town some miles distant from the Jones home place; that the defendant Goodman, Victor Goodman, and William Nunes were desirous of attending the same. It further appears that the defendant A. S. Goodman had asked and received permission to use a certain automobile known as and called the Dodge commercial car in going to this dance, and was intending to take with him Victor Goodman and the defendant William Nunes. Upon arriving at the Jones home place with the Ford truck the defendant Goodman went into one of the houses there for the purpose of shaving, and otherwise making preparation to attend the dance referred to, to be held at Walnut Grove, and while he was so doing, the defendant William Nunes and Victor Goodman, not wishing to be delayed in reaching Walnut Grove and so late at the dance, and wishing to have opportunity to arrive at Walnut Grove to shave or get shaved and properly dressed to attend the dance, without permission of any one, took the Ford truck, and drove to Walnut Grove, Victor Goodman doing the driving. The two workmen referred to as King and Wolf accompanied Victor Goodman and the defendant Nunes in the Ford truck to the town of Walnut Grove. It

further appears from the testimony that the workman King had severed his employment with C. W. Jones & Sons, and was leaving by way of Walnut Grove. After the departure of the defendant Nunes and Victor Goodman for Walnut Grove in the Ford truck, the defendant A. S. Goodman proceeded to the same place in the Dodge commercial car, and on the evening of Saturday, the 23d, the following conversation took place between defendants A. S. Goodman and William Nunes. The testimony of William Nunes:

"Q. Prior to the driving of that machine, did you have any conversation that night at Walter Goodman's place with A. S. Goodman? A. No conversation, only I told him the lights were on the bum; he said he would come and fix them. That was all the conversation we had. Q. With whom did you have that conversation that the lights were on the bum? A. Yes. Q. With whom did you have that conversation? A. With A. S. Goodman. Q. Where was that conversation held? A. In Walter Goodman's house. Q. Just prior to your driving the truck away? A. Yes, sir. Q. What, if anything, was said by Goodman as to driving the machine? A. He just simply asked me if I would drive the truck home. Q. Repeat as near as you can, his words? A. Well, he turned around, asked me if I would drive the machine home, over to C. W. Jones' ranch on Grand Island. Q. Was that where the truck belonged? A. Yes; that is where the truck was left. Q. Who told you it was to be left there? A. Arthur Goodman—A. S. Goodman. Q. The man who asked you to drive the Ford truck—did he tell you where it was going, where you had to drive it? A. He told me to take it over to the ranch; leave it there, at C. W. Jones', leave it, he would meet me with the other car, take me over to the ranch. Q. Did you come in town into Walnut Grove in that truck? A. I did. Q. When? A. Saturday night. Q. Who, if any one, came with you? A. Victor Goodman, and a man by the name of Wolf, I do not know his first name. Q. Do you know who he was? A. No—just a ranch hand, all I know about him. Q. Was he working where you were working? A. Yes, sir. Q. That is, on Saturday night, you came into town, you and Walter Goodman, and this man Wolf came in this truck. A. Not Walter Goodman—Victor Goodman. Q. Victor, and yourself? A. Yes. Q. A. S. Goodman—apparently there are three Goodmans; there is Walter Goodman, Victor, and A. S.? A. Yes, and Arthur. Q. A. S. the defendant? A. Yes. Q. Where, if you know, was Victor Goodman working? A. I could not say for sure; I think he was working for Goodman & Jones—Jones & Goodman. Q. Where did you get into the truck on that Saturday night when you came into Walnut Grove? A. On Ryer's Island. Q. Who, if any one, was in the truck when you got in the truck that night? A. Victor Goodman, myself, Jack King, and Wolf. Q. Were the others in the truck when you climbed aboard—or did you all get in the truck together at that point? A. I could not state; I guess we all got in together, I could not state. Q. You mentioned a man by the name of King? A. Yes. Q. He was in the truck?

A. Yes, sir. Q. Do you know where he had been working? A. I could not say for sure where he was working; I think he was working for Jones & Goodman, I am pretty sure. Q. Where was Jones & Goodman's place where the truck was? A. Known as unit 2. Q. As a matter of fact, Mr. Nunes, was not he working in the same place where you were working? A. I could not state; I do not think he was. Q. What is it? A. I do not think he was. Q. That truck, had you driven it before? A. No, sir. Q. How long had you been working for Jones & Sons? Prior to the accident? A. I was over on Liberty Farms for eight months; to say how long I worked for Jones & Sons, I could not say. I worked for Jones & Goodman or for Jones & Sons. Q. When you speak of Liberty Farms, what property do you refer to? A. That is unit 2. Q. Do you know who owns unit 1? A. No.—. Mr. Driver: Objected to as incompetent. The Court: If he knows. Mr. Atkinson: Q. Do you know who operates the place known as No. 1? A. C. W. Jones & Sons, No. 1. Q. Who operates No. 2? A. Jones & Goodman. Q. The defendant Goodman? A. Yes, sir. Q. Or C. W. Jones & Sons? A. At times I was working for C. W. Jones & Sons and at times Jones & Goodman. Q. From whom did you get your instructions, if any one, while you were working there on unit No. 1, and unit No. 2? A. I got my instructions most of the time from Goodman."

Shortly after leaving Walnut Grove the Ford truck while being driven by the defendant William Nunes had come into collision with the person of the plaintiff, and furnishes the basis for the cause of action herein.

On the part of the appellants it is insisted that there is no testimony upon which any legal liability can be fixed as against either of the defendants C. W. Jones or A. S. Goodman. On the part of the respondent it is contended that the defendant A. S. Goodman was the general superintendent of C. W. Jones & Sons, and as such had authority to give directions to the defendant William Nunes, and that, while driving the Ford truck on its way from Walnut Grove back to the C. W. Jones home place, the defendant William Nunes was acting as an agent, servant, and employee of the defendant C. W. Jones, and also under the immediate direction and supervision of the defendant A. S. Goodman. The testimony in the case is of considerable length, and, of course, cannot be set forth in full, but it appears therefrom without contradiction that, whether the defendant Nunes was on the 22d day of May, 1920, in the employ of C. W. Jones & Sons or in the employ of Goodman & Jones, he was, at least, from the evening of that day until and including the following Sunday at Walnut Grove on his own time and in pursuit of his own pleasure. It also appears without any contradiction that the Ford truck was taken from the Jones home place and driven to Walnut Grove without permission so to do being asked of any one, by any one, or given by any one. The contention that the Ford truck was in the serv-

ice of either C. W. Jones & Sons or Goodman & Jones by reason of the fact that a workman known as Jack King, who, by the testimony of the defendant William Nunes, may have been at work for the copartnership known as C. W. Jones & Sons, but by the time book of Goodman & Jones appears to have been at work for the latter named copartnership, accompanied Victor Goodman and William Nunes in the Ford truck, requires only a statement of facts to show that such a contention is untenable. The fact that the Ford truck may have previously been used to take workmen to town who had severed their connection with either of the partners does not controvert the fact that upon the night in question the Ford truck was taken from the Jones home place without direction or permission, for the purpose of enabling Victor Goodman and William Nunes to speed up their arrival at Walnut Grove in order that they might fitly prepare themselves for the coming dance. They were not directed to take the Ford truck to Walnut Grove for the purpose of conveying thereto any other workmen. It further appears from the testimony that the defendant A. S. Goodman, while in Walnut Grove on Sunday, May 23d, obtained the services of a workman by the name of Smith, and brought this workman to the locality of the ranches herein referred to, and that on the 25th day of May, 1920, the man Smith began to work for the partnership of C. W. Jones & Sons. This workman was brought from Walnut Grove to the farm referred to in the Dodge commercial car. It also appears from the testimony that this workman may have been employed for services on the ranch or farm operated by Goodman & Jones, as the time book introduced in evidence shows that a man by the name of Smith began work for Goodman & Jones on May 24th, and continued in such service until May 31st of the year 1920. It further appears that the defendant Nunes was tractor engineer, and his employment, whether working for C. W. Jones & Sons or Goodman & Jones, was along that line, and that the employment upon the two ranches and for the two copartnerships varied from time to time as the occasion required; that is, he would be employed for a period of time on one ranch and then upon the other. The scope of his employment wherever he was at work was in driving a tractor or caring for the same. As to the relation of the defendant A. S. Goodman with the copartnership of C. W. Jones & Sons during the month of May, there is much discussion by the respective counsel. The testimony of the defendant Goodman is to the effect that he was not the general superintendent and had no legal relation whatever to the copartnership of C. W. Jones & Sons during the month of May, 1920, that it had been severed some time previous to that month. Upon this question and as to who was the general superintendent of C.

W. Jones & Sons, the testimony appearing in the transcript is as follows:

"Q. Your name is G. D. Jones? A. Yes, sir. Q. C. W. Jones is your father? A. Yes, sir. Q. Are you a member of the copartnership of C. W. Jones & Sons? A. Yes, sir. Q. Does C. W. Jones & Sons operate—that is, in May, 1920, did C. W. Jones & Sons operate the ranch known as unit No. 1 that has been referred to here? A. Yes, sir. Q. During the month of May, 1920, who was foreman and superintendent of that ranch? A. Charles Beaton. Q. And did Charles Beaton at that time have full charge of the running of that ranch, when some member of the firm of Jones & Sons was not there? A. Absolutely—he had, absolutely. Q. He had charge at all times? A. Yes, sir. Q. During the month of May? A. Yes, sir. Do you remember the occasion of this accident concerning which this suit is concerned? A. Yes, sir. Q. You heard that talked about? A. Yes, sir. Q. Were you on Ryer Island—I mean at unit No. 2 on May 22d, the day before the accident—1920? A. Yes, I was on unit No. 1; and also unit No. 2. Q. Did you have any conversations with the defendant Goodman concerning the Dodge—not the Dodge—concerning the Ford truck? A. Yes, we were talking to each other. Q. Just relate what you said. A. We were talking about a dance— Mr. Atkinson: We object as irrelevant, immaterial, and incompetent. The Court: Objection overruled. A. We were talking about a dance, he was going to a dance; I said, 'If you come over Saturday night I wish you would bring the Ford truck over and leave it at C. W. Jones' place.' The Court: Who was that conversation with? A. A. S. Goodman. * * * Q. You requested Mr. Goodman, one of the defendants, to take that truck from where it was to the home place? A. I absolutely did not. Q. I beg your pardon—what did you say? A. I asked him if he would. Q. What was my question then—question withdrawn. Did you ask Mr. Goodman, one of the defendants in this case, to take that Ford truck to the home place? A. Yes, sir. Q. Had you been accustomed to look out for matters for him from time to time? A. He was a partner of mine. Q. Have you frequently asked Goodman to attend to matters for the copartnership of Jones & Sons? A. He was a partner of mine. Q. You frequently asked Mr. Goodman to attend to matters for the copartnership of C. W. Jones & Sons? A. I was not in the habit of it, no. Q. Have you ever before? A. No, sir; not to my knowledge. Q. Why did you want the truck taken down to the home place? A. I wanted to take it to Sacramento myself to sell it; it was not giving satisfaction. Q. So that it was desirable from a business standpoint for Jones & Sons to have the truck down from Ryer Island to the home place of Jones & Sons, is that it—what is it? A. He was coming over; I simply asked him if he would bring the truck over."

The copartnership referred to by the witnesses herein is that of Goodman & Jones, sometimes called Jones & Goodman, and not the copartnership of C. W. Jones & Sons. The copartnership of Goodman & Jones had

to do with what is known as and called unit No. 2. The copartnership of C. W. Jones & Sons had to do with the ranch known as and called unit No. 1. Both were situated on Ryer Island, and some three or four miles apart.

Upon the question as to who was the superintendent and had charge of unit No. 1, the ranch operated by C. W. Jones & Sons during the month of May, 1920, the testimony of Charles G. Beaton is as follows:

"My business is that of farming superintendent. During the month of May, 1920, I was employed by C. W. Jones & Sons on unit No. 1, Liberty Farms. I was farm superintendent. My business was keeping the time; setting the men to work. I hired men, sometimes I came down and got them. I told them what to do and where to do it. I know a man named Jack King, I know George Jones, Fred Jones, C. W. Jones, Victor Goodman, a man named Yancy, and A. S. Goodman. On May 22, 1920, Yancy was working for C. W. Jones & Sons. During the month of May Victor Goodman was working for C. W. Jones & Sons. On the 22d day of May, 1920, King was working for Jones & Goodman. At that time A. S. Goodman (the defendant) was working on his own ranch. A. S. Goodman was a partner in the firm of Goodman & Jones. A. S. Goodman was not working on unit No. 1 that I know of about the 22d of May, 1920. A. S. Goodman stayed at unit No. 1 at nights. He usually went from unit No. 1 to unit No. 2 by boat. He got his meals at unit No. 1. On May 22, 1920, I believe, William Nunes was working for Goodman & Jones. He was not working on unit No. 1 on May 22d; he was working for Goodman & Jones on unit No. 2. I have a book that shows when Nunes was working for Goodman & Jones and for Jones & Sons. It is a time book kept by me as foreman for C. W. Jones & Sons' ranch. Previous to the time I went the book is not in my handwriting, after that it is entirely in my handwriting. I made no entries until April, 1920. The book was kept in the boathouse in unit No. 1. The boathouse was used as a boathouse and sleeping quarters. I made the entries every night. Mr. William Nunes quit work for Jones & Sons on May 15, 1920; did not work for Jones & Sons on unit No. 1 after May 15, 1920. During that month I had occasion to go to Sacramento after men. I went in a Ford truck. I never drove the Ford truck to Walnut Grove after anybody to work on unit No. 1. On one occasion I took a man who had quit work to Sacramento in the Ford truck. The Ford truck had been used by A. S. Goodman several times for the purpose of bringing men to work and taking men away who had quit or been discharged. I went to work for Jones & Sons about the 5th or 6th of April, 1920. Pages 1, 2, and 3 of the time book are in my handwriting. The words, 'A. S. Goodman,' under the title of 'C. W. Jones & Sons, Time Book for the Month of April, 1920,' is in my handwriting. I asked Mr. Goodman if he was on the payroll of C. W. Jones & Sons. He told me he did not know. I put his name on the book, I had no instructions to carry his time. I never spoke to Mr. Jones about this entry. Opposite

the name of A. S. Goodman is the sum of \$200. That is in my own handwriting. That indicates Goodman was paid \$200 for services on unit No. 1 for the month of April, 1920. That is what he had been paid; he told me that those were his wages. When I was hired, C. W. Jones and George Jones came to the Golden State Company; they stated that A. S. Goodman would instruct me until such time as I was able to take the ranch over and run it. I got instructions from them when I was hired on unit No. 1 that A. S. Goodman would instruct me how to run the place until I became familiar with the work, and that he would sign all checks that were there. The conversation as nearly as I can relate it is as follows: 'C. W. Jones and George Jones came to the Golden State, and wished me to go over. I decided finally to go over there. They said A. S. Goodman was working for them at the upper place and also the lower place, units No. 2 and 1. They wanted a man there the whole time that could keep the records and keep the work going at unit No. 1, so A. S. Goodman could devote most of his time to unit No. 2. I asked G. D. Jones in what manner they would pay off the men when they were discharged; he said I just give them checks, and A. S. Goodman would sign them. Nothing was said as to the position then occupied by Goodman. They did not say he was running it as boss or foreman. They said that he could be over there, that both C. W. Jones and George Jones would be over there two or three days to make any suggestions necessary until the time I got hold of the ropes. They did not say anything about taking instructions about unit No. 1 from A. S. Goodman; just to work in co-operation with him. Q. I thought you testified that at the time of your employment you were told to report at unit No. 1 to Mr. Goodman, who would tell you what to do. A. I did not say so—to work with him. Mr. Goodman would be there until such time as I got hold of the ropes and could run the ranch. I did confer with A. S. Goodman. He gave me suggestions about the place and the checks which I made out. Checks were signed C. W. Jones, per A. S. Goodman, for C. W. Jones & Sons. Those checks were made out by him in payment of wages of employees on unit No. 1. I used to keep the time book for A. S. Goodman; I helped him out on that work; he would tell me about his men; also make out the checks. They were made out and signed by Jones & Goodman for A. S. Goodman. I have paid in checks for work for C. W. Jones & Sons, signed C. W. Jones & Sons, per A. S. Goodman. Q. I understand your testimony, these figures '\$200' opposite the name of Goodman in ink, show so far as the record you kept is concerned, Goodman was paid in the month of April, 1920, \$200 by C. W. Jones & Sons for work on unit No. 1. A. I do not know whether he was paid or not. I just put that in there as a matter of record. I got the figures from A. S. Goodman. He said that was the salary he had been receiving. I just put it in that month. I didn't make out a check for him. I was told by C. W. Jones and George Jones that Goodman would put me onto the ropes of running the place, how to run the ranch. I understood from C. W. Jones that I had charge of the place. The checks

that were signed by A. S. Goodman were made out by me. A. S. Goodman understood that men were in demand on unit No. 1. He brought Smith to unit No. 1. He said: 'Here is Smith; I hired him for you.' The checks referred to were made out both before and after the accident."

The defendant A. S. Goodman testified upon the points involved as follows:

"I am a member of the copartnership of Goodman & Jones. In the month of May, 1920, the members of that partnership were A. S. Goodman, G. D. Jones, and F. C. Jones. C. W. Jones was not a member of that partnership. C. W. Jones is the father of G. D. and F. C. Jones. I was not employed by the firm of C. W. Jones & Sons during the month of May, 1920. During the month of May, 1920, I was operating the farm in which I am interested, unit No. 2, Liberty Farms, Solano county, Cal. At one time I was foreman for C. W. Jones & Sons. I ceased being foreman on the 25th day of February, 1920. I know a man by the name of King, also Nunes, Beaton, and Yancy. On the afternoon of May 22, 1920, I left unit No. 2, went to unit No. 1, and from there on to Ryer Island to C. W. Jones' home on Grand Island. I went by a Ford truck. G. W. Jones asked me coming over on Saturday night to take the Ford truck over to the C. W. Jones home place on Grand Island and leave it there. I took the truck to the C. W. Jones home place, and left it there. Victor Goodman, Jack King, and William Nunes went with me. After reaching the C. W. Jones home place I went in the house to see Mr. Jones. I asked him if I could use the Dodge commercial. He gave me permission to use it. I took the Dodge to Walnut Grove. I stayed in Walnut Grove all night. The Ford truck was in Walnut Grove. Q. On Sunday night May 23d, did you tell William Nunes to take the Ford truck back to C. W. Jones' place? A. No, sir. Q. By the Court: Did you have any conversation with him about the car? A. Not with him—in general I just spoke up, 'Who was going to take the truck back.' He spoke up and said: 'I will take it back.' Q. Did you ever give Nunes any orders about the work at unit No. 1? A. No, sir. Q. To the men that were working there? A. No, sir. I had driven the Ford truck before May 22, 1920. Had driven it to Sacramento; drove it there on business of C. W. Jones & Sons. When I was foreman I employed men for C. W. Jones & Sons. I have employed the Ford truck in carrying employees of Jones & Sons to Ryer Island. I used the truck in taking men to and from Ryer Island. Have not done so since I ceased to be their foreman. C. Smith worked one day for Jones & Goodman on unit No. 2 on the 24th day of May. Then he went to work for C. W. Jones & Sons. I received no pay from C. W. Jones & Sons after February. I told Beaton my compensation was \$200 a month. (Page 3 of Defendant's Exhibit 1 is then admitted in evidence as follows: "A. S. Goodman," under the month of April, 1920, the sum of "\$200"; under date of March, 1920, A. S. Goodman \$200.) I consulted with G. D. Jones about the conversation I had with

him in relation to driving the Ford truck over to the C. W. Jones home place."

The testimony of witness A. S. Goodman as to duties in other matters than this referred to herein was somewhat conflicting. Whether this was due to the fact that the witness apparently was hard of hearing, had a poor memory, or was attempting to prevaricate does not seem to us very material, because upon the main questions involved there is, in fact, when carefully considered, no conflict in the testimony.

Victor Goodman, who accompanied the defendant Nunes in the Ford truck on the night of May 22, 1920, testified as follows:

"I am a brother of A. S. Goodman, the defendant. During the month of May, 1920, I was working for C. W. Jones & Sons; I was working for them on May 22d; I know the defendant William Nunes. I know the witness Yancy. I know Fred Jones, George Jones, C. W. Jones, and Mr. Beaton. During the month of May, while I was working for Jones & Sons, I took my orders from Beaton. I was working on unit No. 1, on Liberty Island. Mr. Yancy worked there at the same time. I left the island, unit No. 1, on the evening of May 22d, 1920. Mr. Yancy left the same day. We first got a ride in the motor boat. After we got out of the boat, we took the car and went to the Jones home place on Grand Island. When we got to the Jones home place, Jack King and A. S. Goodman got out of the machine. I inquired around how long I was going to wait before I got started. I did not get the information, so I just drove off, went off to Walnut Grove. I had to be shaved and get a bath. I was going to the dance; going in a Ford truck. A. S. Goodman drove the Ford truck from the ferry to the home place. I took the truck and went to Walnut Grove. I went there for the purpose of shaving and dressing up to go to the dance. I did not see any of the Joneses when I got there. I did not ask anybody for permission to take the car; just took it. The launch we went in belonged to Goodman & Jones—came from unit No. 1 to unit No. 2—A. S. Goodman brought it down. Nunes and Jack King were along. When we got to Ryer Island, we got out of the motor boat and drove to the C. W. Jones place. I had not been accustomed to take the truck in going from Ryer Island to Walnut Grove. That particular Saturday night was the first time I ever took the truck. It was customary for the men to get off from unit No. 1 on Saturday night. They went from there the best way they could. If the Ford truck was going down, he gave them a ride. If it was not, they would walk. My brother was superintendent of unit No. 1 at one time. There was no boss with me when I worked the ranch. My brother drove the car down to the Jones home place. I do not know how he got the car."

The testimony of Jack King is to the effect that he accompanied the person mentioned from unit No. 2 to Ryer Island by the motor boat, and then by the Ford truck to the C.

W. Jones home place; that he and A. S. Goodman got out of the Ford truck and let the others start off in the Ford truck.

The defendant C. W. Jones testified that he was a member of the firm of C. W. Jones & Sons; that the Ford truck belonged to the copartnership of C. W. Jones & Sons; and that nobody else was interested in the ownership of the truck.

From the foregoing résumé of the testimony it seems to us clear that there is not a scintilla of evidence showing that the defendant A. S. Goodman was either a general superintendent or a farming superintendent of the ranch known as unit No. 1, owned and operated by the copartnership of C. W. Jones & Sons during the month of May, 1920. It does appear that during said month he had authority and did sign checks for the copartnership of C. W. Jones & Sons that had been drawn by the witness Charles G. Beaton. This testimony does not show any superintendency or right of control or any authorization to exercise control over any of the employees belonging to C. W. Jones & Sons, or any of his property, and we do not see how any reasonable inference can arise that such authority was given or exercised from the mere fact of signing checks. The extent of that authority was not inquired into, but is made the basis of an argument that the defendant A. S. Goodman was thereby vested with general authority as superintendent over the ranch known as unit No. 1, belonging to the copartnership of C. W. Jones & Sons, and the personal property used in connection therewith. We do not see how any such conclusion can be reached from the premises laid down, or how C. W. Jones can be charged with the negligence of the defendant William Nunes, because the defendant A. S. Goodman had signed the copartnership name of C. W. Jones & Sons to checks made out by Charles G. Beaton for the payment of employees working on unit No. 1.

[2] The testimony clearly establishes that Victor Goodman and the defendant Nunes were off on their own mission, seeking their own pleasure; that they took the Ford truck as a matter of their own convenience, without permission of any one, to reach Walnut Grove in time to enable them to get ready to attend a dance to be held there on Saturday evening, May 22, 1920. Under such circumstances it was the legal duty of the persons who had taken the truck to return it to the place from whence it had been taken. If the defendant C. W. Jones had learned of the taking of the Ford truck without permission by Victor Goodman and the defendant Nunes, and had called either one of them up at Walnut Grove, and directed or requested that they return the truck to the place from which it was taken without permission, and to which place it was their legal duty to return the truck, we do not see how any one could

reasonably argue that the defendant C. W. Jones would by so doing render himself liable for any act of negligence in returning the truck by the person who had wrongfully taken it away, and whose legal duty it was to make the return. If this is true, the interposition of the defendant A. S. Goodman, whether he made inquiry as to who was to return the truck or gave orders for its return, would not make any difference, or transfer any liability upon the defendant C. W. Jones. Nor is there anything in the testimony that we have been able to find which fixes any legal liability upon the defendant A. S. Goodman. He is not shown to be an agent of any one having the ownership in the truck, and whatever he did do he did of his own volition and not as one having authority in the premises over either Victor Goodman or the defendant William Nunes.

[3] As to whether the court erred in denying the defendants' motion for a nonsuit is, from the view we take of the whole case, wholly immaterial, nor is it necessary to discuss the authorities as to the presumption of agency, arising from testimony showing ownership of an automobile. When all the facts are laid before the court and it appears therefrom that the automobile in question was not used, and was not being used, in the service of the owner, then the presumption which otherwise arises from the mere fact of ownership is completely met. *Maupin v. Solomon*, 41 Cal. App. 323, 183 Pac. 198, and *Brown v. Chevrolet*, 39 Cal. App. 740, 179 Pac. 697.

[4] Nor does it seem to us necessary to lengthen this opinion by either a discussion or an analysis of the decisions of the various supreme courts cited by counsel other than to state that all the authorities hold that in order to hold the principal liable for the act of his agent, even where the agency is shown or admitted, it must also appear that the agent was acting in the service of his principal. If it appears that the agent was seeking his own ends exclusively, in pursuit of his own business or pleasure, then and in that case the master is not liable. And this is true, no matter how short a time the agent is acting in matters disconnected from the business of his principal, if the injury complained of occurs during that period of time. In the case at bar counsel for the respective parties do not differ as to the law involved, but simply seek to draw different conclusions from the testimony in the case, and then make application of the authorities cited. But, holding as we do that there is nothing in the testimony showing or fixing legal liability for the act of William Nunes upon either of the defendants A. S. Goodman or C. W. Jones, in that there was no showing whatever that at the time of the injury William Nunes was acting as the agent of C. W.

Jones, or that he was under any obligations to obey either the request or command of the defendant A. S. Goodman, or that A. S. Goodman had any authority invested in him to act for C. W. Jones & Sons in relation to their Ford truck, we do not deem it necessary to set forth the law or refer to the decisions having to do with the subject of principal or agent.

It follows from what has been said that the judgment against the defendants A. S. Goodman and C. W. Jones should be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

65 Cal. App. 310

SHEPARD v. SHEPARD. (Civ. 4815.)

(District Court of Appeal, First District, Division 2. California. Jan. 17, 1924.)

1. Divorce — 130—Uncontradicted evidence showed husband's extreme cruelty.

In wife's action for a divorce, uncontradicted and undisputed evidence held sufficient to justify divorce for extreme cruelty.

2. Evidence — 594—Uncontradicted and unimpeached testimony not to be disregarded by trial court.

Uncontradicted and unimpeached testimony, tending to establish an issuable fact, may not be arbitrarily disregarded by the trial court, and must be accepted as proof.

3. Divorce — 150(2), 186—Findings of fact not required in default decree; reversal should carry directions to enter judgment.

A decree of divorce by default requires no findings of fact, and reversal of trial court's decree should carry directions to enter judgment in accordance with finding on appeal.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Florence D. Shepard against Harold E. Shepard. Judgment for defendant, and plaintiff appeals. Reversed.

Pierce H. Ryan, of Eureka, for appellant.

NOURSE, J. [1] The plaintiff sued for a divorce from the defendant upon the grounds of extreme cruelty. The complaint alleged that the parties intermarried in June, 1909; that they resided in the county of Humboldt for the statutory period, that two children were born of the marriage, and that they separated on the 18th of February, 1922. The charge of cruelty found in the complaint related to the conduct of the defendant regarding his association with other women, and it was alleged that during the period of two years last past defendant had received many letters of a loving and affectionate nature from many women other than plaintiff, that he continually flirted with and made love to other women, and that in the month

of November, 1921, he stated to plaintiff that he had certain relations of an immoral character with two women. Plaintiff prayed for an interlocutory decree and the custody of her two children. No answer was filed on the part of the defendant, and, his default having been entered, the cause came on for trial on the allegations of the complaint just referred to. The testimony of the plaintiff was plain and unambiguous and clearly established the allegations of cruelty. She testified that for a period of about eight years the defendant had been guilty of the conduct of which she complained; that she had often seen letters which were written to him by other women, some of which were shown to her by the defendant and which she had read; that he had frequently stayed out until 2 or 3 o'clock in the morning and sometimes had remained away from home altogether in the company of other women; that a short time before the commencement of the action the defendant had shown her a large number of letters which he had received from other women, and upon his promise to discontinue his objectionable conduct she had destroyed them; that in December, 1921, the defendant had contracted a venereal disease through his association with another woman; and that plaintiff thereupon, with her two children, separated from him. She was corroborated by the witness Moore, who testified that during the period referred to he had spent two months with the defendant and had seen him almost nightly write letters to other women; that he had read portions of letters which the defendant received from other women; that they were all in the nature of love letters; and that the defendant frequently told him that he had been engaged in such conduct for a number of years, that it had caused a great deal of trouble between him and his wife, and that he regretted very much that he had been guilty of such conduct as he felt that he had thereby lost the affection of his wife and that she would demand a legal separation from him. These two witnesses, as well as the plaintiff's counsel, were all subjected to a grilling examination by the trial court upon matters which were not brought out on their direct examination, but which tended to show that the trial court suspected that there was some collusion between the parties for the purpose of obtaining a divorce for the plaintiff. At the close of the trial the trial court entered judgment denying the interlocutory decree, and from this judgment the plaintiff prosecutes this appeal.

On this appeal the appellant relies upon the rule which now seems to be fairly established that a trial court may not arbitrarily disregard the uncontradicted evidence in the case, and base his judgment on mere suspicions which he may have in his own mind, and which are not supported by the record.

No appearance has been made on behalf of respondent, but on September 20, 1922, about one week after appellant's opening brief in this case was filed, there was filed with the clerk of the Supreme Court, at the request of the trial judge, a document designated "opinion of the court," which is not dated and which does not appear in the official transcript on file herein. It does not appear when the opinion was prepared, or whether it was at any time filed in the superior court where the cause was tried. It seems to be rather an answer to some of the contentions made by appellant's brief on this appeal. No findings being necessary because of the default, we are uncertain as to how to treat this document. A brief reference to it, however, will indicate plainly that the denial of the divorce was based upon the suspicions of the trial judge and not upon the evidence brought before him at the trial. Reference is made to the testimony of the appellant as to the admissions of misconduct made to her by her husband. The trial court says: "This is all hearsay, and framed up for the purpose of this divorce." Of course, this was not hearsay. It was incumbent upon the appellant to show that the misconduct of her husband had come to her attention, otherwise there would have been no cruelty. She had already given sufficient positive testimony to prove that such misconduct existed. At this time she was testifying as to the method of her knowledge of that misconduct and the statements of her husband were positive evidence of that fact and not hearsay. The court's conclusion that this was framed up for the purpose of the divorce was a mere matter of suspicion which is not borne out by any evidence in the record.

The opinion refers to the letter of appellant's counsel addressed to her husband, suggesting that if he would drop in to the sheriff's office at Yreka and accept service of the summons he would save the expense of the sheriff's fees and mileage in traveling out into the country to serve him. This letter the trial court points to as evidence of collusion on the part of the respondent. It seems to us that in a case of this nature, where no large property rights were involved, and where the attorney for the appellant had been paid but \$25 for his services, it was but natural for him to suggest a method whereby the expense of the trial would not be curtailed, and we find nothing in the letter or in the evidence justifying the court's suspicion of collusion.

Reference is also made to the testimony of the witness Moore, and here it is said that this testimony covered nothing but the admissions of the husband regarding his conduct, but the record does not support this statement. One of the charges of the complaint was that the husband flirted with and made love to other women, and that he carried on a voluminous correspondence with

such women. The witness Moore testified positively that he had seen the husband write letters to other women, and had seen and read portions of letters which he had received from them. This in itself was sufficient corroboration of the testimony of the wife, and, taking the record as a whole, there is ample evidence to warrant an interlocutory decree in favor of the wife.

[2] We come then to the only point of law involved on this appeal, and that this is whether the trial court may reject all the evidence in the case and based his judgment upon his own suspicions arising outside of the record. The last expression of the Supreme Court is found in the concurring opinion of Mr. Justice Lennon in *Stewart v. Silva*, 221 Pac. 191, in which he says:

"That it is the general rule that the uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial court. *Hayward v. Rogers*, 62 Cal. 348, 372; *Gage v. Billing*, 12 Cal. App. 688, 108 Pac. 664; 10 Cal. Jur. p. 1143. To the contrary, such testimony must be accepted as proof of the fact which it is offered to establish, unless it can be said that such testimony is so inherently incredible and improbable as to amount to no evidence at all. *Hutchison v. Holland*, 47 Cal. App. 710, 190 Pac. 1072; *Hynes v. White*, 47 Cal. App. 549, 190 Pac. 836."

This is precisely the situation which is presented in this record. All the evidence material to the case is found in the testimony of two witnesses, the appellant and the witness Moore. The appellant fully and clearly stated the facts in support of the allegations of her complaint, and the witness Moore sufficiently corroborated her in all material respects. Her counsel was called to the court and compelled to be sworn by the trial judge in order to answer questions covering the court's suspicions that he might be guilty of collusion or that he might have knowledge of collusion on the part of the parties. Throughout the court's examination of these witnesses reference was made to rumors of misconduct on the part of the wife, and statements are found in the court's questions which indicate that rumors and suspicions were afloat regarding the wife and her purpose in seeking this divorce; but in every instance the suspicions of the trial court were denied, and there is therefore not a particle of evidence in the record tending to contradict the evidence in support of the allegations of the complaint.

[3] We are satisfied that the judgment must be reversed, and, inasmuch as no findings were required by reason of the default (*Waldecker v. Waldecker*, 178 Cal. 566, 568, 174 Pac. 36), the reversal should carry directions to the trial court to enter judgment in favor of the appellant (*Brautigam v. Brautigam*, 181 Cal. 157, 183 Pac. 529).

Judgment reversed with directions to enter judgment for appellant as prayed.

We concur: LANGDON, P. J.; STURTEVANT, J.

65 Cal. App. 268

PEOPLE v. FLANAGAN et al. (Cr. 714.)

(District Court of Appeal, Third District, California. Jan. 14, 1924. Hearing Denied by Supreme Court March 14, 1924.)

1. Insurrection and sedition ⚡2—Evidence held to warrant inference of knowledge by defendants of character of I. W. W.

In a prosecution of members of the I. W. W. for criminal syndicalism, evidence held to warrant an inference of knowledge by the defendants of the criminal character of the organization.

2. Insurrection and sedition ⚡2—Instruction as to knowledge of defendants of character of organization held properly denied.

An instruction on the question of defendants' knowledge of the character of the I. W. W. organization held erroneous as requiring a finding that same "was organized in the county of Sacramento."

3. Insurrection and sedition ⚡2—Conspiracy under criminal syndicalism act complete without overt act.

The conspiracy prohibited by the Criminal Syndicalism Act, providing any person who is a member of an organization assembled to advocate, teach, or aid and abet criminal syndicalism is guilty of a felony, is complete without commission of an overt act; the mere agreement itself being punishable.

4. Criminal law ⚡313—Ignorance of law, though not of fact, no defense to charge of crime.

Every person is presumed to know the law, and ignorance thereof is no defense to a charge of crime, though such ignorance must be of law and not of fact.

5. Insurrection and sedition ⚡2—Knowledge of defendants of character of organization essential to violation of Criminal Syndicalism Act.

In a prosecution for being members of the Industrial Workers of the World, in violation of the Criminal Syndicalism Act, knowledge of the purpose of the organization is an essential element to the crime.

6. Criminal law ⚡419, 420(1)—Statements as to past acts of defendants held inadmissible.

In a prosecution for membership in the I. W. W., in violation of Criminal Syndicalism Act, hearsay evidence consisting of declarations of past acts not made at a meeting of the organization, or to or by an officer or representative thereof, or in the way of propaganda, but which related to commission of criminal acts by members, held erroneously admitted over objections.

7. Criminal law ⚡450—Opinion and conclusions of former member of I. W. W. as to character of organization held inadmissible.

In a prosecution of several defendants for being members of the I. W. W., in violation of Criminal Syndicalism Act, it was error to permit one formerly a member of that organization to express opinions and conclusions as to its character and purpose, though statements of facts concerning matters occurring during his membership were admissible.

8. Insurrection and sedition ⚡2—Evidence of religious principles of I. W. W. held inadmissible in prosecution for criminal syndicalism.

In a prosecution for membership in the I. W. W., in violation of Criminal Syndicalism Act, admission of testimony by a former member of that organization as to the religious principles of same, tending to prejudice defendants, held erroneous.

9. Insurrection and sedition ⚡2—Conspiracy unlawful regardless of object if to be promoted by unlawful acts of force or violence.

Under Criminal Syndicalism Act, a conspiracy is criminal, however beneficent its object, if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism, and it is not criminal, however baneful its object, if its accomplishment is sought by peaceful means only.

10. Insurrection and sedition ⚡2—Showing of contemplated industrial change by I. W. W. admissible in prosecution for criminal syndicalism.

In a prosecution for being members of the I. W. W., in violation of the Criminal Syndicalism Act, the state may properly show that that organization proposed to accomplish an industrial and political change, though the character of the system to be established is immaterial.

11. Insurrection and sedition ⚡2—Exclusion of literature of I. W. W. held proper in prosecution for criminal syndicalism.

In a prosecution for criminal syndicalism, consisting of membership in the I. W. W., the exclusion of literature of that organization, composed largely of arguments in defense of the organization and in condemnation of the prosecution of members thereof, held proper.

12. Criminal law ⚡656(3)—Remarks of court concerning literature of I. W. W. held prejudicial error.

Remarks of the court in sustaining objection to literature of the I. W. W. offered by defendants in a prosecution for criminal syndicalism, "I think it is nothing but a reasonable article. It isn't the truth. * * * The very statement is a conglomeration of falsehoods and reasonable in itself," held prejudicial error.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

William Flanagan and others were convicted of a violation of the Criminal Syndicalism Act, and they appeal from judgments of conviction and orders denying motions for new trials. Judgments and orders reversed.

R. W. Henderson, of San Francisco, and T. F. Allen, of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendants were jointly charged with being members of the Industrial Workers of the World, in violation of the Criminal Syndicalism Act. (Stats. 1919, p. 281.) They were jointly tried. Flanagan and Stagland were convicted and the other defendants, three in number, were acquitted. The convicted defendants moved for new trials, and their motions were denied. They were thereupon sentenced to imprisonment in the state prison for the terms provided by law, not less than one nor more than fourteen years. They have appealed from the judgments of conviction and the orders denying their motions for new trials. The appeals are prosecuted on a single record.

[1] Admittedly the defendants were all members of the I. W. W. The evidence was sufficient to show the criminal character of the organization. It was similar to that in the many cases heretofore reviewed on appeal, and no useful purpose would be served by setting it out in this opinion. It is urged that the evidence is insufficient to establish knowledge on the part of the defendants of the criminal character of the organization. The only evidence tending to connect the defendants with the criminal conspiracy is the mere fact of their membership. Persons, however, do not usually join an organization without some knowledge of its character and purposes. The general character and purposes of the I. W. W. have been given such wide publicity, as shown by the evidence, that it is reasonable to assume, in the absence of evidence to the contrary, that any person of mature judgment and understanding is possessed of sufficient knowledge thereof to put him upon inquiry at least as to the nature of the organization. The intent of the defendants must be determined from their voluntary connection with the conspiracy, viewed in the light of the circumstances which they knew or ought to have known. It must be held that the evidence is sufficient to justify the inference that the defendants had knowledge of the purposes of the organization.

[2] It was the theory of the prosecution and of the trial court that it was not necessary, in order to convict, for the jury to find that the defendants had any knowledge of the character of the organization. The defendant Flanagan testified that he was born July 18, 1902; that on the 27th of November, 1922, a man on the street showed defendant a membership card and asked him if he wanted to join the organization, informing defendant that it is "a labor organization"; that the defendant thereupon gave the man \$2.50, and was handed a membership card; that he

never knew of such an organization prior to that time, and had never had any experience with members thereof; that he had never heard that "any of the purposes announced in the preamble were to be carried out by the use of force and violence." He was then asked:

"Did you have such an understanding, that that was the plan or scheme of the Industrial Workers of the World, when—"

The court then interrupted counsel for defendant and said:

"Well, that is immaterial, whether he has or not; if he is a member, and the organization is one organized for the purposes of doing the things prohibited by statute, it doesn't make any difference what he understands."

Stagland did not take the witness stand. It would have been futile for him to have attempted to prove want of guilty knowledge after the ruling mentioned. The court refused to instruct the jury that proof of knowledge by defendants of the character of the organization was essential to a conviction. One of the proposed instructions upon the question of such knowledge is faulty in stating that to justify a conviction the jury must find that "the Industrial Workers of the World was organized in the county of Sacramento." The other instruction upon that question, which the court refused, correctly states the law. After the jurors had retired to deliberate they returned into court, and the foreman inquired:

"If the jury finds that a man joins an organization, and was stopped from investigating it very much before he became fully cognizant of what the organization was, and, in fact, the jury believes that he would have repudiated it had he known it was a criminal syndicate, should the jury take that evidence into consideration?"

The court replied:

"It is not necessary, and the law does not require, that the prosecution establish that he knew the character of the organization. * * * It does not require that they know the character of the organization when they joined it. * * * The word 'knowingly' there means that he must know that he joined the organization. If he was under the influence of some kind of a narcotic, and didn't know what he was doing, or was insane, then he would not knowingly join it; but if he knew that he joined the organization, and if you find that it is a criminal organization, that is all that the law requires to be established."

From the foregoing it is clear that the court not only ruled out testimony tending to show want of guilty knowledge, but instructed the jury that guilty knowledge is not an essential element of the offense charged. Flanagan became a member, in the manner stated, on the 27th of November, 1922. He was arrested the following day while on the picket line with some Hetch Hetchy strike

bulletins in his possession. He was taken before the police judge three days later and discharged. He was again arrested on the 2d day of December, and was thereafter confined in jail until the time of the trial. There was no advocacy of crime or violence contained in the strike bulletin. While the jurors were not required to accept as true the testimony given by the defendant, he had the right to have the same considered by them.

It is argued that the intent of a defendant is not an element of the crime denounced by the Criminal Syndicalism Act, but that the statute makes a violation of its terms a crime regardless of intent. The contention finds support in the cases of *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211, and *State v. Laundy*, 103 Or. 443, 204 Pac. 958, 206 Pac. 290. In *Matter of Application of Ahart*, 172 Cal. 762, 159 Pac. 160, the petitioner was charged under an ordinance prohibiting the transportation of intoxicating liquor "to any place, the establishing or keeping of which is prohibited by this ordinance." It was contended that "the ordinance itself would make guilty of crime any person who, without knowledge of the character of the place and without intent to violate the law, innocently and in ignorance of the character of the place transported to it forbidden liquors." The court said:

"We do not construe section 5 of the Covina ordinance as designed to inflict punishment upon an innocent person who shall so transport intoxicants. The case comes quite clearly within the reasoning and principle of the English case of *Regina v. Tolson*, L. R. 23 Q. B. Div. 168 (1889), s. c., 40 Alb. L. J. 250. * * * The case was a criminal charge against a woman for a bigamous marriage. * * * The woman had married five years instead of seven years after her husband's desertion of her, under the belief held in good faith that her husband was dead. The proposition considered was whether honest belief and good faith constituted a defense. It was conceded that the prisoner 'falls within the very words of the statute.' Cave, J., said: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. * * * So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses, unless they are excluded expressly or by necessary implication.'"

[3,4] The contention here made need be examined only in relation to the crime charged. The act provides that "any person who * * * is * * * a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism * * * is guilty of a felony." The defendants were, in effect, charged with conspiring "to advocate, teach or aid and abet criminal syndicalism." *People v. Steelik*, 187 Cal. 361, 376, 203 Pac. 78; *People v. La Rue*

(Cal. App.) 216 Pac. 627, 629. A criminal conspiracy is a partnership in criminal purposes, and is constituted by an agreement, though, of course, the agreement need not be formal. *United States v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. Every person who joins a conspiracy after it is constituted comes into it by a like agreement on his part. The conspiracy here charged is complete without the commission of an overt act. Since the mere agreement is punishable, no reason appears why the rules applicable to civil contracts should not apply. One of the essentials of a civil contract is that the consent of the parties must be free. Civ. Code, § 1565. "An apparent consent is not real or free when obtained through * * * mistake." Civ. Code, § 1567. It would be a harsh rule which would punish a defendant, not guilty of culpable negligence, for merely agreeing to further a purpose, if he is honestly mistaken as to the nature of the purpose. Every person is presumed to know the law, and ignorance thereof is no defense to a charge of crime, but the defense here sought to be shown is not ignorance of the law, but of a fact. In a case where the defendants were charged with conspiracy to obstruct the administration of justice, it is said:

"Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defense to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise." *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

See, also, *United States v. Milburn* (D. C.) 288 Fed. 573; *Harrington v. United States* (C. C. A.) 267 Fed. 97; *United States v. Jenks* (D. C.) 258 Fed. 763; *United States v. McHugh* (D. C.) 253 Fed. 224; *Buchanan v. United States*, 233 Fed. 257, 147 C. C. A. 263; *Salla v. United States*, 104 Fed. 544, 44 C. C. A. 26; *Ford v. United States*, 12 Ariz. 23, 94 Pac. 1102; *State v. Cole* (Del. Gen. Sess.) 114 Atl. 201; *State v. Gregory*, 93 N. J. Law, 205, 107 Atl. 459; *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719. The intention of the parties to an agreement is not only an essential element, but the most important element thereof. This is true of an agreement of conspiracy.

"Joint evil intent is necessary to constitute the offense. 'The confederation must be corrupt. This is implied in the meaning of the term conspiracy.'" *Wharton's Crim. Law* (11th Ed.) § 1606.

"The formation of a common design by two or more persons is never simpliciter a criminal conspiracy. * * * In many cases this inference [of criminal intent] would be irresistible, in others the jury might find that, although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance, without any actual criminal motive. If that conclusion should be reached by the jury, then, whatever other criminal penalties the parties might have incurred, the crime of conspiracy would not have been established." *People v. Flack*, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807.

In the case of *People v. Lloyd*, supra, where a conviction under the criminal syndicalism law of Illinois was involved, the court said:

"The criminal quality of the common design of two or more persons resides in the intention of the parties to the agreement, construed in connection with the purpose contemplated, and as the accused may deny any criminal intent, the question of intent becomes one of fact. * * * This question of intent, therefore, cannot be ruled as a question of law, but must be submitted to the jury."

[5] While the question under consideration has not been expressly decided by the higher courts of this state, it may be implied from the opinion in the case of *People v. Steelik*, supra, that knowledge of the purposes of the organization is an essential element of the crime here charged. It is there said that "there was * * * evidence before the jury that the defendant * * * knowingly belonged to a conspiracy to commit crimes"; that it was alleged "that the defendant was a member of the I. W. W., knowing its alleged purposes"; that "the testimony as to his statements and activities were admissible to show his knowledge of and sympathy with the purposes of the organization"; and that the evidence justified the conviction of the defendant "in that he knowingly belonged to an organization which in its nature was a criminal conspiracy."

[6] Hearsay evidence, of a character similar to that held to have been erroneously admitted in the case of *People v. La Rue*, supra, being declarations of past acts, was admitted over the objections of defendants. In *People v. Irwin*, 77 Cal. 494, 504, 20 Pac. 56, 59, it is said:

"Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made."

For other authorities to the same effect see *People v. Smith*, 151 Cal. 619, 626, 91 Pac. 511; *State v. Dingham* (Idaho) 219 Pac. 760; *State v. Gibson*, 115 Wash. 512, 197 Pac. 611;

State v. Pettilla, 116 Wash. 589, 200 Pac. 332; and State v. Kowalchuk, 116 Wash. 592, 200 Pac. 333. The hearsay statements erroneously admitted were not made at any meeting of the organization, or to or by an officer or representative thereof, or in the way of propaganda to further its purposes, but the facts sought to be proved by the declarations were the commission of criminal acts by its members.

[7] Appellants contend that witnesses for the prosecution were permitted to give their opinions and conclusions as to the character and purposes of the I. W. W. One of the principal witnesses for the prosecution testified that he joined the organization in the year 1908, when he was 19 or 20 years of age, and remained a member for 6 months; that he was again a member for 6 months in 1911; that he joined again on the 22d day of July, 1916, and remained a member until July, 1922; that from 1916 to 1920 he traveled through many states, and actively participated in many cowardly crimes to further the purposes of the organization, such as malicious damage to machinery; putting emery dust in bearings; placing pieces of iron in shocks of grain to damage threshing machines; "jabbing the horses with a pitchfork and making them run away and tear up the wagon"; perforating airtight cans containing meat, being packed for the use of the American soldiers in France, to "cause ptomaine poisoning"; and frequently robbing laborers who were not members of the organization, at the point of a gun. In the year 1919 the witness forsook his wife and child, and clung to the organization. He testified:

"I left my wife and child for the I. W. W. She told me to give her up or give the I. W. W. up, * * * and in June, 1919, I took two suitcases of literature * * * and went down into Kansas, and I returned back up into Nebraska, and worked with the organization the rest of the year. * * * I voluntarily quit the organization in the month of October or November, 1920. I quit the organization in principle. I quit believing in the organization, and I quit, and I continued my membership until including the month of July, 1922. * * * I just reformed, the same as any criminal would reform."

The reformation of the witness, like the reformation which the defendants claim took place in the organization itself, followed closely upon the enactment of stringent criminal syndicalism laws in many of the states, and vigorous prosecutions thereunder. These facts may be mere coincidences or they may tend to support the old-fashioned doctrine that the commission of crime is more effectively prevented by punishment than by coddling criminals. There is no intention here to imply that the reformation of the witness was not real and sincere or that his testimony was not given under "the whip

of his own repentance," as these were questions for the exclusive determination of the jury, but such a witness should be held strictly to a statement of facts, to the exclusion of mere opinions and conclusions. In many cases the prosecution must of necessity rely upon the testimony of criminals, but in such cases there should be a rigid adherence to the rules governing the admission of evidence. It appears from a reading of the testimony of the witness that the complaint of appellants is not without foundation.

[8-10] The same witness was permitted to testify that in the utopia of industrial and political perfection which is proposed to be established by the I. W. W. there will be no homes; children will be taken from their mothers at the age of two and a half years and will be given but three or four years' schooling; men's farms will be taken away from them, and they will become workers, as will the owners of "small business houses"; there will be no marriage relation, but "free love" will be the rule; jails and penitentiaries will be abolished; there will be no churches, "as religion is the greatest enemy that the radical movement has"; courts will be abolished, and the men in prisons and jails will be released; "the I. W. W. terms themselves as on an equal footing with Christ. * * * They say the only difference between the I. W. W.'s of today and Christ is that he rode a jackass and they ride freight trains; * * * that religion is a sham to keep people in ignorance; * * * The I. W. W. call Jesus Christ Jerusalem Slim." In the foregoing testimony there is not a single fact material to any issue being tried, but every juror could find something therein appealing to his prejudices. There are many law-abiding citizens in this country who do not believe in the divinity of Christ—persons of other religious faiths, as well as some "modernist" Christians—but it is not proper to admit evidence of such lack of faith as tending to establish a charge of crime against one of them. The defendants were not on trial for their or other conspirators' moral or religious beliefs, or for the character of the industrial and political scheme which the organization proposes to establish; but for the unlawful means to be advocated and employed by the conspiracy in effecting its ultimate object. However beneficent that object may be, the conspiracy is criminal if it advocates the accomplishment thereof by "unlawful acts of force and violence, or unlawful methods of terrorism," and however baneful the ultimate object, the law does not make criminal the advocacy thereof if peaceful means only, such as are sanctioned by our Constitutions and laws, are employed. The admission of the foregoing evidence was error. It was proper for the prosecution to prove that the organization proposes to accomplish an industrial and political change,

but such purpose is shown by practically every piece of I. W. W. literature admitted in evidence, and no member or witness has ever denied that the organization advocates making a change. The character of the system to be established is immaterial in the trial of a case arising under the act.

[11] The court permitted the defendants to introduce certain I. W. W. literature tending to show that the means advocated by the organization were lawful. Other literature offered by them was rejected. That rejected was composed largely of arguments in defense of the organization and in condemnation of the prosecution of members thereof, and was properly excluded.

If any portions thereof were admissible, such portions should have been offered separately.

[12] It is urged that the court was guilty of prejudicial misconduct in the following statement made in the presence of the jury in sustaining objection to one piece of literature offered by the defendants, but which was not read before the jury:

"I think it is nothing but a treasonable article. It isn't the truth. The statement here is not the truth, and I think it is really unbecoming of anybody to offer such an article in defense of any one. The very statement in there is a conglomeration of falsehoods and treasonable in itself."

At the request of counsel for defendants the court instructed the jury to disregard the statement. In view of the fact that the character of the organization which issued the literature in question was an issue in the case, it is doubtful whether any instruction to the jury could have removed the prejudicial effect of the statement.

The other alleged errors will probably not occur in the retrial of the case, and need not be specifically noticed.

The judgments and the orders are reversed.

We concur: PLUMMER, J.; HART, J.

65 Cal. App. 257

HEWELCKE v. SHIPMAN. (Civ. 4654.)

(District Court of Appeal, First District, Division 1, California. Jan. 14, 1924. Hearing Denied by Supreme Court March 14, 1924.)

1. Malicious prosecution §20 — "Probable cause" defined.

"Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in believing that a charge is true.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause (In Malicious Prosecution).]

2. Malicious prosecution §56—Plaintiff has burden of proving want of probable cause.

The burden of proving want of probable cause rests upon the plaintiff in an action for malicious prosecution.

3. Malicious prosecution §21(2)—Defendant held to have had probable cause for instituting prosecution.

Where plaintiff was employed by one for whom defendant had been sales agent to audit his books, and while so engaged plaintiff removed the books and accounts, and refused to return them to defendant on demand, and defendant, acting on advice of counsel and the district attorney had plaintiff arrested, *held*, that defendant had probable cause for instituting the prosecution.

4. Malicious prosecution §31—Defendant's passion held not to show malice in causing arrest.

Where plaintiff was employed by one for whom defendant had acted as sales agent to audit his books, and while so engaged removed the books and accounts, and refused to return them to defendant on demand, the fact that defendant on learning of the matter flew into a passion *held* insufficient to show malice on part of defendant in having plaintiff arrested.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Herman R. Hewelcke against Carroll Shipman. Judgment for plaintiff; defendant appeals. Reversed.

O'Gara & De Martini, of San Francisco, for appellant.

Harry I. Stafford, of San Francisco, for respondent.

ST. SURE, J. This is an action to recover damages for malicious prosecution. Trial was had by jury, which gave plaintiff a verdict for \$1,500, upon which judgment was entered. Defendant appeals from the judgment and also from an order denying his motion for a new trial.

[1] Defendant claims, in support of this appeal, that the evidence is insufficient that he instituted a criminal action without probable cause. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *Potter v. Seale*, 8 Cal. 221. It is necessary to chronologically narrate the facts contained in the record in order to show the situation of the parties and the circumstances of their business relationship preceding and up to the trouble which resulted in this litigation.

Plaintiff, Hewelcke, is a public accountant. Defendant, Shipman, for a number of years prior to April 20, 1920, had been the exclusive sales agent for the Automatic Refrigerating Company of Hartford, Conn., of which I. K. Hamilton, Jr., and M. F. Owens

were at all times respectively president and secretary. The business of the corporation is the erection of refrigerating plants and the manufacture and sale of refrigerating equipments, appliances, and materials. Shipman resigned said agency on April 20. For several years Shipman held a lease of rooms in the Holbrook building, where he transacted business on behalf of the Automatic Refrigerating Company. On May 1, 1920, the business of the Automatic Refrigerating Company, its books, and property were removed from the Holbrook building to new offices in the Hearst building.

By the terms of his contract with the Automatic Refrigerating Company, Shipman was entitled to a salary of \$1,500 a year, payable in weekly installments, and was also entitled to an allowance for rent and for clerical hire. In addition, Shipman was entitled to a commission of $3\frac{1}{2}$ per cent. of all contracts which were closed through his office. In case the volume of contracts turned in by him during any calendar year equalled or exceeded 10 per cent. of the amount of his salary and expenses, then he was entitled to a bonus in an amount equal to 10 per cent. of the total contracts closed through his office during the year, less his salary, traveling expenses, office expenses, and the $3\frac{1}{2}$ per cent. commission. In 1917 he was allowed an additional salary of \$3 per day for time which he might give in superintending construction work. It was the practice between Shipman and the Automatic Refrigerating Company for an accounting to be made by the company following the 1st day of January and the 1st day of July of each year. Usually two or three months passed before Shipman received his commission earned during the preceding six months. At the time when he ceased to act for the company, on April 20, 1920, the company had not accounted to him for his commission earned since July 1, 1919. The Automatic Refrigerating Company had a thoroughly organized accounting system at its principal place of business in Hartford, Conn. Shipman was not required to, and did not, keep a regular set of books. He made weekly reports to the company, showing, for example, his salary earned or expenses paid out, which were utilized by the company in making up its books of account. He kept for his own protection a carbon copy of each report, using a printed form supplied by the company. In due time the company sent to Shipman a check drawn on a Hartford bank and payable to the order of Carroll Shipman, for the account of his salary or his expenses or both, as previously reported in the weekly statement. Attached to such check was a so-called "check voucher," upon which was printed:

"The attached check is in full payment of items listed below a copy of which is retained in this office. No receipt is necessary. In case

of error return without detaching check. Detach before depositing check."

These "check vouchers" were regularly detached and retained by Shipman. For the conduct of his personal and business affairs Shipman opened three separate accounts at the First National Bank of San Francisco. The first was under the name of "Carroll Shipman," the second was designated "Carroll Shipman, San Francisco Manager of the Automatic Refrigerating Company," and the third "Carroll Shipman, Special." The records of Shipman's office, which Shipman claimed were stolen by Hewelcke, comprised carbon copies of the weekly reports, "check vouchers," bank statements, canceled checks, and the corresponding check book stubs.

Following his resignation Shipman commenced doing business on behalf of the American Ice Machine Company, a corporation organized by himself. This new concern engaged in the same line of business that he had previously transacted for the Automatic Refrigerating Company.

About April 25, 1920, Shipman employed plaintiff, Hewelcke, the accountant, to examine the records of his office, and to report to him as to the condition of his affairs, with special reference to certain irregularities alleged to have been committed by a man named Shafer, a former employee of Shipman. Hewelcke conducted his examination of said records at the rooms in the Holbrook building, made his report to Shipman, and was paid for his services by Shipman about the 7th of May, 1920.

Soon after completing said audit for Shipman, Hewelcke was employed by Shipman to act as bookkeeper for the American Ice Machine Company and other concerns in which Shipman was interested. By the terms of this second employment Hewelcke was at liberty to do the work at his own convenience, provided he kept the work up to date. Hewelcke entered upon said employment, and was supposed to work in pursuance thereof up to the 28th day of July, 1920.

Hewelcke, while in the employ of Shipman as aforesaid, met Owens, secretary and general manager of the Automatic Refrigerating Company, at the office of Shipman. Later Owens employed Hewelcke to examine the records in Shipman's office. Owens called on Shipman, and expressed a desire to have an audit made. This was agreeable to Shipman, and he consented. Subsequently Hewelcke, who was not present at the conversation with Owens, called on Shipman, stated that Owens had employed him to make an audit, and arranged to see the records. Shipman told him to go ahead and examine them, which Hewelcke proceeded to do. Up to this time the records were in Shipman's office, under his exclusive control, and no one had questioned his ownership or right to possession of them.

Hewelcke removed the records from Shipman's office to his own office in another building. Shipman testified that he did not consent to the taking of any of the records from his office. Hewelcke testified that Shipman did consent to the taking of the records to Hewelcke's office. But Hewelcke further testified that when he removed the papers to his own office he intended to return them to Shipman's office when the examination was finished.

It is undisputed that on a day shortly prior to July 28, 1920, Shipman telephoned Hewelcke and asked him if he, Hewelcke, had his, Shipman's records. It is admitted that Hewelcke then replied that he did have the records. Shipman testifies that he then demanded the return of the records, which Hewelcke denies.

After he had made the audit for the Automatic Refrigerating Company, Hewelcke made a report to its president, Mr. Hamilton. He next saw Shipman in the latter's office on July 28. Shipman asked Hewelcke if he had completed his report, and Hewelcke informed him that he had, and Shipman then asked where the records were, and Hewelcke told him they were in the office of Mr. Hatch, an attorney for the Automatic Refrigerating Company. Shipman became very angry, and Hewelcke says there followed an outburst of language he did not care to repeat. In describing the incident Shipman said:

"Of course I was angry. I was as angry as I could be. I don't think I was so angry in my life before. The whole thing I had, all my books and everything else, had been taken. The Automatic Refrigerating Company could frame up anything they wanted to on me, and not having any proof against them—I was angry."

Shipman hastened to the office of his friend and counselor, Colonel Neal Power, attorney at law. After hearing Shipman's story, Power telephoned to attorney Hatch's office, demanding the return of Shipman's records, and his demand was refused. Power advised Shipman that Hewelcke had committed a crime, either embezzlement or grand larceny, and that he, Shipman, should consult the district attorney as to the proper charge. Power gave Shipman a letter of introduction to District Attorney Brady, but Shipman went instead to the office of the bond and warrant clerk. Skillin, an attorney, and an assistant of the bond and warrant clerk, issued a citation. In answer Hewelcke appeared, and Skillin heard the statements of both Shipman and Hewelcke. Skillin told Hewelcke to return the records to Shipman. Hewelcke telephoned to Hatch, and then reported that Hatch would not return the records. Skillin announced that a warrant would be applied for, and at once prepared a complaint charging Hewelcke with embezzlement as the agent of Shipman. By the advice of Skillin, Shipman swore to this com-

plaint. The embezzlement charge was heard by Police Judge Sullivan, and promptly dismissed.

The hearing before Judge Sullivan was summary, and Shipman reported to Power that the case had not been fully presented. In this report Shipman was supported by J. C. Flannery, a duly licensed attorney associated with Power, who was present at the hearing. Power advised Shipman that Hewelcke had committed a crime, and told him to see the district attorney in person. Power wrote a second letter to District Attorney Brady, which Shipman delivered. Thereupon Brady heard Shipman's statement of the case, and also called on Heidelberg, the assistant who presented the case before Judge Sullivan, for his statement. After hearing Heidelberg's statement, the district attorney stated to Shipman that in his opinion Hewelcke was guilty of grand larceny, and told him to sign a new complaint charging grand larceny. This Shipman did at once; the new complaint being prepared upon Brady's instructions personally given. It is this second complaint which is the basis of this action.

Power testified and Brady testified for defendant, Shipman, at the trial. Each of them was certain of the result of Shipman's statement, and as to the advice given him as stated herein. Besides being advised with respect to the grand larceny charge by Power and the district attorney, Shipman was also advised by J. C. Flannery, a duly licensed attorney associated with Power. Flannery testified for defendant, Shipman, and showed affirmatively that Shipman made a full and fair statement of the facts of the case to him, and that he also advised Shipman that in his opinion Hewelcke was guilty of grand larceny.

The complaint sworn to by Shipman charged Hewelcke with the commission of the crime of grand larceny, for that he did steal, take, and carry away certain canceled checks, check book stubs, bank statements, "check vouchers," and copies of weekly statements, the property of Shipman. The value of the property was alleged to be \$6,000. The warrant issued, and Hewelcke was arrested and kept in prison for an hour. After the hearing, Police Judge McAtee dismissed the case. This action resulted.

The only issues raised by the pleadings herein are on the subject of want of probable cause, the existence of malice, and the infliction of damages.

From the story told by the record it appears that all was serene between Hewelcke and Shipman up to July 28th. Indeed, Hewelcke was at that time in Shipman's employ. Shipman was willing that there should be an examination of his records by Hewelcke for the Automatic Refrigerating Company. There is a dispute between Shipman and Hewelcke as to whether or not the records

were removed by Hewelcke to his office with or without Shipman's consent. But there is no dispute that Shipman demanded the return of his records of Hewelcke on July 28th. Here is what witness Hewelcke says about such demand:

"Q. Mr. Stafford. Tell us what you said to him and what he said to you, especially with reference to the telegram, if anything was said with reference to it. (Upon receipt of Hewelcke's report Hamilton, president of the Automatic Refrigerating Company, had wired witness to turn the records over to Hatch, the attorney for the company.) A. He asked me whether I had completed the report, and I said that I had completed the report, and that the same had been forwarded to Mr. Hamilton in Hartford, Conn., and he asked me where the records were. I told him (Shipman) I had turned them over to Mr. Hatch, the attorney for the Automatic Refrigerating Company. He says: 'Under what authority?' I says: 'On the telegram I had received from Mr. Hamilton,' and then I showed him the telegram. He says: 'I don't give a damn what that telegram says, or anything, those are my records, and you had no right to turn them over to anybody but me.'"

These were the records for the larceny of which plaintiff was arrested. These records included 29 statements issued by the First National Bank for "Carroll Shipman, Special," the first being of date December 31, 1917, and the last dated April 20, 1920; also 29 bank statements issued by the same bank to "Carroll Shipman for account S. F. Manager of the Automatic Refrigerating Company," covering the same dates. Also bank checks consisting of 1,106 bank checks in the name of "Carroll Shipman, Special"; 1,383 canceled checks, "Carroll Shipman, S. F. Manager Automatic Refrigerating Company"; four books of check book stubs for the account of "Carroll Shipman, Special"; five books of check book stubs for the account of "Carroll Shipman, S. F. Manager Automatic Refrigerating Company"; also "check vouchers" or statements covering a period for office expenses from September 1, 1914, to April 30, 1920, and also separate statements covering construction expenses for the same period, and, finally, carbon copies of weekly statements divided into three different classes, one of expense account entered "Carroll Shipman, S. F. office," from September 14, 1910, to April 20, 1920; the second entitled "Expense account Carroll Shipman, Personal," for the same period; and the third of said expense accounts entitled "Carroll Shipman, Construction," for the period from December 1, 1913, to April 30, 1920. These records taken by Hewelcke constituted Shipman's only books of account; and they were necessary for his protection in order to establish his claims against the Automatic Refrigerating Company and others, and to resist any false claims which might be made against him by the Automatic Refrigerating

Company or any other person. It was no part of Shipman's duties to collect money for the Automatic Refrigerating Company, and he never did collect any money for the company.

It is suggested that these records were of little or no value. When witness Shipman was asked how he fixed the value of them at \$6,000, he replied that he had at that time a claim against the Automatic Refrigerating Company, which was afterwards settled with him for \$1,500; that he had at that time a claim against the First National Bank, which was afterwards settled for \$1,500; and that he has a claim against one Burgess for \$3,500; that "there is an argument about some of the items that might reduce it to \$3,000." There is no denial of this testimony. Even if there was, we cannot see that the intrinsic or market value of the records would make any difference. They were certainly of great value to Shipman, consisting, as they did, of the only records he had of his financial business transactions covering a period of years.

[2-4] We agree with counsel for plaintiff that the only question involved in this appeal is whether the defendant, Shipman, in making the complaint against plaintiff, Hewelcke, acted maliciously and without probable cause. The burden of proving want of probable cause rests upon the plaintiff. *Potter v. Seale*, 8 Cal. 217, 221; *Grant v. Moore*, 29 Cal. 644; *Levy v. Brannan*, 39 Cal. 485; *Anderson v. Coleman*, 53 Cal. 188; *Jones v. Jones*, 71 Cal. 89, 11 Pac. 817; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Davis v. Pacific Telephone Co.*, 127 Cal. 313, 57 Pac. 764, 59 Pac. 698; *McKenna v. Heinlen*, 128 Cal. 97, 60 Pac. 668; *Lee v. Levison*, 173 Cal. 166, 159 Pac. 438; *Jirku v. Brod*, 42 Cal. App. 796; *Squires v. Southern Pacific Co.*, 42 Cal. App. 459, 183 Pac. 695. Plaintiff, Hewelcke, argues that the evidence shows malice by defendant, Shipman, against him, because when Shipman demanded the return of his records he became very angry with him, called him vile names, threatened him with arrest, and later had him arrested. Shipman admits that he was angry, but denies the use of vile language. Considering all of the circumstances, we think that an outburst of passion on Shipman's part was perfectly natural. The evidence shows that he had as an excuse for his anger an honest belief that he had been grievously wronged by Hewelcke in being deprived by him of his property. This belief was not founded upon mere suspicion, but upon his actual knowledge that Hewelcke had taken and retained his property. Shipman had an honest belief in Hewelcke's guilt, and the undisputed evidence shows that he was justified as a reasonable man in such belief. In addition, the evidence shows that Shipman laid the facts of his case fully and fairly before counsel, and that he acted in good faith upon the opinion given him by

counsel. There is no evidence whatever to show bad faith in defendant, Shipman.

Our conclusion, based upon the evidence adduced at the trial and the law applicable thereto, is that there was probable cause for the arrest of plaintiff, Hewelcke. We have read every California case upon the subject of malicious prosecution, from *Potter v. Seale*, supra, to and including the recent decision of our Supreme Court in *Franzen v. Shenk*, 221 Pac. 932, and we think our view is supported by the authorities. The *Franzen* Case was an action to recover damages for the malicious prosecution of a proceeding wherein, by affidavit filed by the defendant before a justice of the peace, the plaintiff was charged with being an insane person. The Supreme Court pointed out that there was "manifestly a conflict in the evidence relating to the facts from which the existence or want of probable cause for the prosecution of the insanity proceeding must be determined." In the case before us there is no dispute concerning the facts relied upon to show probable cause, nor was advice of counsel based upon any false statement of fact. Here the question presented by the evidence was one of law, and should have been determined by the court. The case upon the evidence should never have been submitted to the jury for its verdict, unless, under proper instructions of the court, to find in favor of the defendant.

The judgment is reversed.

We concur: TYLER, P. J.; NEEDHAM, Justice pro tem.

65 Cal. App. 241

ROOT et al. v. CONLIN et al. (Civ. 4199.)

(District Court of Appeal, Second District, Division 2, California. Jan. 11, 1924. Hearing Denied by Supreme Court March 10, 1924.)

1. Quieting title §35(3)—Averment of ownership equivalent to allegation of right of possession of property.

Averment in complaint in action to quiet title that plaintiffs were the owners of and for long time prior to action had been the owners of and entitled to possession of the property was equivalent to allegation that they were entitled to possession when suit was begun; right of possession following as matter of law from ownership.

2. Trial §82—Objection to admission of evidence must be specific.

Objection to the admissibility of evidence, to have weight and merit attention, must be specific.

3. Evidence §366(11)—Judgment and execution not merely preliminary to sheriff's deed as evidence of transfer of title.

Judgment and execution are not merely preliminary, as technical items of foundation,

to sheriff's deed as the final and real evidence of transfer of title.

4. Trial §75—Failure to object to admission of sheriff's deed waived production of evidence of judgment and execution basis thereof.

In action to quiet title, where sheriff's deed purporting to convey to one of plaintiffs was admitted, although there was no offer of any judgment or execution as a basis for the sale pursuant to which the deed was executed, failure to specifically object to the admission of the deed on that ground waived the production of evidence of judgment and execution.

5. Trial §75—On specific objection to offered evidence, objections not made are waived.

Where specific objection is made to offered evidence, all objections not made are waived.

6. Trial §75—Objection to admission of evidence waived at trial cannot be urged in motion for nonsuit.

Where, in an action to quiet title, a sheriff's deed was offered in evidence, and objection thereto that it was not preceded by proof of judgment and execution was not made, and such objection was thereby waived by the form of objection made, the waiver operated at once, and was not affected by presentation of such point in motion for nonsuit.

7. Trial §69—On motion for nonsuit, trial court may refuse to permit case to be reopened.

A motion for nonsuit does not necessarily allow plaintiff to reopen his case to supply missing evidence, as the trial court, in exercise of discretion, may refuse to permit it to be reopened.

8. Trial §105(4)—Production of preliminary evidence waived by failure to object to its absence.

Production of preliminary evidence before introduction of sheriff's deed is waived by failure to object to its absence.

9. Trial §84(3)—Objection to admission of sheriff's deed as not showing interest in corporation referred to therein held not good.

Where, in action to quiet title, plaintiffs introduced sheriff's deed as proof of title in themselves, without proof of judgment and execution authorizing it, and evidence showed that the corporation referred to in the deed had an interest in the property prior to execution, defendant's objection to its admission as showing no interest in the corporation was not good.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action to quiet title by L. V. Root and others against C. B. Conlin and others. Judgment for plaintiff, and defendant named and E. C. Eddie appeal. Affirmed.

Z. B. Stuart and J. W. Hocker, both of Los Angeles, for appellants.

Kaye & Siemon, of Bakersfield, for respondents.

WORKS, J. This is an action to quiet title to a group of mining claims, and to enjoin defendants from removing certain improvements, fixtures, and machinery therefrom. Decree went for plaintiffs, and two of the defendants appeal.

[1] The first point made by appellants is that the complaint is insufficient, in that it contains no allegation that respondents were entitled to the possession of the claims at the time of the commencement of the action. There is an averment in the pleading, "that the plaintiffs are now the owners of, and for a long time prior to the commencement of this action have been owners of, and entitled to the possession of," the property in suit. This allegation is equivalent to an allegation that plaintiffs were entitled to possession when the suit was begun, as the right to the possession of property follows as a matter of law from the ownership of it. *Jones v. Peck* (Cal. App.) 218 Pac. 1030.

The controlling point on the appeal is that next presented by appellants. The trial court admitted in evidence a sheriff's deed purporting to convey to one of respondents the mining claims in question in the suit, although there was no offer of any judgment or execution as a basis for the sale pursuant to which the deed was executed. The deed contained the usual recitals as to judgment and execution. The contention of appellants is that the court erred in admitting the deed without proof of judgment and execution. Respondents make reply that the point thus made cannot now advantage appellants for the reason that it was not presented by objection to the deed at the time it was offered in evidence. The only objection was:

"We object to the introduction of the deed; it purports to convey the interest of a corporation in a certain mining claim; until they go back and show that interest it does not convey any title at all; they cannot build up a title on a sheriff's deed, except on a showing that the party whose interest purports to have been sold had some title."

There is no doubt that the point which appellants now make would have been good if it had been urged as an objection to the admissibility of the deed, and that respondents, upon such an objection being pressed, would have been driven to offer a judgment and execution for the purpose of showing the authority of the sheriff to sell and convey. The cases upon this particular point are numerous. The question now to be considered, however, is whether the point made by appellants was waived by the failure to include it in the objection to the admission of the deed in evidence.

[2] It has long been the rule in this state, as well as elsewhere, that objections to the admissibility of evidence, in order to have

weight and to merit attention, must be specific. It was said in *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683:

"The general rule is, that 'a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified.' *People v. Manning*, 48 Cal. 338. It is true that a general objection is sufficient, if the evidence objected to is absolutely inadmissible for any purpose. *Nightingale v. Scannell*, 18 Cal. 315. But otherwise, to entitle the objection to notice, 'the party should have laid his finger on the point at the time.' *Martin v. Travers*, 12 Cal. 243; *Cochran v. O'Keefe*, 34 Cal. 558."

Stress has been laid upon this point in a great number of other cases, many of which will be found cited below in support of cognate or attendant propositions of law.

The mere statement of the rule just enunciated would seem to settle the question now before us. The point, however, is not to be solved so easily. It has been said in many cases that the rule that objections are waived which are not specifically made can be applied only to objections relating strictly to the admissibility of evidence, and can have no reference to its evidentiary value after its admission. In other words, it has been said that the absence of a given foundation for admitted evidence will not be waived if the missing foundation affects the evidentiary value of that which is admitted. Among the cases closely touching this rule are *Hulick v. Scovil*, 4 Gilman (Ill.) 159; *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Pettis County v. Gibson*, 73 Mo. 502; *State v. Kaufman*, 45 Mo. App. 656. Without attempting to dissect these cases we shall now take up the labor of determining whether the general rule announced by them has an application to the specific question confronting us here. Before we begin that work it is to be noted, to come nearer home, that the rule mentioned is announced in *Roberts v. Chan Tin Pen*, 23 Cal. 259, and has received a passing notice in *Palmer v. Guaranty T. & S. Bank*, 45 Cal. App. 572, 188 Pac. 302.

[3] It will conduce to a settlement of the question now presented if we pay some attention to the relationship under the law between a judgment and an execution on the one hand, and the sheriff's deed which follows them in a given instance on the other. Under the California cases it is conclusively established that judgment and execution are not merely preliminary, as technical items of foundation, to the sheriff's deed as the final and real evidence of transfer of title:

"The claim of title by the defendant, by virtue of a sheriff's deed, is insufficient, without showing the judgment which authorized the sale. By the most accepted authorities the judgment is a muniment of title, and for sound reasons it is the safest rule." *Sullivan v. Davis*, 4 Cal. 291.

"The rule undoubtedly is that, when one seeks to obtain or hold possession of real property under a sheriff's deed, he must prove the judgment and execution under which the sheriff acted in making the sale. * * * The title of the purchaser in such a case rests upon the judgment, execution, sale, and deed." Peterson v. Weissbein, 75 Cal. 174, 16 Pac. 769.

Among the many other cases touching this question more or less directly are Hibberd v. Smith, 1 Cal. Unrep. 554; Kelley v. Desmond, 63 Cal. 517. While, however, judgment and execution are muniments of title, they are not so in the sense in which the sheriff's deed itself occupies a place in that classification. Judgment and execution are muniments of title of the same class with powers of attorney in those instances in which a deed in a chain of title is executed by an attorney in fact for his principal. The sheriff's deed conveys the title, while the judgment and execution constitute the sheriff's authority to convey.

"The judgment and execution go to the sheriff's power to sell, and to his power to recite a sale, and to his power to give a deed also. * * * Hihn v. Peck, 30 Cal. 280.

"The sheriff in making the sale acts under a naked statutory power, dependent for its existence upon the existence of the judgment which he is attempting to execute, and if there is no judgment in support of the writ of execution, under which he makes the sale, the power to make the sale is wanting. * * * "The sheriff, in making sale of property under process of the court, acts under a power, and if the power does not exist, no title passes, even to an innocent purchaser. * * * " Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176.

It is apparent from these quotations that it is not going afield to assert that in legal effect the judgment and execution together may be likened to a power of attorney authorizing the sheriff to make a sale and to execute a conveyance. With this idea in mind, then, and reverting to one of the rules of law above stated, it is difficult to perceive in the present instance why, if the sheriff's deed was admissible because of the failure specifically to object that no showing of judgment and execution preceded the offer of the instrument, it did not possess full evidentiary value. The deed was in form perfect. Within itself it was an impeccable transfer of title. We do not see, even under the rule which apparently stands to some extent in the way of an easy solution of the question before us, why proof of the sheriff's authority could not be waived, nor why, under all the circumstances of the present case, it was not actually waived. A comparison of the facts here present with those of the cases announcing what we have called the interfering rule will demonstrate that it is different from them.

[4] A consideration of several lines of ar-

gument will enable us finally to assert with confidence that appellants waived the production of evidence of judgment and execution. We pursue further the idea that judgment and execution are in effect a power of attorney authorizing a sheriff to convey. In a certain case a deed, executed jointly, under an order of court, by an assignee in bankruptcy and a trustee under a deed of trust, was received in evidence in the trial court without proof of the order. The higher court said, on appeal:

"The objection to the deed was that it was 'incompetent, irrelevant and immaterial, because it is not shown that the parties had any power to make the deed.' The deed recites that it was sold under an order of the court in bankruptcy and under the provisions of the deed of trust. It also recites that the sale was approved by the court. There was no objection on the ground that the orders of the court were not shown in evidence. We hold that the objection was properly overruled." Stone v. Kansas City & W. B. Ry. Co., 261 Mo. 61, 169 S. W. 88.

Considering judgment and execution as equivalent to a power of attorney authorizing a sheriff to convey, we are furnished with an analogy even closer than that provided by the case just cited, in the text of a standard commentary. The italics are in the original:

"When the opponent *fails to object* to the admission of the document, this is, of course, on general principles * * * a waiver as to the need of any evidence authenticating its genuineness; and this waiver is commonly held to extend to the fact of *authority of an agent* purporting to sign the document for a principal, but not as to the *legal sufficiency* of the instrument for any purpose." Wigmore, Ev. § 2132.

It is plain that in this last statement, that concerning "the legal sufficiency of the instrument," the learned author has in mind the sufficiency of the admitted instrument within itself. It is only upon such a view that force may be given to his language as a whole. The utterance clearly means that evidence of the authority of the agent is waived by a failure to object that the authority is not shown. The text of this commentator is supported by McClung v. McPherson, 47 Or. 73, 81 Pac. 567, 82 Pac. 13, and by several illuminating cases cited in the second opinion in that cause rendered.

If we still keep in mind the apparently just view that judgment and execution are analogous to a power of attorney to the sheriff to perform the actual function of making conveyance, we may cite in abundance decisions of the Supreme Court of this state which support the view that appellants waived the production of evidence of judgment and execution. See People v. Frank, 28 Cal. 507; Gardiner v. Schmaelzle, 47 Cal. 588; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33

Pac. 878; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *Bundy v. Sierra Lumber Co.*, 149 Cal. 772, 87 Pac. 622. In making application of these cases to the present one it is to be observed that in each of them the objection made was merely general—that the offered evidence was incompetent, irrelevant, and immaterial, or the like. In no one of them was a special objection of any nature interposed. Here the objection was of such a character as to furnish even a firmer ground for the application of the doctrine of waiver than is evident in those cases. The objection was that no title had been shown in the corporation whose property was sought to be conveyed by the sheriff's deed. This objection was not only specific, but it was of a nature similar to that other objection which appellants might have made but which they did not make, at least to the extent that the two would most naturally have gone hand in hand. The sheriff's deed recited the fact that judgment had been rendered against the corporation in an action in which certain named persons were parties. The court by which the judgment was rendered was named, the date of the judgment was given, and the fact that execution had issued upon the judgment was recited. The date upon which execution had issued was also set forth. With this information before them, appellants, in limiting their objection to the point that title in the corporation had not been shown, in effect said: "We have no objection on any other ground. We concede the authority of the sheriff to execute the deed." That this was the result of the objection made is apparent when we remember the ground upon which is rested the principle that one waives the production of evidence, preliminary to offered evidence, by a failure to object that the preliminary evidence has not been produced. It is said in several of the opinions in the cases last above cited that objections to offered evidence must be specific, to the end that missing links in the chain of evidence may be supplied and cases be tried on their merits. Other cases announcing this rule are *Owen v. Frink*, 24 Cal. 171; *Mayo v. Mazeaux*, 38 Cal. 442; *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983; *Starkweather v. Dawson*, 14 Cal. App. 666, 112 Pac. 736. A perusal of the opinions in all these cases will convince that such a waiver as we here have under consideration arises upon principles akin to those of estoppel. The present case furnishes an excellent example for the application of those principles. If objection had been made that proof of judgment and execution was lacking, that proof doubtless would have

been produced. That it was not produced was doubtless owing to the form of the objection which was actually made. At any rate, appellants cannot be heard to say that their objection did not so result.

[5] In view of what is said in the preceding paragraph, and notwithstanding the manner in which we have closed it, we may appropriately cite authority for the proposition of law that, where specific objections are made to offered evidence, all objections not made are waived. *Jones*, Ev. § 894; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Bailey v. Chicago, etc., Ry. Co.*, 3 S. D. 531, 54 N. W. 596.

[6-8] Appellants made a motion for nonsuit at the trial upon the ground that the offer of the sheriff's deed had not been preceded by proof of judgment and execution, and the motion was denied. It is claimed that this ruling was error, but it is our opinion, for the reasons already stated, that the point was made too late on motion for nonsuit. If the objection which was not made was waived by the form of the objection which was made, the waiver operated at once, and it was not affected by the presentation of the point on motion for nonsuit. This conclusion seems obvious. It finds support, however, in *Birney v. Haim*, 2 Litt. (Ky.) 262; *Starkweather v. Dawson*, 14 Cal. App. 666, 112 Pac. 736. It is to be observed, also, that the presentation of such a ground on motion for nonsuit does not necessarily allow a plaintiff the right to a reopening of his case in order to supply missing evidence, as a trial court may, in the exercise of a sound discretion, refuse to permit a case to be reopened on such a motion. See *San Pedro Lumber Co. v. Schroeter*, 156 Cal. 158, 103 Pac. 888. We are prompted to this remark upon consideration of the rule already stated, that the production of preliminary evidence is waived by a failure to object to its absence, for the reason that, if objection were made, the evidence would naturally be forthcoming.

[9] It is insisted that the objection to the sheriff's deed actually made at the trial was good. We think it was not good. There was evidence to show that the corporation referred to in the deed had an interest in the claims prior to the execution of the instrument, and there are admissions to the same effect in appellants' briefs.

Other points are made by appellants, but they are all either concluded by our disposition of what we have characterized as the controlling question in the case, or they do not merit a separate consideration.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

65 Cal. App. 181

RYAN v. RILEY, State Controller.
(Civ. 2743.)

(District Court of Appeal, Third District, California. Jan. 7, 1924. Hearing Denied by Supreme Court March 6, 1924.)

1. States ⇨131—Appropriation must be definite and certain.

Where an appropriation is made by the Legislature and the money is to be paid out of the general fund, the appropriation must be specific both as to purpose and amount.

2. States ⇨131—Motor Vehicle Act held to properly make appropriation for payment of traffic officers.

The Motor Vehicle Act sufficiently makes appropriation out of fund created by the act for payment of traffic officers under section 30.

3. States ⇨131—Motor Vehicle Act held not to make appropriation for more than single purpose.

The Motor Vehicle Act, providing for payment of inspectors and traffic officers out of fund created thereby, does not contravene Const. art. 4, § 34, providing that no bill making an appropriation of money shall contain more than one item of appropriation, and that for a single and certain purpose to be therein expressed; all moneys appropriated or referred to in the act having to do with the highways of the state and the regulation of traffic thereon.

4. Highways ⇨93—Act providing for appointment of traffic officers to act in particular counties held valid.

Motor Vehicle Act, § 30, is not unconstitutional because it permits the appointment of traffic officers, who are state officers, to act in particular counties.

5. Constitutional law ⇨62—Motor Vehicle Act, § 30, held not an unwarranted delegation of legislative power.

Motor Vehicle Act, § 30, in providing for the appointment of such number of traffic officers as the chief of the motor vehicle division may deem necessary, and the fixing of the salaries thereof by the boards of supervisors of the various counties in connection with the chief of the motor vehicle department, and in further providing that the amount of the salary shall be fixed by contract, held not an unwarranted delegation of legislative power, and so violative of Const. art. 3, § 1.

6. Officers ⇨3—No particular language necessary for creation of office.

No particular language is necessary for the creation of an office; it being sufficient if the intent of the Legislature is so manifested by the language used.

7. Highways ⇨93—Motor Vehicle Act giving power to appoint traffic officers held not void for failure to specify number.

Motor Vehicle Act, § 30, empowering the chief of the motor vehicle division to appoint such number of traffic officers as he may deem necessary, is not void because it does not limit

or specify the number of traffic officers to be appointed.

8. Statutes ⇨212—Presumed Legislature adopted language used in view of prior construction.

It must be presumed that the Legislature in using language which had received judicial construction adopted the language in view of such judicial construction.

9. Statutes ⇨73(2)—Motor Vehicle Act held not void as not being uniform in its operation.

Motor Vehicle Act, § 30, relating to appointment of inspectors and traffic officers by the chief of the division of motor vehicles, is not void as not being uniform in its operation, though whether it shall be put into effect in all the counties of the state is discretionary with the chief of the motor vehicle department.

10. Counties ⇨160—Payment of traffic officers held not unlawful interference with county funds.

Payment of traffic officers, appointed by the chief of the division of motor vehicles under Motor Vehicle Act, § 30, as state officers, is not an unlawful interference with county funds, in view of section 159 of such act; such officers being paid out of the money received by motor vehicle department as fees, etc.

11. States ⇨131—Motor Vehicle Act held not to violate constitutional provision as to budget.

The Motor Vehicle Act, in so far as it makes provision for the payment of inspectors and traffic officers and appropriation for salaries, is not violative of Const. art. 4, § 34, generally known as the budget amendment; the Motor Vehicle Act being passed and approved after the budget bill had been disposed of, since, when the budget bill has been disposed of, other appropriations may be considered, passed, and approved.

12. Constitutional law ⇨48—Construction given, if possible, which will uphold act.

Such construction shall be given as will uphold an act of the Legislature when such a construction may reasonably be given, and where a reasonable doubt exists as to the constitutional exercise of power, or where it does not clearly appear that any constitutional limitation has been transgressed.

Application for writ of mandate by T. M. Ryan prayed to be directed to Ray L. Riley, as State Controller of the State of California, to require him to draw a warrant for services as traffic officer. Writ granted.

Percy E. Towne and Peter A. Breen, both of San Francisco, U. S. Webb, Atty. Gen., and Robert T. McKisick, Deputy Atty. Gen., amici curiæ, for petitioner.

Ralph W. Smith, of Sacramento, Wesley E. Marten, of San Francisco, and Louis B. Diavila, of Sacramento, for respondent.

PLUMMER, J. On rehearing. This is an original petition seeking a writ of mandate

directing and requiring the respondent as the state controller of the state of California to draw a warrant in favor of the petitioner in the sum of \$175, alleged to be due him as salary for services rendered as a traffic officer in and for the county of Sacramento, appointed under the provisions of section 30 of the California Motor Vehicle Act, approved May 30, 1923 (St. 1923, p. 517).

The petition sets forth the various acts taken and performed by the chief of the motor vehicle department of the state of California and the board of supervisors of the county of Sacramento, from which it appears that the petitioner and the board of supervisors of said county entered into a contract providing for the payment to the petitioner of a monthly salary in the sum of \$175 per month, and recommended the petitioner's appointment, as provided by said section; that said contract was also entered into by Will H. Marsh, as chief of the division of motor vehicles, and that, in accordance with the recommendation made by the board of supervisors of said county of Sacramento, the petitioner was appointed a traffic officer in and for the county of Sacramento by the said Will H. Marsh, chief of the division of motor vehicles of the state of California. Application was made by the said petitioner to the respondent for the issuance of the warrant herein referred to, which was refused by the respondent on the ground that the provisions of section 30 of the Motor Vehicle Act are unconstitutional. Section 30 of the Motor Vehicle Act contains the following provisions:

"The chief of the division of motor vehicles is hereby authorized to appoint all necessary state inspectors at large and in addition thereto a sufficient number of state inspectors and traffic officers to enforce the provisions of this act in each of the counties of the state and all inspectors and traffic officers appointed as provided herein are hereby vested with the authority of peace officers for the purpose of enforcing the provisions of this act.

"Boards of supervisors in their respective counties and the chief of the division of motor vehicles are hereby authorized to enter into contracts providing for the appointment by the chief of the division of a sufficient number of inspectors and traffic officers to serve in such counties respectively and providing for the amount of their compensation.

"Boards of supervisors in their respective counties may submit to the chief of the division a list of names of proposed traffic officers from which list the chief of the division may in his discretion make such appointments.

"The compensation of such inspectors and traffic officers appointed to serve in any particular county shall be paid by the state out of that portion of the net receipts of the motor vehicle fund which such county is entitled to receive under the provisions of this act."

Subdivision 5 of said section 30 exempts inspectors and traffic officers from the vari-

ous provisions of the act creating the civil service commission of the state of California.

By section 159 of the same act, a fund is created in the state treasury to be known as the "Motor Vehicle Fund." It is in that section provided that the state treasurer shall deposit all moneys received by him from the division, or under the provisions of this act, into the motor vehicle fund. Subdivision (b) of section 159 of the act is as follows:

"There is hereby appropriated out of such fund all moneys received as operators' license fees, and chauffeurs' license fees and duplicate operators' and chauffeurs' license fees and in addition thereto such portion of the remainder of such motor vehicle fund not exceeding in any registration year twenty per cent. thereof as may be necessary for the maintenance of the division of motor vehicles to be expended by the division in carrying out the provisions of this act. * * * The balance of said fund after the expenditure of so much as may be permitted by this act for the support of the division of motor vehicles shall be known as the 'net receipts' and shall be devoted to the purposes and in the manner herein specified."

Subdivision (c) of said section 159, so far as involved in this proceeding, reads as follows:

"One-half of such 'net receipts' is hereby appropriated and shall be paid from the motor vehicle fund to the counties of this state in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued; provided, that there shall be deducted from the amount to be paid hereunder to any county all amounts that may have been expended under the provisions of this act during the preceding six months to pay the compensation of state inspectors and traffic officers appointed to serve in such county. * * *

Subdivision (e) of section 159 of said act requires that the state controller shall in the months of February and August of each year draw his warrants upon the motor vehicle fund in favor of the county treasurer of each county for the amount to which said county is entitled, etc.

Eight different reasons are assigned by the respondent why the provisions of section 30 of the Motor Vehicle Act are void, and therefore why the petitioner is not entitled to a warrant drawn against any of the motor vehicle funds now in the state treasury. These reasons are as follows: (1) The controller has no means of knowing if funds are available for payment of the petitioner's claim under the contract. (2) The controller is not authorized to draw his warrant except upon an appropriation made by the Legislature. The "California Vehicle Act" makes no appropriation for the payment of traffic officers. (3) There is more than one item of appropriation contained in the "California Vehicle Act." (4) Traffic officers appointed to act in the various counties are state offi-

cers. (5) The Legislature cannot delegate to the chief of the motor vehicle division and the board of county supervisors the power to fix salaries of, and create offices of, state traffic officers in the various counties. (6) The "California Vehicle Act" is not uniform in its operation. (7) The payment of traffic officers under the "California Vehicle Act" is an unlawful interference with county funds. (8) The Budget Act of the Legislature of 1923 makes no provision for the payment of inspectors or traffic officers.

Owing to the fact that it was admitted upon argument herein that there are sufficient funds in the hands of the controller available for meeting the demands of the petitioner herein, if otherwise valid, objection No. (1) need not be further considered.

Section 22, article 4, of the state Constitution reads: "No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the controller," and subdivision 17, section 433, of the Political Code, also specifies: That "no warrant must be drawn unless authorized by law, and upon an unexhausted specific appropriation provided by law to meet the same." Does the Motor Vehicle Act make an appropriation for the payment of traffic officers under the provisions just quoted? The definition of an appropriation given in *Ingram v. Colgan*, 106 Cal. 117, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, appears to be the one adopted by all the cases having to do with this question, to wit, "to an appropriation within the meaning of the Constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid."

[1] There must be a setting apart from the public revenues of a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purposes. In applying this principle in the various cases defining the word "appropriation," and the cases based upon the different acts of the Legislature in making appropriations, there must be kept in mind the distinction made between the setting aside of revenues derived from a particular source to be used for a particular purpose, and moneys ordinarily intended to be paid out of the general funds of the state. Where the appropriation is made by the Legislature and the money is to be paid out of the general fund, there seems to be no conflict in the cases, and the appropriation must be specific both as to purpose and amount; neither of these requisites can be left indefinite nor uncertain. This is shown by the principal case cited by respondent and relied upon by the Supreme Court of this state and many other courts, to wit, the case of *Ristine v. State of Indiana*, 20 Ind. 328.

The *Ristine Case* makes the distinction

which we have above indicated. It is there said:

"An appropriation may be made in different modes. It may be made by an act setting apart and specially appropriating the money derived from a particular source of revenue to a particular purpose. Our swamp land act is of this character."

Section 26 of the Swamp Land Act of Indiana (1 Gavin & Hord 1870, p. 602) reads:

"The amount of money paid into the office of the treasurer of state, from the different counties, for the sale of swamp lands, shall constitute a special fund for the following purposes, and for no other, to wit: First. To pay the expenses of the selection thereof under the act of Congress donating them, as ascertained by law. Second. To pay the expenses of preparing maps and plats thereof, the expense of the sale thereof, and all other expenses necessarily incurred in the sale thereof. Third. To pay the commissioners and engineers for their services, as hereinafter provided. Fourth. To pay for the expenses of reclaiming by ditching, dyking, or other necessary and proper means [in so reclaiming] the said swamp lands."

In *Lange v. Stover*, 19 Ind. 175, the Supreme Court of Indiana, in passing upon the sufficiency of the act just quoted to constitute an appropriation, said:

"We think the statutes on the subject of swamp lands make an ample appropriation of the swamp land fund to the payment of legitimate claims against that fund. * * * The auditor is authorized to draw his warrant, in a proper case, upon these funds, and no other or further appropriation is necessary than is found in the statutes above referred to."

The same ruling is found in *Dodd v. Miller*, 14 Ind. 433. In that case, however, it was found that the fund was exhausted, and for that reason the writ of mandate prayed for was denied.

In *Blaine County Inv. Co. v. Gallet*, 35 Idaho, 102, 204 Pac. 1066, the Supreme Court of Idaho, in passing upon the validity of an attempted appropriation, refers to this distinction and also as to the intent of the Legislature in making an appropriation of the entire general fund, and where it is clear that the entire general fund is not appropriated or intended to be appropriated then and in that case there must be the specific designation and limitation set forth in the case of *Ingram v. Colgan*, supra, and also in *Ristine v. State*, supra, and other cases following the same rule as to what constitutes an appropriation.

[2] Referring to subdivision (b) of section 159 of the Motor Vehicle Act of this state, it will be observed that the Legislature, after having created a motor vehicle fund in subdivision (a), explicitly appropriates out of such fund all moneys received from certain specified sources to be applied toward paying the expenses of maintaining the motor vehicle department and the expenses incurred in car-

rying out the provisions of the Motor Vehicle Act, and after deducting such expenses the balance of said fund shall constitute what is known as net receipts, and by subdivision (c) of the same section one-half of such net receipts is appropriated to the counties in proportion to the number of motor vehicles registered, less whatever sum has been paid out as salary or compensation to traffic officers and inspectors. If the act is otherwise valid, we think this would amount to an appropriation of the entire one-half of the net receipts for the payment of traffic officers and inspectors, if in the exercise of his discretion the chief of the motor vehicle department saw fit to expend such sum or sums. Were the various items of money to be paid out of the general fund, we think the objection urged by respondent would be good, but, as against a special fund created by the Legislature for a special purpose and derived from a special source, we think the exception pointed out in the *Ristine Case* is an exception to the general rule, and is applicable to the case at bar.

[3] As we read the Motor Vehicle Act, we do not find anything therein contravening section 34 of article 4 of the Constitution, which provides as follows:

"No bill making an appropriation of money, except the budget bill, shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed."

There is but one general purpose sought to be accomplished by the Motor Vehicle Act, i. e., the regulation of traffic upon the public highways of the state, and the appropriation of moneys contained in the Motor Vehicle Act is simply a designation of funds to be used in maintaining the different branches of the motor vehicle department and furthering the purposes intended to be secured or obtained in the adoption of the motor vehicle law. All the officers referred to in the Motor Vehicle Act are intended to be and we think may reasonably be denominated members of the general staff or corps making up the motor vehicle department in charge of one person denominated the chief of the motor vehicle department.

It is also to be noted in this connection that the funds dealt with by the motor vehicle law are special funds arising from the use of the highways by the people of the state, and are not derived by general taxation or from general sources, and that the remainder of the funds so specially raised, after paying expenses of providing for safeguarding the highways, are to be used in connection with the maintenance of the same. In other words, all moneys appropriated or referred to in the Motor Vehicle Act have to do with the highways of the state and the regulation of traffic thereon.

[4] That the traffic officers contemplated to be appointed under the provisions of sec-

tion 30 of the Motor Vehicle Act are state officers may be admitted, but this fact does not appear to us to involve any constitutional question, even though the officer was appointed for and required by his appointment to perform his duties in a particular county. It may also be admitted that traffic officers come under the definition of what is known as public officers as distinguished from mere employees. We find no constitutional provision bearing upon this particular question, and hence there is no reason to conclude that the power of the Legislature to make provision for such officers is in any wise limited. Objection No. (4), therefore, seems to us devoid of merit.

[5-8] Objection No. (5), to wit, "that the Legislature cannot delegate to the chief of the motor vehicle division and the board of county supervisors the power to fix salaries of, and create offices of, state traffic officers in the various counties," is one that has given us much concern, and which has caused us to give further consideration to the questions presented by the petition for a writ of mandate herein.

Section 1 of article 3 of the state Constitution provides:

"The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the other, except as in this Constitution expressly directed or permitted."

Section 4 of article 20 of the Constitution reads:

"All officers or commissioners whose election or appointment is not provided for by this Constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the Legislature may direct."

Under section 4 of article 20 of the Constitution, the offices being statutory and not constitutional, if the office of traffic officers is in fact created by the act of the Legislature and the other requirements complied with, the fact that the appointment is in and of itself left with the chief of the motor vehicle department or with the chief of the motor vehicle department and the board of supervisors of any particular county, would not in and of itself be an unwarranted delegation of legislative power. The language of section 4 of article 20 expressly contemplates that the election or the appointment of such officers may be made just as the Legislature may direct. In other words, the Legislature might have directed the appointment to be made by the chief of the motor vehicle department or by the boards of supervisors of the respective counties without in any way contravening the provisions of

the section just referred to. The manner of appointment is purely optional with the Legislature. Does the first subdivision of section 30 of the Motor Vehicle Act create the office of traffic officer? It reads as follows:

"The chief of the division of motor vehicles is hereby authorized to appoint all necessary state inspectors at large and in addition thereto a sufficient number of state inspectors and traffic officers to enforce the provisions of this act in each of the counties of the state," etc.

Upon first impression it might appear questionable as to whether any such office was in fact created, but upon further consideration and investigation it seems clear that the language used conveys the intent as well as embodies the intent of the Legislature to call into existence such an office, notwithstanding the fact that the functions of that office are to be gathered only from the general terms of the section, to wit, to enforce the provisions of the Motor Vehicle Act, and that the number of persons exercising the functions of such office or to exercise the same is not specifically set forth. In other words, it is an office with functions to be performed by one or more persons, so that the question of vacancy or unoccupied position does not enter into the question of determining the existence or nonexistence of the office.

The language used is almost identical with that which occurs in the provisions of the statutes and the codes having to do with many of the other departments of the state government, such as prison directors, fish and game commissioners, lunacy commission, directors of industrial homes, board of directors of California schools for deaf, dumb, and blind, board of pilot commissioners, etc.

No particular language appears to be necessary for the creation of an office. It is sufficient if the intent of the Legislature is so manifested by the language used. *Childs v. State*, 4 Okl. Cr. 474, 113 Pac. 545, 33 L. R. A. (N. S.) 563. That the language used in the first subdivision of section 30 of the Motor Vehicle Act sufficiently manifests the intent of the Legislature to create the office of traffic officer is supported by the case of *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, where an act of the Legislature approved March 18, 1911 (St. 1911, p. 383), was held sufficient to create the position of sealer of weights and measures. Section 4 of that act reads as follows:

"The respective counties, incorporated cities, incorporated towns and incorporated cities and counties of the state are hereby authorized to appoint sealers of weights and measures."

Further illustrations might be given, but we deem the foregoing sufficient.

The number of officers to fill the office or to exercise the functions thereof is not designated, and no compensation or salary is fixed by the Legislature. The necessity for the ap-

pointment of a person or persons to be designated as such officer or officers and the number for each county are left to the discretion of the chief of the motor vehicle department. The amount of the salary to be paid or the compensation to be awarded is left to the boards of supervisors and the chief of the motor vehicle division, and is to be ascertained by contracting with the person or persons to be appointed to exercise the function of traffic officer. Do the various provisions of section 30 of the Motor Vehicle Act, in providing for the appointment of such number of traffic officers as the chief of the motor vehicle division may deem necessary, and the fixing of the salaries thereof by the boards of supervisors of the various counties in connection with the chief of the motor vehicle department, and further providing that the amount of the salary shall be fixed by contract, constitute an unwarranted delegation of legislative power, and so violative of section 1 of article 3 of the Constitution heretofore referred to?

It is not difficult to quote general definitions as to powers which may be exercised by the respective departments of the state government, but to make application of such definitions under the constantly changing conditions as they are presented from day to day, and so apply the language of the Constitution as not to hinder such development, and yet give true expression to the fundamental law as expressed in the Constitution adopted by the people, is not always easy or free from uncertainty. The language of the Supreme Court of Wisconsin in the case of *Appointment of a Revisor*, as reported in 141 Wis. 597, 124 N. W. 671, 18 Ann. Cas. page 1177, expressed clearly the idea we have in mind:

"It is easy to give general definitions of the three great governmental powers. The legislative power is the power which makes the laws; the executive, the power which enforces them; and the judicial, the power which expounds and applies them. Would that it were as easy to apply these general definitions to a concrete case! It is familiar to all who have considered the subject at all that between these several powers, which seem so distinct in their general character, there are great borderlands of power which may be said to approach nearer and nearer until they merge gradually into each other. In these borderlands it is often difficult to tell where one power ends and the other begins. This was not so marked a condition in earlier and simpler conditions of society as it is to-day. With the development of the complex conditions of modern civilization there have come governmental necessities undreamed of by our fathers. Fifty years ago there was no necessity for that new and remarkable governmental agency known as the 'commission,' while now it fills a wonderful and increasingly important place in our governmental scheme. Though not named in the Constitutions and not dreamed of by their makers, the commissions which regulate and control public utilities of

the states and the nation are to-day wielding powers scarce second to the powers of either of the three original departments of the government. Though they are truly executive agencies and have neither legislative nor judicial powers, they are daily doing many things which vitally affect the life, liberty, and happiness of the people, and in doing these acts they are exercising powers trenching closely on the judicial and the legislative. In effect they decide real controversies like courts, and they daily coerce vast interests by regulations which fifty years ago would have been thought to be nothing short of legislation; yet in the exercise of these powers they have been almost universally sustained. This does not mean that the distinction between legislative, executive, and judicial functions has passed away, or that the constitutional division of powers is worn out, but simply that as matter of fact it is impossible to say at any given place: Here is a line where legislative power ends and judicial power begins; all on one side of this line is legislative and all on the other side is judicial, and no single power can be both. Each department has exclusive functions which no other department can perform, but this does not mean that there may not be functions common to all the departments. It is the exclusive function of the Legislature to make laws, and it is the exclusive function of the courts to expound the laws; but the power of neither department is exhausted by the performance of such exclusive function. There are many other governmental operations and duties not properly to be classified under either head, nor exclusively executive in their character, and which may be performed by inferior officers or agents in aid of the functions of either great department.

"Appointment to office, while generally called an executive function, cannot under our Constitution be classed as exclusively a function of either of the three great departments."

It will be noted that section 4 of article 20 of the Constitution is silent upon the subject of the manner in which the salaries of the officers provided to be appointed in accordance with that section shall be fixed. In other words, it contains no words of limitation or prohibition, and therefore under the ordinary rules of construction leaves the matter entirely with the Legislature. There are no limitations or specifications as found in the section of the Constitution having to do with the fixing of salaries of county officers wherein it is distinctly provided that the Legislature must fix the same according to duties to be performed.

It is generally held in those states where there is no constitutional provision setting forth the manner or the mode of fixing the salaries of county officers that such matters may be properly delegated to local authorities. In 12 C. J. 859, we find the general rule stated as follows:

"In general, statutes authorizing local authorities to fix the salaries of local officers are valid; as, for example, a statute authorizing the board of county commissioners to regulate the fees of justices of the peace in certain

cases, and to fix the salaries of county officers; a statute authorizing police commissioners to fix the salaries of policemen; a statute authorizing a district or county court to fix the salary of the county attorney, or deputies or assistants of the court; and it has even been held that municipal corporations may be authorized to fix the salaries of certain county officers whose duties are performed within such corporations. But when the Constitution provides that the compensation of certain local officers shall be regulated by general and uniform legislative acts, a board of supervisors cannot be empowered by the Legislature to change or to suspend the provisions of such an act in relation to a particular officer. Nor can the Legislature delegate the power of determining such compensation to county commissioners."

A distinction is also made between the delegation of a power which may be rightfully exercised by the Legislature and one which must be exercised by the Legislature. In the former it has been held that such delegation is largely discretionary, while in the latter that such delegation is not permissible. In other words, what the Constitution provides that the Legislature itself must do cannot be delegated to some other person or body of persons. The rule as to power of appointment is set forth in 29 Cyc. 1369 in these words:

"It is one of the principles of the law of the United States that, in the absence of a constitutional provision to the contrary, any one of the three departments of the government may, under the authority of a statute, appoint its own subordinates. Although there is some conflict, the better rule would seem to be that in the absence of some constitutional provision the power to appoint may also, if the statutes of the legislature so provide, be exercised for any class of officers by any of the three governmental departments."

And on the question of compensation in the same volume, page 1426, it is said:

"The amount of compensation is, in the absence of other provision, to be fixed by the Legislature which may, however, delegate its power, and which of course must observe all constitutional limitations. A common limitation is that the compensation of officers must be fixed by general law. Where the provision of law fixing the compensation is not clear, it should be given the construction most favorable to the government."

There being no language used in section 4 of article 20 of the Constitution limiting the power of the Legislature to provide the manner in which the compensation of traffic officers may be fixed, we conclude that such matter was left within and lies within the discretion of the Legislature to be determined in such mode and manner as it may see fit and prescribe. In *State v. Turner*, 37 N. D. 635, 164 N. W. 924, the Supreme Court of North Dakota, having under consideration an act known as the Uniform State Grading Act of that state (Laws 1917, p. 388), provid-

ing for the appointment of inspectors and for the fixing of salaries thereof, disposed of this question as follows:

"The only power that is delegated is the power to fix salaries and to determine the number of inspectors, etc. It is true that no limit is placed on the cost of the upkeep of the buildings where scales are kept, but this, of course, must be reasonable, and all of the expense must be within the limit of the sum total of the fees collected. If such a statute is unconstitutional, then all statutes are unconstitutional which create boards of trustees of our state university, agricultural college, or normal schools, and other schools and public institutions."

The objection which we have denominated No. (5) raises the further question that the section is void because it does not limit or specify the number of traffic officers to be appointed. In this particular the act is very similar to the several acts creating the various departments and institutions to which we have referred. The language of subdivision 1, section 642 of the Political Code relating to the duties of fish and game commissioners is very similar. That subdivision reads as follows: "To see that the laws for the protection and preservation of" fish and game "are strictly enforced, and for that purpose they may, from time to time, employ such assistants as they shall consider necessary, which persons so appointed as assistants shall be public officers and shall have all the powers and authority of sheriffs and other peace officers to make arrests for violations of such laws and to serve all processes and notices, throughout the state." A number of acts creating the different boards and commissions provided for the appointment of secretaries, clerks, and assistants without specifying the number or fixing the amount of the compensation to be allowed the persons so appointed. It is suggested that most of these persons denominated officers, etc., are in reality only employees. This may be true in many instances, but wherever such person, whether called an employee or an officer, exercises a part or portion howsoever small of the sovereignty of the state, such as the power to make arrest, then and in that case he is a public officer, whether called an employee or an officer under the statute providing for his appointment. By reference to subdivision 1 of section 642 of the Political Code, which we have just quoted, it will be seen that the persons whose appointments are therein provided for are not only denominated public officers, but are invested with the exercise of a part of the general sovereignty of the people of the state of California, to wit, the power to make arrest. This is true of the persons employed as guards at the state prison and other public institutions, the safeguarding of which necessitates investing such employees or officers with the power to make arrest. Nor is the

language used in the first subdivision of section 30 such as to give unlimited power to the chief of the motor vehicle department in the appointment of traffic officers. The reading of that subdivision in this particular is:

"Appoint all necessary state inspectors at large and in addition thereto a sufficient number of state inspectors and traffic officers to enforce the provisions of this act, * * * and all inspectors and traffic officers appointed as provided herein are hereby vested with the authority of peace officers. * * *"

While this language would ordinarily appear to give unlimited authority as to the number of traffic officers to be appointed, this language has received judicial construction, and, following the usual course of reasoning in such cases, it must be presumed that the Legislature adopted the language used in the act in view of the construction theretofore given it by the courts. In *Riley v. Chambers*, 181 Cal. 589, 185 Pac. 855, 8 A. L. R. 418, in dealing with the power to license realty brokers, etc., where the language used is practically the same as above quoted, the Supreme Court says:

"Another * * * objection is that the act is invalid because it gives the commissioner arbitrary power to determine who may have a license, and therefore who may lawfully engage in the real estate business. If such arbitrary power were in fact conferred by the act, it may well be that the objection would be good. But such power is not conferred either in the granting of licenses or in their revocation."

The objection to the act on this ground was held not well taken. In *Tarpey v. McClure*, 213 Pac. 983, the Supreme Court of this state affirms the case of *Riley v. Chambers*, and also construes the phrase "such as he may deem necessary" as follows:

"The provision in section 1 authorizing the state engineer to employ such engineers, attorneys, and other assistants as he may deem necessary, and to fix their compensation, does not contravene the rule in *Farrell v. Board of Trustees*, 85 Cal. 408, 24 Pac. 863, for two reasons: First, because the assistants here provided for are not officers, but mere employees; second, because the discretion as to the number to be employed is not unguided, as it was in the *Farrell Case*. The phrase 'such as he may deem necessary,' as here used, is precisely analogous to the provision under consideration in the case of *Riley v. Chambers*, supra, and which was there held not to confer arbitrary power. * * *"

In *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, sections 4 and 5 of the act, approved March 18, 1911, were upheld. Section 4 provided for the appointment in the plural number, without stating the number, and section 5 provided that the appointing power "shall fix the compensation of such officer and may provide deputies for such officer and fix their compensation." The case of *Scott v. Boyle* also points out another distinction

which is applicable, and differentiates it from acts applying to the ordinary political functions of counties and cities, and of many boards and commissions, to wit: The exercise of the general police power of the state which is involved in the enforcement of the laws adopted to protect the lives and property of persons using the highways. The several questions involved herein are referred to by the Supreme Court in that case as follows:

"It is further suggested that they are county officers, that section 5 of article 9 provides that the Legislature shall regulate the compensation of all such officers in proportion to duties, and, consequently, that it cannot delegate to the board of supervisors of the county or city and county the duty of fixing the salaries of such officers instead of doing so itself. It is true that the general principle is that, when the people by their Constitution impose an express duty of this kind on the Legislature, that body cannot, in general, delegate such duty to any subordinate body. *Dougherty v. Austin*, 94 Cal. 601 (16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092). That case decided that said section 5 confided to the Legislature itself the duty to regulate and fix the compensation of county officers, and that it could not delegate this duty, or any part of it, to a county board of supervisors. We are of the opinion that the provision of that section requiring the Legislature to regulate the compensation of the officers referred to therein does not apply to offices created by the Legislature, under said section 14, to exercise a part of the police powers of the state which the provisions of the latter section, both in its original form and as amended, recognize as something distinct from the general political functions of counties and cities and the general scheme of county or municipal government.

"The act applies throughout the state to all the counties, cities, and municipalities thereof. It is therefore uniform in its operation. The fact that it does not make it compulsory upon the respective counties and municipalities to appoint such sealers does not render it lacking in the uniformity necessary to a compliance with section 11 of article 1 of the Constitution, nor make it a special law within the meaning of subdivisions 9, 28, and 29 of section 25 of article 4."

We come now to the consideration of the cases which, upon first reading, may very readily be held to prohibit the legislation with which we have been dealing by reason of the general language used therein, but which, upon closer inspection and further analysis, are distinguishable from and not decisive of the issues herein involved. The case of *Farrell v. Board of Trustees*, 85 Cal. 408, 24 Pac. 868, cited in argument, and referred to by many of the subsequent decisions of the Supreme Court, had to do with the attempted investing of the police commissioners of the city of Sacramento with the power to appoint policemen, not exceeding 30 in number, and consequently the construing of subdivision 28 of section 25 of article

4 of the Constitution, forbidding the Legislature to pass special laws creating offices, or prescribing the powers and duties of officers, in counties, cities, and counties, etc. In the decision of the *Farrell Case*, the case of *Ford v. Board of Harbor Commissioners*, 81 Cal. 19, 22 Pac. 278, was taken up and considered. In the *Ford Case* it was pointed out that three of the justices held that the power to create an office and to make appointment thereto could be delegated, and that two of the justices dissented therefrom. The question was then asked why is not the power to create an office a legislative power? It is not necessary to construe the language used as an attempted answer to this question. It is sufficient to say that the opinion does hold that where the Legislature has created the office it may vest the appointment thereto in such individual or officers as it may think proper. It was then held that the provisions of the Constitution to which we have referred were prohibitory of the power attempted to be delegated. Similar questions were before the Supreme Court of this state in the case of *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435, and in *Logan v. Shields*, 214 Pac. 45. As the latter case refers to the former, and adopts its language, we quote from the latter case, to wit:

"In the case of *People v. Wheeler*, 136 Cal. 652, 69 Pac. 435, this court held that a county physician was not an officer within the meaning of the constitutional provision above quoted. [Referring to section 5 of article 2.] With reference to the question as to whether or not an office was created by the appointment of the county physician it was said:

"It may be added that if the act could be thus construed, it would be clearly unconstitutional. For the effect of the act would then be to delegate to the board of supervisors the power to create an indefinite number of public officers, with varying duties and compensation; which cannot be regarded as within the constitutional powers of the Legislature. "The Legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number." *Ford v. Harbor Commissioners*, 81 Cal. 37; *Farrell v. Board of Trustees*, 85 Cal. 415. Still more obviously would this be the case if the supposed office be regarded as a county office, as, "if an office at all," it should be. *People v. Harrington*, 63 Cal. 260. For with relation to county offices it is the constitutional duty of the Legislature, not only to provide for the election of the officers, but also to fix their terms of office, to prescribe their duties, and to regulate their salaries or compensation; and this duty could not be delegated to the board of supervisors or others. Const. art. 2, § 5."

In *Coulter v. Pool*, 187 Cal. 181, 201 Pac. 120, the court had under consideration a statute attempting to authorize the board of supervisors to employ a county engineer and fix his salary, and it was held that such delegation was beyond the power of the Legis-

lature. The language used in the Wheeler Case, supra, and also in the case of Logan v. Shields, supra, indicates that the conferring of the power to appoint an officer delegated the power to create the office. The distinction between the two powers exists which we have pointed out, and, not being necessary to the decision of any of the cases to which we are now referring, was probably not called to the attention of the court, and no occasion therefor arose for drawing the line between the exercise of the two powers which we are here called upon to do. Again these cases have to do with the powers conferred and the limitations set forth in section 5 of article 11, relating particularly and explicitly to county officers. That section provides that the Legislature shall by general and uniform acts provide for the election or appointment of county officers, prescribe their duties, fix their terms of office, regulate their compensation, etc. Section 5 of article 11 is mandatory in its terms as to what the Legislature itself shall do, and thus expressly limits the power of the Legislature as to what it may authorize others to do.

None of these mandatory provisions or limitations appear in section 20 of article 4 of the Constitution, wherein the Legislature is authorized to provide for the election or appointment of all officers or commissioners not provided for by this Constitution. It necessarily follows that in the general language used in the cases having to do with questions governed by the language found in section 5, article 11, must be read in connection with the issues actually presented and actually decided. Thus the language found in *People v. Wheeler*, supra, and approved in *Logan v. Shields*, to wit: "The Legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number," must be held to refer to and be governed by the limitations and proscriptions set forth in the section and article of the Constitution having to do with the creation of county offices, as that was the question then and there being decided. In the case at bar we have to do with public officers of the state created by the Legislature of the state, and appointed as hereinbefore set forth for the purpose of exercising the general police powers of the state. In view of what we have said, and, also, in view of the general course of legislation pursued by the state of California for a number of years, and in view of the distinction which we have heretofore drawn between the various sections of the Constitution referred to, we are constrained to hold that the fifth objection dealt with herein is untenable, and, in so holding, the language of Associate Justice Hart used in the case of *Stephens v. Chambers*, 34 Cal. App. 660, 168 Pac. 595, best expresses our views:

"A written Constitution, like a statute, cannot so deal with particulars as to meet or pro-

vide for every case or contingency which may arise and of which legislative cognizance is allowable if necessary to the complete enjoyment of those privileges, immunities, and rights which are of the essence, and, indeed, the primary and foremost objects of a government in which, like ours, ultimate sovereignty is in the people themselves. By this we do not mean to say that the limitations or barriers contained in the Constitution against the exercise of legislative power may be set aside or disregarded, or that the intent of the organic law, as it is to be gathered from the instrument itself, shall not in all cases prevail. Nor do we intend thus to imply that the courts, in the construction of a written Constitution, may be governed by a change in public sentiment as to any subject to which express attention is given and as to which limitations are fixed by the Constitution. But what we do maintain is that, since a written Constitution is intended as and is the mere frame work according to whose general outlines specific legislation must be framed and modeled, and is therefore, as stated and as is essentially true, necessarily couched in general terms or language, it is not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government."

[9] The sixth objection urged by respondent has been answered in some of the cases cited herein, in dealing with objection No. (5). The act is uniform in its operation, but whether it shall be put into effect in all of the counties of the state is discretionary with the chief of the motor vehicle department, and is similar in that respect to statutes upheld, having to do with the appointment of county health officers, etc.

[10] The seventh objection urged by respondent is that the payment of the traffic officers as officers of the state is an unlawful interference with county funds. The wording of section 159 of the Motor Vehicle Act in itself answers this objection. No funds belonging to any of the counties of the state are used in the payment of traffic officers. The payment of traffic officers may diminish the fund or funds which, under the terms and provisions of the motor vehicle law, may finally become county funds, but that is not an interference with funds belonging to any of the counties of the state. The payment of traffic officers out of the money received by the motor vehicle department as fees, etc., from the citizens of the various counties of the state is payment made out of state funds, and this is true, even though the payment to a particular traffic officer appointed for a particular county is paid out of the funds received as fees from the citizens or residents of the particular county involved.

[11] It is further objected that the Motor Vehicle Act, in so far as it makes provision for the payment of officers and appropriation for salaries, is violative of section 34 of

article 4, generally known as the budget amendment to the Constitution, in that the budget act, approved May 7, 1923 (St. 1923, p. 242), makes no provision whatever for the support of the motor vehicle department.

The budget amendment provides that:

"The Governor shall, within the first thirty days of each regular session of the Legislature * * * submit to the Legislature * * * a budget containing a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him, and of all its institutions, departments, boards, bureaus," etc., "* * * for each fiscal year of the ensuing biennial period," etc.

A recommendation was made by the Governor as to the number of state inspectors, etc., but the budget act itself, as finally passed by the Legislature and approved by the Governor, contained, as hereinbefore stated, no provisions whatever for the support of the motor vehicle department. Does this militate against the motor vehicle law? We think not. The section of the Constitution referred to contains the further provision:

"Until the budget bill has been finally enacted, neither house shall place upon final passage any other appropriation bill, except emergency bills recommended by the Governor, or appropriations for the salaries, mileage and expenses of the Senate and Assembly. * * * In any appropriation bill passed by the Legislature, the Governor may reduce or eliminate any one or more items of appropriation of money while approving other portions of the bill," etc.

It thus plainly appears that the power of the Legislature to pass other appropriation bills than the budget bill is only limited in point of time, i. e., no such bill can be passed until the budget bill is first disposed of, which necessarily carries with it a correlative interpretation that when the budget bill has been disposed of other appropriation bills may be considered, passed by the Legislature, and presented to the Governor for approval. The budget bill passed by the Legislature in 1923 was approved on the 7th day of May of that year. The Motor Vehicle Act, now before us for consideration, was approved on May 30, 1923. It thus appears that the very terms of the Constitution were complied with, and the Motor Vehicle Act was not acted upon until the Legislature had the power so to do, and the Governor possessed the authority to affix his approval to such legislation. While necessity does not authorize reading into a section of the Constitution words not therein found, yet the very necessities of the case called for the insertion in the amendment of the provision giving power to the Legislature which we have just set forth. Otherwise any omission on the part of the Governor in relation to the preparation of the budget bill, or any omis-

sion on the part of the Legislature to include therein appropriations for the various departments of the state, would render it impossible to correct errors or omissions in legislation, and tend to leave the state crippled or hampered in its departmental functions, whenever in any case the necessities and requirements of the different departments have not been fully set forth in the budget bill, as passed by the Legislature. As we read the constitutional amendment providing for the submission to the Legislature by the Governor of the budget bill, we find no limitation to the power either of the Governor to recommend or the Legislature to pass acts such as the motor vehicle law containing provisions for the support and maintenance of the department dealt with and intended to be maintained.

[12] Adopting and following, without setting forth the general rules applicable to the construction of statutes and the determination of their validity when constitutional questions are raised, that such construction shall be given as will uphold the act of the Legislature when such a construction may reasonably be given, and, also, where a reasonable doubt exists as to the constitutional exercise of the power, and also where it does not clearly appear that any constitutional limitations have been transgressed, that the act under consideration should be upheld, we conclude, upon this rehearing and reconsideration, that the sections of the Motor Vehicle Act referred to are valid and subsisting provisions of the motor vehicle law, and that the petitioner herein is entitled to a writ of mandate, directing the drawing of a warrant for his salary in the sum of \$175, as prayed for.

Let the writ issue as prayed for.

We concur: FINCH, P. J.; HART, J.

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MARKET ST. RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 10815.)(Supreme Court of California. Feb. 2, 1924.
Rehearing Denied March 3, 1924.)**1. Master and servant ☞417(7)—Compensation Commission's finding on evidence final.**

A finding by the Commission on the question of the extent of dependency of the parents of a deceased employee sustained by the evidence is not reviewable on certiorari, under Workmen's Compensation Act, § 67, subd. (c).

2. Master and servant ☞386(1)—Measure of compensation to partially dependent parents of deceased employee.

Under the Workmen's Compensation Act, partially dependent parents of a deceased employee are entitled to death benefits computed on the rate of the annual contribution at the time of injury, and not the gross amount deceased happened to pay through any past year or through any other period.

3. Master and servant ☞386(1)—Compensation awarded to partial dependent parents of deceased employee held excessive.

Where for a number of years partially dependent parents had received contributions approximating \$25 a month, in addition to a monthly rental of \$50, from their son's property which he sold, receiving in part payment \$900 cash, which he gave to his father who used part and deposited \$500 to which the father had recourse as occasion required, and for nine months after the sale the son had contributed, and at the time of his death was contributing \$25 a month to his parents' support, that sum was the correct basis for an allowance, and an award greater than three times that amount was in excess of the jurisdiction of the Industrial Accident Commission, as having no support in law or fact.

4. Master and servant ☞417(7)—Finding without evidence in compensation case reviewable by court.

Where there is an entire lack of evidence to support a finding of fact on which an award is made by the Industrial Accident Commission, the proceeding is reviewable by the court.

In Bank.

Proceeding under the Workmen's Compensation Act by Woolf Shapero and wife, claiming compensation for the death of their son, opposed by the Market Street Railway Company, employer. The Industrial Accident Commission awarded compensation, and the employer brings certiorari. Award annulled, and case remanded.

William M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco, for petitioner.

Warren N. Pillsbury, of San Francisco, for respondents.

WASTE, J. This is a proceeding in review to determine the legality of a death benefit allowed by the respondent Commission to a father and mother, the partial dependents of a street car conductor in the employ of the petitioner. It was stipulated before the Commission that the injury which caused the death of the employee arose out of and occurred in the course of his employment. Some six years before his death the decedent left Calgary, Canada, where his parents resided, and came to San Francisco and obtained employment. Thereafter, and until his death, it was his custom to send to his parents in Canada, for their support, monthly sums, the total contribution from this source being about \$300 a year. He had acquired a piece of real property in Canada which rented for \$50 a month. This amount he appears to have also regularly turned over to his parents. The son sold this property in March, 1922, receiving in payment \$900 in cash and a mortgage for the remainder of the purchase price. He gave the \$900 to the father, who used a portion of the money for the payment of bills and placed \$500 of the

amount in bank, together with other funds he had on deposit. His total deposits in two banks at that time amounted to about \$1,100 or \$1,200. These bank accounts appear to have been in the sole and exclusive control of the father of the decedent, who deposited and withdrew varying amounts at different times. No fixed sums were regularly withdrawn; recourse to the bank accounts being had as any occasion required. For the nine months after making this sale the son continued as before to send his parents sums averaging about \$25 a month. He was killed in December, 1922. The parents had more than \$1,000 in bank when he died. They then closed the bank accounts and came to San Francisco.

[1] The Commission found the applicants to be partially dependent upon the deceased employee for support. Petitioner contends that the finding as to who constituted the dependents of the decedent, and the extent of their dependency, is not supported by the evidence, and is not in accordance with the facts existing at the time of the death of the employee. We find evidence in the record to sustain the finding, and the determination of the Commission in that regard must be taken as final and binding, in so far as this inquiry is concerned. Workmen's Compensation Act (St. 1917, p. 876), § 67, subd. (c).

The real issue presented by this proceeding is whether or not the Commission made an award in excess of its jurisdiction. It is the lawfulness of the amount of the award that is here under consideration. The Commission found the annual amount contributed by the employee to the applicants was the sum of \$900, which entitled them to a death benefit in the sum of \$2,700. In arriving at the annual amount contributed by the employee to the support of his father and mother, the Commission based its finding upon the testimony that for a number of years the parents of the decedent had regularly received and used as their own the monthly rental of \$50 derived from the real property in Canada, and in addition thereto an amount approximating \$25 a month, which he had contributed from his earnings. But, as already noted, the property was sold in March, 1922, and thereafter, and for a period of some months prior to his death, the only amount devoted by the decedent to the support of the applicants was approximately \$25 per month. It is the contention of the respondent that the \$900 resulting from the real estate transaction was given to the parents as a substitute for the \$50 rental of the property which was sold in March, and was turned over to the parents as a sort of fund, to be drawn on as needed for their support, and that, as the \$900 was purposely drawn upon from time to time, rather than spent in one lump sum, the Commission was justified in considering that contributions at the rate of \$75 per month were actually being

made by the decedent at the time of his injury and death. Respondent therefore says that it was complying with the criteria set forth in *Great Western Power Co. v. I. A. C.* (Cal. Sup.) 218 Pac. 1009, as well as in the case of *Spreckels Sugar Co. v. I. A. C.*, 186 Cal. 256, 199 Pac. 8, in determining the amount devoted by the decedent to the support of the dependents.

[2] Respondent is mistaken in its contention. The cases relied on by it hold the whole theory of the Compensation Act as to death cases to be that the dependents of the employee, killed through some hazard of his employment, shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the death benefit must be computed upon the rate of contribution at that time. It is the rate that is the measure of the loss, not the gross amount the decedent had happened to pay through any past year or through any other period of time. The act provides that not only shall the question of the condition of dependency, as to entire or partial, be determined as of the date of the injury to the employee, but also that the extent of dependency shall be determined as of that date. The provision of the statute that in cases of partial dependency the death benefit shall be proportionate to the amount of the annual contribution of the employee is but a provision that the death benefit shall be proportionate to the extent of the dependency, so that the effect of the two provisions is that it is the annual contribution as of the time of the injury that is to be taken. This can only be a rate of contribution, since it is a point and not a period of time by which the contribution is to be determined. *Spreckels Sugar Co. v. I. A. C.*, supra, at pages 253, 259 (199 Pac. 8); *Great Western Power Co. v. I. A. C.*, supra, 218 Pac. 1009.

[3] For a period of nine months preceding the death of the decedent he had contributed, and at the time of his death was devoting an amount approximating \$25 a month, and no more, to the support of his partial dependents. The rate of the annual contribution of the deceased to the support of his dependents at the time of the injury was therefore \$25 a month, or \$300 per year. That sum was the correct basis for an allowance, and an award greater than three times that amount, having no support in law or fact, is in excess of and without the jurisdiction of the Industrial Accident Commission. *Spreckels Sugar Co. v. I. A. C.*, supra.

[4] There is in this case that entire lack of evidence to support the finding on which the award was made, which subjects the proceeding to a review by this court. *Pruitt v. I. A. C.*, 189 Cal. 459, 209 Pac. 31; *Dearborn v. I. A. C.*, 187 Cal. 591, 594, 203 Pac. 112.

The award is annulled, and the proceeding is remanded to the Industrial Accident Com-

mission for such further proceedings and order as are not inconsistent with the views herein expressed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

65 Cal. App. 413

BOARDMAN v. CHRISTIN et al. (Civ. 4131.)

(District Court of Appeal, Second District, Division 2, California. Jan. 23, 1924.)

1. Attorney and client ⇨143—Principle that doing what one is legally bound to do not consideration, held not applicable.

Where plaintiff, attorney at law, who, as guardian of a ward's estate, was authorized by a court order to bring an action against a railroad company to determine the latter's water rights affecting a certain ranch in which the ward and defendant each owned a parcel of land by reason of which defendant was interested in the action, plaintiff was not, as an attorney at law, under duty to render any professional services in that action, so that his promise to render such services on behalf of the ward, in consideration of defendant's promise to pay a stipulated fee, was supported by a sufficient consideration.

2. Attorney and client ⇨144—General rule for construing ambiguous contract stated.

If a contract between attorney and client concerning compensation is ambiguous, that construction should be adopted which is most favorable to the client.

3. Attorney and client ⇨145—Contract held to require full performance as condition precedent to attorney's right to recover stipulated compensation.

A contract whereby defendant agreed to pay plaintiff, as attorney at law, \$1,000 for services rendered by him in the prosecution of an action, as authorized by a court order, on behalf of a minor who was defendant's brother, to determine a railway company's water rights on a certain ranch in which the minor and defendant each owned parcels of land, the contract reading, "I am interested with said minor in procuring a judgment determining the rights aforesaid," held an entire contract requiring full performance and a prosecution of the action to judgment by plaintiff as a condition precedent to his right to recover the stipulated compensation.

4. Attorney and client ⇨145—Attorney may recover in quantum meruit when complete performance becomes impossible without fault of either party.

When complete performance by an attorney of his contract of employment becomes impossible without fault on part of either party, the attorney may recover in quantum meruit the value of the services actually rendered by him.

5. Attorney and client ⇨145—Attorney, prevented from fully performing held entitled to reasonable value of services rendered.

Where plaintiff, attorney at law, who agreed to prosecute an action on behalf of a minor, in consideration of defendant's promise to pay a stipulated fee, was prevented from fully performing his contract, without fault of either himself or defendant, by reason of the minor's selection, upon attaining his majority, of another attorney, held that, while plaintiff was not entitled to recover the stipulated sum, he was entitled to recover in quantum meruit the reasonable value of services actually performed under the contract.

6. Attorney and client ⇨165—In suit on express contract for compensation, no recovery on quantum meruit without amendment.

An attorney, suing on an express contract to recover compensation stipulated therein cannot recover on quantum meruit without amending his complaint.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Louis P. Boardman against Estelle C. Christin and her husband. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to allow amendment to complaint.

Knight, Boland, Hutchinson & Christin, L. M. Chapman, and Ward Chapman, all of Los Angeles, for appellants.

Philip C. Boardman, of San Francisco, for respondent.

FINLAYSON, P. J. This is an action by an attorney at law to recover compensation for services alleged to have been rendered by him under a contract with the defendant Estelle C. Christin, whose husband, C. A. Christin, is made a party defendant solely because, as the law stood when the action was commenced, the husband was required to be joined with the wife. Judgment passed for plaintiff, and defendants appeal. The grounds of the appeal are that Mrs. Christin's promise to pay plaintiff is not supported by any consideration, and that plaintiff failed to perform the obligation of his contract.

[1] The facts in brief are these: Mrs. Christin, née Estelle C. Porter, is the sister of Benjamin F. Porter, of whose estate plaintiff was the guardian when Mrs. Christin executed the contract in question. Plaintiff's appointment was made some time prior to February 16, 1912, and he continued to be such guardian until the ward attained his majority on September 24, 1916. Mrs. Christin and her brother each own a parcel of land in the Rancho ex-Mission de San Fernando in Los Angeles county. The two parcels adjoin each other, and each is contiguous to the right of way of the Southern Pacific Railroad Company. On February 16, 1912, the court in which the guardianship proceed-

ing was pending made an order authorizing and directing plaintiff, as guardian of the estate of Benjamin F. Porter, to commence and prosecute such action as might be necessary to determine the right of the Southern Pacific Railroad Company and its successors to appropriate or use waters from the cienegas or springs on the Rancho ex-Mission de San Fernando. The order directed the guardian to procure a judgment establishing the amount of water which the railroad company and its successors were entitled to take, and to secure a final adjudication of the respective rights of the minor and of the Southern Pacific Railroad Company or its successors in and to the waters. Mrs. Christin, as the owner of the piece of land contiguous to the parcel owned by her brother, was interested in securing the entry of such judgment.

On June 5, 1912, Mrs. Christin, then Estelle C. Porter, executed the instrument whereby she promised to pay respondent. That document, so far as pertinent, reads:

"Whereas, Louis P. Boardman, as the guardian of the estate of Benjamin F. Porter, a minor, has been authorized and directed by an order of the Superior Court of the County of Los Angeles * * * to commence and prosecute to final judgment an action in a court of proper jurisdiction to finally determine the right of the Southern Pacific Railroad Company, its successors or assigns, to use or appropriate any of the waters from the cienegas or springs on the Rancho ex-Mission de San Fernando; * * * and whereas, as an owner of lands contiguous to the lands of said minor, constituting his said estate, and adjacent to the right of way of said Southern Pacific Railroad Company. I am interested with said minor in procuring a judgment determining the rights aforesaid, I do hereby agree to pay the said Louis P. Boardman, as attorney at law in the prosecution of said action on behalf of said minor, on account of attorney's fees and expenses of said action, a sum of money equivalent to the amount which shall be allowed to said Louis P. Boardman by the said superior court of the county of Los Angeles, for his services and expenses rendered and incurred on behalf of said minor in said action, which amount to be so paid by me shall be in full payment of all services rendered and expenses to be incurred by the said Louis P. Boardman on my behalf in and about the prosecution of said action."

Thereafter plaintiff, as guardian of the estate of the minor and pursuant to the order of court directing him so to do, caused an action to be commenced in the superior court for Los Angeles county, in the name of his ward, against the Southern Pacific Railroad Company and its successor, the Southern Pacific Company, to secure a judgment determining the respective rights of the minor and of the railroad companies in and to the waters of the above-mentioned springs and cienegas. The only parties to that action were the minor, suing by his guardian, and the two railroad companies. The guardian

did not employ an attorney to represent him in the action. He himself is an attorney at law, and he elected to act as his own counsel in the case. He made preparations for the trial, but before the issues of fact were determined his ward attained his majority. Thereafter, and before the trial of the action, other counsel were substituted as attorneys for Benjamin F. Porter. Plaintiff thereupon filed his accounts as guardian and rendered to the court a statement of the nature and amount of the services performed by him in the action which he had brought on behalf of the ward. With his accounts he filed a report wherein he exhibited to the court the contract between him and Miss Porter. The court allowed plaintiff the sum of \$1,000 for the services which, as guardian, he had performed in the action which he had caused to be brought by his ward. Thereupon plaintiff, deeming himself entitled to recover an equivalent sum from Mrs. Christin under the terms of her written promise, brought this action to recover from her the sum of \$1,000.

We think there was sufficient consideration for Mrs. Christin's promise to pay respondent for his professional services. Because respondent, as guardian, was bound to commence and prosecute the action against the railroad companies when, as an attorney at law, he entered into the contract with Mrs. Christin, it is earnestly urged by appellants that the case is within the doctrine that a promise to do what the promisor is already bound to do is not a consideration. It is conceded by respondent, as indeed it must be, that a promise by a party to do what he already is bound to do is of no value as a consideration to support a promise by the other party to the contract; for, if the latter gets nothing in return for his promise but that to which he already is entitled, the consideration, in so far as he is concerned, is unreal. But that principle is not applicable to the facts of this case. Here, it is true, respondent, by reason of the court's order directing him to bring the action against the railroad companies, was, as guardian, legally bound to cause the action to be brought on behalf of his ward. But he was under no obligation, as an attorney at law, to render any professional services in that action. If we assume that the order commanding him to bring the action was not of itself sufficient authorization for the employment by him of counsel, and if we therefore further assume that, had he employed other counsel and the court in the guardianship proceeding had refused to make an allowance for counsel fees, he might have found himself in the predicament of having to pay the fees out of his own pocket, still no obligation rested upon him to do aught as an attorney at law in the case which he, as guardian, caused to be brought by his ward. Without in anywise violating the order of the court directing him, as

guardian, to bring the action, and without in the least degree falling short of the full performance of his duties thereunder, respondent could have employed other counsel to render all the professional services required to be performed in the action. But Mrs. Christin evidently desired to have the professional services in that action performed by respondent, and not by some one else. Accordingly, though no duty rested upon respondent as guardian to render any services as an attorney at law, we find Mrs. Christin, in her contract with respondent, agreeing to pay him "as attorney at law in the prosecution of such action on behalf of said minor, on account of attorney's fees * * * a sum of money equivalent to the amount which" the court might allow respondent for his services as guardian in the prosecution of the action. It is not beyond the realm of possibility that Mrs. Christin was so impressed with what she conceived to be respondent's superior attainments as a lawyer that she wanted him, and not some other attorney, to perform all the services as counsel in the action. But respondent, simply by reason of the order of court directed to him as guardian, was not bound to render such professional services. His performance of such services was, therefore, something which Mrs. Christin would not have received in any event by reason of the court's order. Indeed, but for his contract with Mrs. Christin, respondent might have been unwilling to act as counsel in the case. For these reasons it is clear that his promise to Mrs. Christin to render services as an attorney at law was a sufficient consideration for the latter's promise to pay him for such services.

[2, 3] Has respondent fulfilled the obligation of his contract? And if he has not, is he entitled to recover the agreed compensation? We think it clear that the contract between respondent and Mrs. Christin contemplated that the former should prosecute his ward's action to final judgment. In section 2253 of *Mechem on Agency* (2d Ed.) vol. 2, the author says:

"An attorney who is retained generally to conduct a legal proceeding is presumed, in the absence of anything to indicate a contrary intent, to enter into an entire contract to conduct the proceeding to its termination."

There is nothing in the language of Mrs. Christin's contract tending to show that the parties contemplated any departure from this general presumption. On the contrary, the language of the contract points unerringly to the conclusion that Mrs. Christin was contracting for professional services which would eventuate in a judgment finally determining the rights of the respective parties litigant in and to the waters which were in controversy. The language of her contract is, "I am interested with said minor in procuring a judgment determining the rights

aforsaid." It is difficult to conceive how she could have been benefited in any degree from the mere prosecution of an action in the name of her minor brother—an action to which she was not a party—unless it terminated in a judgment fixing the rights of the railroad companies and determining what amount of water, if any, they might take from the springs or cienegas. The general rule is that in construing contracts between attorneys and clients concerning compensation if there is any ambiguity as to the intent of the parties that construction should be adopted which is most favorable to the client. *Pinto v. Seely*, 22 Cal. App. 326, 135 Pac. 43.

[4, 5] Though we are of the opinion that respondent's contract with Mrs. Christin was an entire contract, and that it required full performance on respondent's part as a condition precedent to his right to recover the stipulated compensation in an action on the contract, we do not think he is entirely remediless. True, there is nothing in the record before us necessitating the conclusion that Mrs. Christin prevented performance before respondent had entirely fulfilled the obligations of his contract. But it is equally true that there is nothing to indicate that respondent's failure fully to perform his contract was due to any fault on his part. Both parties evidently supposed that in the ordinary course of events the litigation, inaugurated a little more than four years before the minor would reach his majority, would terminate in a final judgment during the guardianship. But the unexpected seems to have happened, with the result that respondent's guardianship came to an end before he could fully perform his contract with Mrs. Christin; and, of course, when the guardianship terminated, the ward, who was then of age, was at liberty to choose his own counsel and to do that which he actually did do, viz. cause other attorneys to be substituted in the place and stead of this respondent. Under these circumstances, while he cannot recover the stipulated compensation in an action on his contract with Mrs. Christin, respondent is entitled to recover in quantum meruit the reasonable value of such services as he actually did perform under his contract. The rule is that when complete performance by an attorney of his contract of employment becomes impossible without fault on the part of either party, the attorney may recover in quantum meruit the value of the services actually rendered by him. *Moore v. Robinson*, 92 Ill. 491; *Baird v. Ratcliff*, 10 Tex. 81; *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281; *Thornton on Attorneys*, § 452; 6 C. J. p. 726, par. 297.

[6] The complaint in this action is based, not on an implied assumpsit for the reasonable value of the services performed, but upon the express contract; and respondent seeks to recover the stipulated amount pro-

vided for in the contract. To entitle him to a recovery it will be necessary for him to amend his complaint so as to allege an action for quantum meruit on Mrs. Christin's implied assumpsit.

The judgment is reversed, and the cause is remanded, with directions to the lower court to allow respondent to amend his complaint if so advised.

We concur: WORKS, J.; CRAIG, J.

67 Cal. App. 92

PARK et al. v. HILLMAN. (Civ. 4686.)

(District Court of Appeal, First District, Division 2, California. April 30, 1924.)

1. Appeal and error $\S$ 1011(1)—**Trial court's finding on conflicting evidence on hearing of motion to vacate default not disturbed.**

Where, on the hearing of defendant's motion, supported by affidavit, to vacate a default judgment based on failure to serve him with notice of trial as required by Code Civ. Proc. $\S$ 594, and on his actual lack of knowledge of time of trial, there was a conflict between the statements of fact in defendant's affidavit and the inferences to be drawn from the statements in the counter affidavit and the other evidence relied upon by plaintiffs, the trial court's finding in defendant's favor held not subject to review on appeal.

2. Appeal and error $\S$ 957(1)—**Order vacating default judgment not disturbed, unless abuse of discretion appears.**

Trial court's order vacating default judgment will not be disturbed, unless it is clear that discretion has been abused.

3. Judgment $\S$ 158—**Affidavit of merits not indispensable to granting motion to set aside default judgment.**

Trial court's order setting aside default judgment pursuant to defendant's motion based on a failure to serve him with notice of time of trial, as required by Code Civ. Proc. $\S$ 594, and on his lack of actual knowledge of time of trial, was not erroneous for a failure of an affidavit of merits to accompany the motions to vacate, in view of statute which does not make such an affidavit a condition precedent to the granting of relief, and in view of allegations contained in defendant's verified answer which the trial court was justified in taking into consideration in reaching his conclusion as to the showing of a meritorious defense.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by Bertram A. Park and others and Rita Park, as administratrix of the estate of Edwin R. Park, deceased, against C. D. Hillman. From an order setting aside a default judgment against defendant, plaintiffs appeal. Affirmed.

Wm. T. Eckhoff, of San Francisco, for appellants.

R. W. Cantrell, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiffs from an order of the superior court of the state of California, in and for the city and county of San Francisco, setting aside a judgment rendered in their favor against the defendant after the entry of his default. The order complained of was made upon two motions of the defendant, one upon the ground that said judgment was irregularly given and made through inadvertence upon the part of the trial court in that no proof was made of the notice to defendant of the time of trial, prior to the date of the actual trial of the said cause, as provided for in section 594, Code of Civil Procedure, and as required by rule 18 of the rules of practice of said court. The other motion of the defendant was upon the ground that the judgment was taken against him through his mistake, inadvertence, surprise, and excusable neglect. The first motion is based upon the notice of motion and the judgment roll, and the second motion upon the notice of motion, all the papers, pleadings, and records on file in the action, and the affidavit of the defendant.

The affidavit of defendant is to the effect that prior to November 13, 1922, he had no notice of the entry of judgment against him on September 6, 1922; that at all times since the commencement of the action he had been a resident of the state of California; that at all times since the date of the filing of the complaint (October 17, 1919), with the exception of short periods of time, he had been actually within the state of California and that during all of said time communications addressed to him at his place of residence and other addresses mentioned in the affidavit would have been delivered to him in due course, and that at no time since the withdrawal of Frank Orwitz as his attorney at law in said matter (November 23, 1921) had he been personally served with notice of the time of trial of the action nor had he received through the mails any notice or communication advising him of the time of trial of said action; that at no time previous to the 30th day of August, 1922, nor on the 30th day of August, 1922, did he have any notice, information, or knowledge of any kind, character, or description that the trial of the above-entitled cause had been set for or would be tried on the 30th day of August, 1922.

The order setting aside the judgment was made upon the ground that said judgment was rendered through the mistake, inadvertence, surprise, and excusable neglect of the defendant in that the defendant was not served with notice of the time of the trial of said cause, as required by section 594, Code of Civil Procedure of the state of California, and, further, that said defendant did not have actual or any knowledge of the time of the trial of said cause as appears from his affidavit on file herein.

[1, 2] There was a conflict between the statements of fact in the defendant's affidavit and the inferences to be drawn from the statements in the counter affidavit and the other

evidence relied upon by the plaintiffs, but this conflict has been resolved in favor of the defendant by the trial court, and is not a matter subject to our review. Not only does a broad discretion in such matters rest with the trial court, but the law favors the determination of an action after a trial upon the merits and not upon technicality or default. When, therefore, the trial court has exercised its discretion in a manner to effectuate this policy of our law, as in the present case, it must clearly and conclusively appear that there has been an abuse of discretion to warrant interference with such action by an appellate court. We think the record in the instant case does not present such a situation.

[3] It is contended by the appellants that the order is erroneous because no affidavit of merits accompanied the motions and that such an affidavit is a prerequisite to the relief sought. Several cases are cited which seem to support this view. An examination of the statute discloses that an affidavit of merits is not made a condition precedent to the granting of the relief, and in the case of *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932, it was held that an affidavit of merits is not a jurisdictional element for granting relief from a judgment and may be dispensed with when the court is otherwise satisfied that the application is meritorious and made in good faith. It was also held in that case that when a verified answer of defendant, contradicting all averments of the complaint, is on file, it may be considered by the court for the purpose of determining whether or not there exists a meritorious defense to the action. The case of *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 143, 56 Pac. 797, contains language to the same effect.

In the present action there was on file a verified answer of the defendant in which he denied the allegations of the complaint and set up certain facts as a defense to the action. The complaint alleged that the defendant had received, without right, certain rents and profits of land owned by them and had not accounted therefor. Defendant alleged that during the times mentioned in the complaint he was in possession of the land described in the complaint by virtue of a lease from Edwin R. Park, deceased, whose interest was represented in the present action by his administratrix, and that said Edwin R. Park, deceased, in making said lease to defendant acted for the other plaintiffs, co-owners with him of the land, under authority from them, and that said Edwin R. Park, deceased, had accepted from defendant, on behalf of himself and the other plaintiffs, rent for said land. These allegations were contained in a verified answer of the defendant, and the trial court was justified in taking them into consideration in reaching its conclusion that a showing of a meritorious defense had been made by the defendant.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

65 Cal. App. 341

PEOPLE v. ONESSIMO. (Cr. 1142.)

(District Court of Appeal, First District, Division 1, California. Jan. 19, 1924.)

1. Rape ☞57(5)—Intent to commit rape question of fact for jury.

The intent with which an alleged assault to commit rape was committed is a question of fact for the jury, whose verdict will not be disturbed, unless the facts proven afford no reasonable ground for the inference drawn.

2. Rape ☞53(2)—Conviction of assault to commit rape held supported by evidence.

Evidence held sufficient to sustain a conviction of assault with intent to commit rape.

3. Criminal law ☞717—Counsel should not be allowed to read law to jury.

Generally the practice of allowing counsel to read law to the jury should not be tolerated, its usual effect being to confuse rather than enlighten the jury.

4. Criminal law ☞798½—Instruction referring to only two of three possible verdicts held not misleading.

In a prosecution for assault with intent to commit rape, where the court instructed the jury that he had prepared three forms of verdict and that they should adopt the one conforming to their views and fully and fairly instructed them as to the law and defendant's rights, an instruction mentioning only the first two for the purpose of distinguishing between assault with intent to commit rape and simple assault, held not misleading in making no reference to the third, which was that of not guilty.

5. Criminal law ☞829(1)—Refusal of instructions covered by instructions given not error.

Refusal of instructions fully or in the main covered by instructions given is not error.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Joe Onessimo was convicted of assault with intent to commit rape, and appeals. Affirmed.

John Thompson, of Monterey, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendant, an Indian boy 19 years of age, was convicted of an assault with intent to commit rape on a white woman of 36 years. He appeals from the judgment and from an order denying his motion for a new trial. The prosecuting witness is a married woman with two children, living on a ranch in Monterey county. From the ranch across Carmel river to a trail leading to the county road, on which was the ranch mail box, is a suspension footbridge. Near the county road, but some little distance from the trail, is the home of the defendant. The trail is fringed with trees and underbrush, but at a certain point can be seen from the county road. On the morning in question the prosecutrix had been across the

bridge, over the trail and to the mail box for her mail. On returning she saw the defendant standing near the entrance to the trail, which sloped steeply up to the bridge. She waited for the defendant to cross and come down the trail. She was afraid to meet him on the footbridge. As the defendant approached she said something about its being a nice day, and she noticed that defendant's trousers, with the exception of the top button, were open. The trail was narrow, and she waited for defendant to pass. "He was in my way," testified the prosecutrix. "The trail was quite narrow, and as I stated this blackberry bush was on one side, and there was a barb-wire fence there. I don't believe the trail was a foot wide, and I thought he would walk on and let me go home, so he didn't make any move, and I said, 'Joe, are you working on this side of the river?' and he said, 'Yes;' and I said, 'Where are you working, at Walter's Ranch?' and he said, 'No; the other place;' and it was getting along towards dinner time, so I started up the trail to pass him."

Defendant suddenly exposed himself, calling her attention, and then began "grabbing at" her ankles, having hold of her once, and touching her several times. She says she fought him, dancing with her feet to keep him from laying hold of her. She also seized his hat. She did not drop the mail she was holding. She screamed the name of a hired man she knew to be on the ranch, and he came running. He says he saw the defendant running away as he came. The prosecuting witness says the defendant did not resist and run away until he heard the hired man reply; that he then said, "No, no," started running away, came back, snatched his hat, and ran off into the brush. He did not go home that night, but went home for breakfast next morning, according to his mother and sister. He was captured while going through the brush by one of the men out searching for him.

Defendant contends that the evidence was insufficient to warrant the inference that he was actuated in what he did by the alleged felonious intent. He argues that the evidence shows that he voluntarily abandoned his purpose before any independent agent intervened, and that he did not intend to accomplish his purpose by force. Defendant, when arrested, said a white boy in Carmel had outlined to him the procedure he followed.

[1, 2] Counsel for defendant admits that, while the testimony of the prosecutrix was uncorroborated, the jury evidently believed her story, and therefore it will have to be taken as true upon appeal. He urges, however, that the "evidence does not show the intent in the mind of the defendant which the law requires." In such cases as this the intent with which an assault is committed is a fact which can only be inferred from the outward act and the surrounding circum-

stances. It is, in other words, a question of fact for the jury and not a question of law for the court, except in a case where the facts proven afford no reasonable ground for the inference drawn. *People v. Moore*, 155 Cal. 237, 240, 100 Pac. 688. Upon a consideration of all of the evidence we are unable to say that the facts proven afforded the jury no reasonable ground for the inference that defendant was actuated in what he did by a felonious intent.

[3] Defendant's next assignment is that the trial court erred in refusing to permit counsel to read law to the jury. Counsel concedes that "the law should come from the court," also that "the trial court in the instructions gave the principle of law" he wished to read to the jury, but he thinks he should have been permitted to proceed with his argument without interruption. As a general rule, the practice of allowing counsel, in either civil or criminal actions, to read law to the jury, is objectionable, and ought not to be tolerated. Its usual effect is to confuse rather than enlighten the jury. *People v. Anderson*, 44 Cal. 65, 70. It has even been held that it is within the discretion of the court to refuse to allow counsel in his argument to read to the jury certain sections of the Civil Code. *Meyer v. Foster*, 147 Cal. 166, 171, 81 Pac. 402.

[4] There is no merit in the contention that the trial court erred in giving instruction No. 20. The instruction given by the court was, in part:

"I have prepared three forms of verdict, and you will adopt the one that conforms to your views. If, from the evidence, you believe the defendant guilty of the crime of assault with intent to commit rape, beyond all reasonable doubt, you should find him guilty as charged in the information, namely of assault with intent to commit rape. If you believe the defendant guilty beyond all reasonable doubt of assault often spoken of and called simple assault, but do not find him guilty of assault with intent to commit rape, then you should find him guilty of assault."

The jury was not misled by this instruction. Obviously when the trial judge gave the instruction he had before him three forms of verdict, viz.: One finding the defendant guilty of the crime of assault with intent to commit rape; the second, guilty of assault; and, the third, not guilty. The court mentioned the first two for the purpose of distinguishing between "assault with intent to commit rape" and "simple assault." The court had fully and fairly instructed the jury as to the law and the rights of the defendant, and upon reading the charge we think that it was, upon the whole, fair and favorable to the defendant.

[5] We see no error in the refusal of the court to give instructions Nos. 29, 21, 34, and 86, requested by defendant. The principle of law which defendant sought to place before the jury in No. 29 is fully covered in instruc-

tions Nos. 11, 12, 13, 14, 15, and 16, which were given. We have read and considered the additional instructions requested by defendant and refused, upon which assignment of error is made. We find that they were in the main covered by the many instructions given, and, where they were not, their refusal was proper.

Judgment and order affirmed.

We concur: TYLER, P. J.; SHORT, Justice pro tem.

65 Cal. App. 327

PRITCHARD v. MERCANTILE TRUST CO.
et al. (Civ. 4532.)

(District Court of Appeal, First District, Division 2, California. Jan. 18, 1924. Hearing Denied by Supreme Court March 17, 1924.)

1. Partnership ⇨258(7)—Surviving partner's complaint to recover deposits as partnership funds held insufficient.

Surviving partner's complaint against deceased partner's administratrix and a bank in which the deceased partner had money on deposit at the time of his death, to recover such amount as funds of the copartnership, under Code Civ. Proc. § 1585, held insufficient to plead that deposits were partnership funds.

2. Pleading ⇨8(11)—Allegation by surviving partner that deposit was partnership funds held mere statement of conclusion.

In surviving partner's action against deceased partner's administratrix and bank for deposits which had been made in such bank by deceased partner, allegation that the deposit was "the moneys and funds of the said partnership" held insufficient, without statement of the facts, to plead that the deposits were partnership funds, the quoted allegation being merely the statement of a conclusion of the pleader.

3. Partnership ⇨258(2)—Surviving partner could not recover deposits as against deceased partner's administratrix without compliance with statute.

Surviving partner could not recover, as against deceased partner's administratrix, money which had been deposited in bank by deceased partner on theory that deposits constituted partnership funds, without compliance with Code Civ. Proc. § 1585, providing for a settlement of the partnership business by the surviving partner without delay, for appraisal of deceased partner's interest and rendition of account to deceased partner's executor or administrator.

4. Partnership ⇨258(2)—Surviving partner has no cause of action against deceased partner's estate where firm assets ample to wind up partnership.

Where, at the death of a partner, there is an abundance of partnership assets to enable the surviving partner to wind up the partnership without making any claim on the estate of the decedent, the surviving partner has no cause of action against the estate on account of

a deposit by the decedent in bank of moneys alleged to be partnership funds.

5. Appeal and error ⇨1040(9)—Appellant cannot complain of rulings on demurrers to superseded pleadings.

An appellant cannot complain of the rulings made by the trial court sustaining demurrers to former pleadings superseded by the pleadings on which the case was tried.

6. Partnership ⇨258(6)—Administratrix of deceased partner held necessary party in surviving partner's action against bank for deposits.

In surviving partner's action against the bank to recover deposits made in bank by deceased partner, on theory that they constituted funds of the partnership, the deceased partner's administratrix, who claimed an interest in the deposits, was a necessary party.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Sadie E. Pritchard against the Mercantile Trust Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellant.

George Clark Sargent, of San Francisco, for respondents.

STURTEVANT, J. The trial court sustained demurrers of the defendants to the plaintiff's fourth amended complaint and refused the plaintiff permission to further amend, and thereafter a judgment was entered in favor of the defendants. The plaintiff has appealed from the judgment.

[1-4] In her complaint the plaintiff alleged that she and Fred G. King did, in the year 1892, enter into a partnership agreement. The business to be conducted by the partnership was that of dealing in mines and mining properties. The plaintiff agreed to furnish moneys to the partnership from time to time, and the said Fred G. King agreed to devote his services as a mining engineer and as the business manager of the partnership business. It was further agreed that the profits of the business should be divided between the plaintiff and the said Fred G. King, share and share alike. The plaintiff further alleges that she thereafter contributed \$30,000 to the partnership business, and that she has been repaid \$14,000 and no more. She alleges that the partnership made gross profits to the extent of \$750,000, and that at the date of the death of Fred G. King the decedent left \$300,000 in "tangible property of said partnership." The plaintiff alleges that, when she entered into the partnership agreement, said Fred G. King had no moneys or properties of his own, but the pleading contains no allegation that after the year 1892 the said Fred G. King did not acquire moneys or properties in his capacity as an individual. She alleges that at the date of the death of King

she did not have possession of any of the partnership property and none of it has since come into her possession, but there is no allegation whether at that time she had possession, or has since obtained possession, of any of the partnership books, records, or papers. Except as hereinafter stated, there is no allegation that any one of the defendants holds any of the partnership property. The only allegation in that behalf is that on the date of the death of Fred G. King he had on deposit in the Crocker National Bank \$18,183, and that the deposit was "the moneys and funds of the said partnership." It is then alleged that, after the death of King, said Hazel H. King obtained letters of administration and had the deposit transferred from the Crocker National Bank to the defendant Mercantile Trust Company, and it is further averred that, after demand made, said Hazel H. King and the Mercantile Trust Company have refused to pay over the amount of the deposit to the plaintiff. There is no allegation that the plaintiff has served or filed any claim against the estate of the decedent. The pleading contains no allegation to the effect that the plaintiff cannot get possession of all of the remaining portion of the \$300,000 of tangible assets, nor is there any allegation that the partnership is in debt to any extent whatsoever. No facts are alleged showing from what source the decedent received the \$18,183, or that said sum was the proceeds of any kind of a mining venture, partnership or otherwise. Nor is there any allegation that the money was deposited by the decedent in the Crocker National Bank in the name of the partnership or in the names of the decedent and the plaintiff. The sole allegation in that respect is that the deposit was "the moneys and funds of the said partnership." That expression is but the conclusion of the pleader. 31 Cyc. 61, 62; Callanan v. Keeseville, A. C. L. C. R. Co., 48 Misc. Rep. 476, 95 N. Y. Supp. 513, 515; Schoonover v. Birnbaum, 148 Cal. 548, 83 Pac. 999. Nevertheless, if it be assumed that Fred G. King collected partnership moneys and deposited them in his bank account, he was acting within his rights as a partner. The effect of the act may have resulted in causing him to become indebted to the partnership; but that fact, standing alone, would not warrant the plaintiff maintaining an action to recover those moneys. She must also show that she had complied with the provisions of section 1585 of the Code of Civil Procedure. It is but reasonable to assume that, in view of all the facts alleged by the plaintiff, there will be an abundance of funds in the \$300,000 estate to enable the plaintiff to wind up the partnership without making any claim whatsoever on the estate of the decedent. Under such circumstances the surviving partner

has no cause of action against the estate of her deceased partner. Painter v. Estate of Painter, 68 Cal. 395, 9 Pac. 450; McKay v. Joy, 2 Cal. Unrep. 639, 9 Pac. 940; Mares v. Mares, 60 Mont. 36, 199 Pac. 267, 271, 272.

[5] As we understand the appellant, she complains also of the rulings made by the trial court sustaining other demurrers to former pleadings filed by the appellant; but those pleadings were superseded by the pleadings which are before us, and which are set forth in the record.

[6] The appellant calls attention to the fact that the defendant, as administratrix, was made a party and brought in pursuant to an order made by the trial court. She does not claim that there was a defect in form in the moving papers, but she complains that the order was improperly made and that no duty rested on the appellant to make the administratrix a party. In view of what we have said above, we think it is clear that Hazel Hubbard King, as administratrix, was a necessary party and that she claimed, as administratrix, to have interest in the moneys which the decedent had deposited in the Crocker National Bank.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 323

HENRY v. JONES.

SMITH v. SAME.

(Civ. 3846, 3847.)

(District Court of Appeal, Second District, Division 2, California. Jan. 17, 1924. Hearing Denied by Supreme Court March 17, 1924.)

1. Bills and notes $\S$ 83—Resort to another instrument held necessary in determining terms of acceptance of order.

Where a bill of exchange or order is accepted according to the provisions of a particular contract, resort must be had to that contract to ascertain the terms of the acceptance.

2. Bills and notes $\S$ 83—Conditional acceptance becomes absolute on happening of condition.

A conditional acceptance becomes absolute on performance, or the happening of the condition, but such acceptance is not enforceable until complete fulfillment of the condition.

3. Bills and notes $\S$ 83—Order construed as to when liability of drawee became fixed.

Where drawee accepted an order, the payment of which was conditioned as of the time when the final payment was made on a ranch that he had purchased from drawer, it was unnecessary that drawee should have actually made the final payment provided for in the agreement before his liability under the order

became enforceable, the condition being satisfied if drawee became liable to make that payment.

4. Bills and notes 83—Condition on happening of which payment of order depended held not to have been fulfilled.

An order, in which the payment was conditioned as of the time when final payment on a contract for the sale of a ranch was made never became due where, under the contract, vendor was required to place in escrow a deed conveying the property free and clear of incumbrance and then to furnish for an examination of purchaser an abstract or certificate of title showing that the deed conveyed the property free from incumbrance, at which time purchaser was to pay his money and to receive the deed, and where vendor complied with contract only to the extent of depositing the deed in escrow.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Actions by Byrd Henry and George C. Smith against A. R. Jones. Judgment for plaintiffs, and defendant appeals. Reversed.

A. B. Bigler, of Santa Maria, for appellant.
Armstrong & Shaeffer, C. U. Armstrong, and Fred A. Shaeffer, all of Santa Maria, for respondents.

WORKS, J. These two actions were tried separately, and they are briefed separately on the appeal. They are, however, companion cases. The evidence on the two trials was similar, and the points which will dispose of the appeal are exactly the same. Such statement of facts as we find it necessary to make will apply in substance to both cases, although we shall frame our language, for clarity and convenience, as if only the first of the two, No. 3846, were involved.

One J. F. McCloskey entered into a written agreement with defendant, dated June 5, 1918, whereby McCloskey agreed to sell and defendant agreed to buy a parcel of real property. The following portions of this agreement are material to the present controversy:

The purchase price * * * is \$51,300.00, * * * which" Jones "agrees to pay * * * as follows: Five thousand dollars on the date hereof, receipt whereof * * * is hereby acknowledged: Twenty-three thousand eight hundred dollars," as early, under certain conditions, as November 1, 1918, but not later than January 1, 1919; "and the balance of said purchase price, to wit: The sum of twenty-two thousand five hundred dollars by note and mortgage as hereinafter stipulated. Upon the payment of said second installment of" \$23,800, "and the execution and delivery of said note and mortgage, * * *" McCloskey "agrees to execute and deliver to" Jones "a deed conveying to him the said real property free and clear of lien or incumbrance and to furnish to him an abstract or certificate of title thereto; provided that said deed shall be executed immediately and placed in escrow in

a bank at Santa Maria with instructions to deliver same upon the performance of such conditions and the abstract or certificate of title shall be furnished for examination at the earliest convenient date; and" Jones, "simultaneously with the delivery of said deed and as a condition thereto, shall execute and deliver to" McCloskey "his promissory note for the principal sum of" \$22,500, " * * * which said promissory note shall be secured by a mortgage constituting a good and sufficient first lien upon the premises."

On June 12, 1918, McCloskey executed to one Viah his certain order, directed to Jones, as follows:

"Pay to the order of V. S. Viah seven hundred eighty-seven 50/100 dollars, value received, and charge the same to account of above [?], to be paid when final payment of \$22,500.00 is made on my ranch."

Viah presented this paper to Jones, and it was by the latter accepted. It is conceded that the payment referred to in the order was the payment of \$22,500 mentioned in the agreement from which quotation is above made. Plaintiff became the owner and holder of the order, which defendant has never paid, nor has he ever made any payment on the real property described in the agreement for purchase and sale between him and McCloskey, except the initial payment of \$5,000, nor has he ever delivered the note and mortgage mentioned in the agreement. This action was commenced for the purpose of recovering on the order. Judgment went for plaintiff, and defendant appeals.

[1-3] It is, of course, the law that, where a bill of exchange or order is "accepted according to the provisions of a particular contract, resort must be had to that contract to ascertain the terms of the acceptance" (8 C. J. 326), and that "a conditional acceptance becomes absolute on the performance or the happening of the condition, but such acceptance is not enforceable until complete fulfillment of the condition" (Id. 326, 327; see, also, Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. 625); although it is probable that this last expression does not mean, to translate it into the terms of the present case, that appellant should have actually made the final payment provided for in the agreement for purchase and sale before his liability under the order became enforceable. The condition in the order was doubtless satisfied if appellant became liable to make that payment. The cause was tried upon such a theory, and appellant now concedes the correctness of the theory. We shall proceed upon the assumption that it is correct, without the citation of authority to support it.

[4] In pursuit of the theory just mentioned, the complaint contains the necessary allegation that McCloskey "has fully complied with each and all the terms and conditions of said agreement of sale. * * *" The trial

court found that this averment was true, and appellant contends that the finding is not supported by the evidence. As a step toward the settlement of this question, and because of the somewhat involved manner in which the agreement is couched, we epitomize certain of its provisions, in the order of their performance as contemplated by the instrument, thus: (1) McCloskey was to place in escrow a deed conveying the real property to Jones free and clear of lien or incumbrance; (2) he was to furnish to Jones, for examination, an abstract or certificate of title showing that the deed conveyed the property free and clear of incumbrance; (3) Jones was to pay \$23,800 and deliver the notes and mortgage, and, simultaneously, the escrow holder was to deliver to him the deed. If there be any doubt upon a cursory reading of the agreement whether these successive steps in its performance are properly set forth, that doubt is removed, inevitably, by a closer scrutiny of the instrument. It is plain that the first step was to have been the delivery of the deed in escrow. It is certain that the deed so delivered was to convey the property free and clear of incumbrance. A little reflection will demonstrate that the furnishing of the abstract or certificate of title was to have been the next step in order. The agreement was dated June 5, 1918, and in no event was the \$23,800 to be paid, or the note and mortgage to be delivered, or the deed to pass from the escrow holder, earlier than November 1 of that year, a period of nearly five months elapsing between the two dates. That the furnishing of the abstract or certificate was to have been the second step in the performance of the agreement is predicable of at least two reasons: (1) While this document was not to have been furnished at any specified time, it was to have been forthcoming as soon as convenient. The use of this phrase is practically conclusive of the idea that the parties contemplated the furnishing of the abstract or certificate within less than five months. (2) The deal was not to have been completed, naturally, until McCloskey showed that he could convey a clear title, and the furnishing of an abstract or certificate was designated in the agreement as the usual means whereby the state of a title is ascertained. The parties plainly contemplated that Jones should not part with his money, or deliver the note and mortgage, or accept a deed, until the matter of the title was settled.

The evidence was insufficient to support the questioned finding. McCloskey never did more than deposit the deed in escrow. Therefore Jones was never put in default. The payment of \$23,800 was never due from him, and he never became liable to deliver the note and mortgage. Therefore, also, his liability under the order sued on never became fixed.

It is unnecessary to discuss other points made by appellant.

Judgment in each case reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(65 Cal. App. 441)

SHAW v. PALMER. (Civ. 2643.)

(District Court of Appeal, Third District, California, Jan. 25, 1924. As Corrected, Feb. 7, 1924.)

1. Wills $\S$ 742—Executor's compliance with agreement by which devisee surrendered his interest in a testator's estate held immaterial in determining devisee's claim to his separate property.

Where it was mutually agreed between the executor of decedent's will and a devisee that, if devisee would surrender whatever interest and claim he had in the estate of deceased, the executor would furnish him a suitable home for his natural life, and also pay the children of devisee by his former wife the legacies provided for them in the will of deceased, that the executor carried out the agreement was immaterial in determining devisee's claim to his separate property, consisting of five shares of stock which had been included in the property of the estate and distributed as an asset thereof, where the terms of the agreement which executor carried out were in harmony with the terms of the will.

2. Wills $\S$ 742—Agreement by devisee to relinquish his claim in decedent's estate held not applicable to certain property.

An agreement by the devisee under a will to relinquish whatever interest or claim he might have in the estate of decedent could not have any application to any property which was not specifically mentioned in the will or included in the inventory at the time that the agreement was made; it appearing that the agreement was made before the filing of the original inventory, and that there was no residuary clause in the will of deceased.

3. Judgment $\S$ 470—Judgment of court having jurisdiction of subject-matter conclusive, and not subject to collateral attack.

A judgment of a court having jurisdiction of the subject-matter of the litigation of which such judgment is a culmination is conclusive, and cannot be challenged or attacked in a collateral proceeding.

4. Executors and administrators $\S$ 315(6)—Effect of decree of distribution in case of testacy stated.

Under Code Civ. Proc. $\S$ 1666, providing that decrees of distribution are conclusive as to the rights of heirs, legatees, or devisees, in case of testacy, such decrees, in absence of a showing of mistake or fraud, are irrevocable, save upon appeal within the time provided by law, even though in contravention of the terms of the will.

5. Executors and administrators ☞315(6)—Devisee held not prevented by decree of distribution from claiming that certain property was his, and not decedent's.

Where plaintiff was a devisee under the will of his deceased wife, and property which he claimed as his separate right was not mentioned in the will nor in the inventory originally filed, but was by the executor of the will subsequently included in the assets of the estate, and devisee had no notice of the fact that his property had been so included and distributed, a decree of final distribution was not conclusive as against devisee, and therefore did not operate as an estoppel against his claim of title to such property.

6. Courts ☞200½—Probate court has no authority to determine disputed title to deceased person's property.

The superior court sitting in probate has no jurisdiction or authority to determine disputed titles to the property of the estate of a deceased person.

7. Executors and administrators ☞315(6)—Devisee, claiming property in his own right entitled to have question of title tried in court of competent jurisdiction.

Where plaintiff was a devisee under the will of his deceased wife, and the property which he claimed to be his in his own separate right was not mentioned in the will nor the inventory originally filed, but was by the executor subsequently included in the list of assets of the estate, devisee had the right to have the question of his title thereto litigated and adjudicated by a court having jurisdiction to try and determine questions of title to the property.

8. Executors and administrators ☞315(6)—Devisee bound by decree of distribution only so far as he was devisee.

A devisee under a will is bound by the decree of distribution of the probate court only so far as he is a devisee, and is not bound by such decree in so far as it purports to distribute his separate property.

9. Trover and conversion ☞13—Proper remedy.

If a party converts the personal property of another, it is immaterial by what means the conversion is effected; the owner being entitled to proceed in conversion for damages for the wrongful act, or in replevin to recover the specific property, or damages if it cannot be restored.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Elias Shaw against W. E. Palmer, also known as William Ellsworth Palmer. Judgment for defendant, and plaintiff appeals. Reversed.

V. L. Hatfield and W. H. Hatfield, both of Sacramento (J. T. McMenamin, of Sacramento, of counsel), for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

HART, J. This is an action in conversion, and involves the question of the alleged wrongful conversion by defendant of five shares of stock in the Associated Oil Company, a corporation.

The complaint alleges that the certificate of said shares of stock was on or about the 18th day of December, 1920, the property and in the possession of the plaintiff, but that on the said 18th day of December the defendant "wrongfully took the said certificate from the possession of plaintiff, and converted and disposed of it to his own use, to the damage of plaintiff in the sum of \$500." It is alleged that at said time the said certificate of stock had been indorsed in blank by the plaintiff. The prayer is for judgment for the sum named, with interest, etc.

The answer specifically denies the averments of the complaint, and alleges that the defendant, during all the time mentioned in the complaint, was, "and is now," the owner and entitled to the possession of the said certificate of stock and the shares of the capital stock in the said Associated Oil Company covered thereby; that long prior to the commencement of this action "the said plaintiff transferred and conveyed all the right, title, and interest he ever had in and to said certificate." The following special defense is set up: That, prior to the 18th day of December, 1920, one Mary Jane Shaw was the owner and entitled to the possession of the said certificate of stock; that said Mary Jane Shaw died intestate, in the county of Sonoma, state of California, prior to said 18th day of December, 1920; that her last will and testament was thereafter duly probated, and that on the 31st day of May, 1921, a decree of distribution of her estate was regularly made and entered; that in and by said decree of distribution the said certificate of stock was distributed to the defendant, and that "thereupon he became, and ever since has been, and is now, the owner thereof, and the said decree of distribution is final and conclusive, and the same has never been modified, annulled, or revoked, and no appeal has ever been taken therefrom, and the said Mary Jane Shaw above mentioned, was the wife of said plaintiff."

It appears that the defendant was the son of the deceased by a former husband; that the plaintiff, prior to his intermarriage with the deceased, some 30 or more years prior to her decease, had been married to another and that 9 children were the result of that union; that the real property owned by the deceased had several years prior to her death been given and transferred to her by the plaintiff. It further appears that the stock in controversy was issued to the plaintiff, and that it was indorsed in blank by him immediately upon its issuance and delivery to him.

By her will the deceased devised to the defendant the real property mentioned and described therein, subject, however, to a life estate in said property to the plaintiff, and bequeathed to the sons and daughters of the plaintiff by his former marriage the aggregate sum of \$4,000, to be divided equally among them. Bequests of certain other stock were made to the defendant and one Stephen Meeker. The will made no mention or reference to the stock in dispute. Nor was it included among the assets of the estate as returned or reported in the original inventory. The will did not name a residuary legatee, all of the property of the deceased mentioned in the will being thereby specifically disposed of.

There was testimony that, after the petition for the settlement of the final account and final distribution of the estate had been filed, the certificate of stock in question was for the first time discovered, and the defendant testified that it was found in a tin box belonging to the deceased, in which her will had previously been found, and which was in the possession of a bank at Sebastopol, Sonoma county, where it had always been kept by the deceased in her lifetime. Claiming that the stock was the property of the deceased, notwithstanding that it was in the name of the plaintiff, the defendant, as executor of the will of deceased, took possession thereof, and by supplemental proceedings caused the stock to be included in the inventory (section 1451, Code Civ. Proc.), and the decree of final distribution was accordingly so amended as that said stock was distributed to the defendant as the "residuary legatee," contrary to the terms of the will, there being, as seen, no residuary legatee mentioned in the instrument.

[1] It was shown that on January 22, 1921, shortly after the filing of the petition for the probate of the will of the deceased, the plaintiff and the defendant entered into an agreement, in writing, whereby it was mutually agreed that the plaintiff would relinquish and surrender whatever interest he had or might claim in and to the estate of the deceased, upon the consideration that the defendant would provide and furnish the plaintiff a suitable home "and necessary provision" for his natural life, on the premises known as the "Shaw Home Place," and also pay to the children of the plaintiff by his former wife the legacies provided for them in the will of the deceased.

[2] The court found that this agreement was carried out by the defendant. This, however, would, in any event, be of little consequence in the decision of this case, since the terms of the agreement are in harmony with the terms of the will. Indeed, the agreement could not have any application to any property which was not specifically mentioned in the will or included in the inventory at the time that the agreement was made, it appearing that the agreement was

made on the 22d day of January, 1921, and that the original inventory, while made on January 21, 1921, was not filed until January 27, 1921, and it also appearing, as has been shown, that there was no residuary clause in the will of the deceased.

The court also found that the petition for a decree of final distribution of the estate was duly and regularly filed and due legal notice of the time and place fixed for the hearing thereof given, and on the day and at the time so fixed the said matter came on for hearing, and that no person appeared to interpose any objection to or protest against the final account and decree, or filed any written objections thereto; that the final account was thereupon settled and the decree entered. The court found as a fact and concluded as a matter of law that the said decree was and has been from the time of its entry final and conclusive as to plaintiff and all other persons, "and by reason thereof the said plaintiff is estopped from asserting any title to the said certificate of stock and from maintaining this action."

Judgment passed accordingly, and a motion for a new trial was denied. The appeal is by the plaintiff from the judgment. The issues of fact to which evidence was addressed in the court below were as to the ownership of the stock, and, as incidental to that question, or as bearing more or less upon the question of ownership, whether the certificate of stock in dispute was, after the death of the deceased, found in the tin box belonging to her, and which was held for her by the bank. The court made no finding upon that issue, basing its decision, as will be observed, upon the theory that the decree of final distribution was conclusive as against the plaintiff, and consequently operated as an estoppel against his claim of title to the stock in controversy. It will therefore not be necessary to present a detailed statement of the testimony. It will suffice to say, generally, that the plaintiff testified that he bought the shares of stock with his own separate money; that he had never sold or transferred the same to any other person, and that said property still belonged to him. The defendant, on the other hand, testified that the stock was purchased by his mother, the deceased, and at her request, and for the reason, as she declared when the stock was purchased by her, that she did not desire to be annoyed with the consequences of a stockholder's liability, she authorized the certificate to be issued in the name of her husband, the plaintiff herein, and that it was for that reason that the plaintiff indorsed the stock in blank, etc.

[3, 4] The conclusion of the trial court, as crystallized in its decision and judgment, is founded on an erroneous theory. It is, of course, manifestly true, and, indeed, elementary, that the judgment of a court having jurisdiction of the subject-matter of the liti-

gation of which such judgment is the culmination is conclusive upon the whole world, and that, as a necessary corollary of that doctrine, it cannot be challenged or attacked in a collateral proceeding. The remedy of the party aggrieved by the judgment must be by a direct attack on the judgment, as by appeal; or, in case the time for appealing has lapsed, then by a suit in equity, if there exist grounds—for instance, extrinsic fraud or mistake brought about by fraud—for vitiating the effect of the judgment which will justify a court of equity in interposing its remedial aid in behalf of the party claiming to be aggrieved thereby; or by proceeding, within the time prescribed, under section 473 of the Code of Civil Procedure. As to the conclusiveness of decrees of final distribution, section 1666 of the Code of Civil Procedure controls. It provides, *inter alia*, that such decrees are “conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.” And by virtue of the terms of that section, in the case of testacy, the decree, “in the absence of a showing of mistake or fraud, is irrevocable, save upon appeal within the time provided by law, even though it was in contravention of the terms of the will.” *Miller v. Pitman*, 189 Cal. 544, 182 Pac. 50.

[5] But, obviously, such decree cannot have the effect of conclusiveness as against a party, whether he be an heir or a devisee or a legatee under the will, where he is either a claimant in his own right in antagonism to the estate, or his individual property has been, without his knowledge or consent, included among the assets of the estate, and has been assigned by the decree to the heirs, legatees, or devisees under the will. *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724; *Matter of the Estate of Jane Rowland, Deceased*, 74 Cal. 523, 526, 16 Pac. 315, 5 Am. St. Rep. 464; *In re Clark's Estate* (Cal. Sup.) 212 Pac. 622; *Estate of Wenks*, 171 Cal. 607, 154 Pac. 24.

In *Bath v. Valdez*, *supra*, the action was to quiet title to certain real property of which the plaintiff claimed ownership, but which the court, sitting in probate had previously, by its decree of distribution, entered in the matter of the estate of Julian Valdez, deceased, distributed to the defendant. The defendant, in the action to quiet title, interposed, among other defenses, the plea of estoppel, based on the decree of distribution in the probate proceedings in the estate of said Julian Valdez, deceased. The trial court upheld the plea of estoppel and gave judgment to the defendant. On appeal the judgment was reversed, the court saying, after disposing of another point:

“The real question, however, remains, and is, Was he [plaintiff] estopped by the decree from setting up the independent estate which he had acquired under the statute of limita-

tions? Had the plaintiff appeared in the probate proceedings and set up his title adverse to the estate, acquired by him under the statute of limitations, the court had no authority to hear and determine the question thus raised. ‘The probate court has jurisdiction to settle the estate of a deceased person, and has no power, save in certain excepted instances, to determine disputes between the heirs or representatives of the deceased and third persons.’ [Citing *Theller v. Such*, 57 Cal. 447.] It is the estate of the deceased upon which the probate court administers. It is the title which the deceased had in and to real property at the time of his death, or which has inured to the estate after death and before distribution, which passes to the heirs and devisees. If there are outstanding or adverse claims to the estate vested in third parties, they are not affected by the probate proceedings, save as in cases of liens, etc., especially provided for by statute. Actions may be maintained by the executor or administrator of an estate to recover possession of the real property, for partition thereof, or to quiet title thereto. Code Civ. Proc. §§ 1581, 1582. The probate court may inquire if the estate has an interest in or title to real property, and if this question is decided in the affirmative, may distribute such estate; but it has no jurisdiction to determine the quality of the title, whether it be good or bad, but will leave the parties to pursue their remedies in a proper form. *Estate of John Dunn, Myrick's Prob. Rep. 122.*”

In *Re Estate of Rowland*, *supra*, the appellant made claim in the probate court that certain money and property in the hands of the executors of the will of the deceased constituted community property of the appellant and deceased, and asked that the same be segregated from the separate property of the testatrix and delivered to him instead of being distributed to a legatee under the will. It was the contention on appeal that the claim of the appellant was concluded by the decree of distribution. The court, holding that contention to be untenable, said:

“Under section 1666, Code of Civil Procedure, the decree is only made conclusive as to the rights of heirs, legatees, and devisees. As appellant does not, as to the claim, come within the category of these, he will not be bound thereby. He appears in a two-fold capacity: (1) As a legatee under the will, and as to his rights as such he will be bound by the decree; and (2) as a claimant, in his own right, antagonistic to the estate. In this latter capacity he will be no more concluded than a third party would be, who might chance to claim real estate adversely to decedent and his representatives. *Freeman on Judgments*, § 66, and cases cited; *Bath v. Valdez*, 70 Cal. 359. If, as may well be, his demand only amounts to a claim against the estate, which should have been presented to the executors, it cannot alter the case as presented here.”

In this case the situation is simply this: That the plaintiff was a devisee under the will of his deceased wife; that property which he claimed to be his in his own separate right was not mentioned in the will, nor

in the inventory originally filed, but was by the executor of the will subsequently included in the list of the assets of the estate; that the plaintiff had no other or further notice of the fact that said property was a part of the estate administered upon and distributed to one of the heirs and devisees under the will than the constructive notice prescribed by law; in other words, he had no actual notice of the fact that his separate property had been included in the property of the estate and distributed as an asset of the estate.

[6-8] The superior court, sitting in probate, has no jurisdiction or authority to determine disputed titles to the property of the estate of a deceased person. See cases above cited. The plaintiff claims to be and to have always been the owner in his separate right of the stock in controversy, and, as that claim is disputed by the party to whom the stock was distributed, he has the right to have the question of his title thereto litigated and adjudicated by a court having jurisdiction to try and determine questions of title to property. The fact that the plaintiff was also a devisee under the will of the deceased does not alter the situation. As stated in the cases above cited, he was bound by the decree only in so far as he was an heir, a devisee, or a legatee. He certainly could not be bound by the decree in so far as it purported to distribute his separate property no more than could a third party or an entire stranger to the will of the deceased and the proceedings attending the administration of the estate could be bound thereby. Let it be supposed that the executor of a will of a deceased person should cause to be included in the inventory setting forth the property and other assets of the estate of the deceased the real or personal property of a person in no way connected with the deceased or her estate and not mentioned in the will, and that such property was distributed to the heirs according to the terms of the will. Could it be said that in such case such party would be bound by the decree of distribution so that he could not maintain an action for the recovery of such property against the heirs to whom the same had been distributed by the probate court? The question answers itself. The plaintiff here is, as to the property in dispute, if it be his separate property, as much a stranger to the probate proceedings in which his wife's estate was administered as though he were not an heir or a devisee under the will of the deceased. It is a maxim of our law that there is no wrong without a remedy, but, if a party were to be held bound by a decree of distribution giving his individual property to some other person, he would be wholly remediless, since the question of title cannot be tried in the superior court sitting in probate, and to the maxim referred to we would, in its applica-

tion, meet with a manifestly absurd as well as a disastrous exception. Of course, if the plaintiff in this case, at the time the estate was undergoing administration and the final decree was entered, had actual knowledge of the fact that the stock had been listed as a portion of the estate of the deceased and that a decree distributing the property to the defendant had been entered, and he at no time made any protest against or objection thereto, there being no fraud or misrepresentation or mistake at the bottom of his silence, he might be held to be estopped, not by the judgment or decree, however, but by estoppel in pais, particularly if the property so distributed had, before he took any steps to have the matter corrected, gotten into the hands of innocent purchasers. Or he would probably be bound if, after obtaining knowledge of the fact that his property had thus been disposed of, he failed to proceed to assert his rights until after the statute of limitations had barred them. But this case comes within neither of the exceptions just referred to.

[9] We conclude that an action in conversion affords the proper remedy for the relief sought by the plaintiff. If a party converts the personal property of another, it matters not by what means the conversion is effected, the owner of the property may either proceed in conversion for damages for the wrongful act or in replevin to recover the specific property or damages if it cannot be restored.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

65 Cal. App. 331

PEOPLE v. HIGHTOWER. (Cr. 1068.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1924.)

1. Homicide $\S$ 250—Circumstantial evidence held to show guilt of murder to moral certainty.

Facts and circumstances held to show guilt of murder to a moral certainty, and conviction therefor not unjust.

2. Witnesses $\S$ 330(1)—Limiting cross-examination of state witness as to means of recollection of date of crime held within court's discretion.

Where state's witness stated she had been with defendant up to about 7:30 p. m. on the night of the homicide, and on cross-examination fixed the date from having gone to a theater with another man after leaving defendant after her dinner with him in a restaurant, the court was within its discretion in limiting further cross-examination when it was evident that her answers would throw no more light on the subject.

3. Witnesses ⇨267—Limiting cross-examination of witness corroborating state witness held within court's discretion.

Where state's witness fixed the homicide as of the date she attended a theater with another man after having had dinner with defendant at a restaurant, restricting cross-examination of the other man, corroborating her evidence, concerning his occupation, was within trial court's discretion.

4. Criminal law ⇨656(9)—Trial court's remarks held to be on expert's qualification, and not on weight of his evidence.

In murder prosecution, during cross-examination of an expert witness, court's remarks that, considering the expert's standing, it would be sufficient, after examination of exemplars in evidence, to give his opinion as to the authorship of a letter, and that he had been an expert for more than a quarter of a century in the court, referred to witness' qualification, and not to the weight of his evidence.

5. Criminal law ⇨730(4)—District attorney's reading in jury's presence of affidavit concerning conduct of juror held without prejudice.

In murder prosecution, where during course of trial one of defendant's attorneys drove a woman juror about town in his automobile, defendant was not prejudiced by the reading by the district attorney of an affidavit in jury's presence concerning the incident, in view of the exoneration of the attorney and the juror of contempt, and court's instruction not to permit the matter to be considered.

6. Criminal law ⇨730(3)—District attorney's good-faith question to defendant's character witness as to specific acts inconsistent with good character held not prejudicial.

In murder prosecution, where character witness had stated that defendant's reputation for peace and quiet was good, district attorney's good-faith question to him as to his knowledge of defendant's having constructed a trap gun to kill a Mexican, which did kill him, and of his being buried by defendant held, if improper, without prejudice; an objection to the question having been sustained, and the jury instructed to disregard it.

7. Witnesses ⇨274(2)—Character witness may be cross-examined as to knowledge of reports of particular charges inconsistent with good character.

A character witness may be cross-examined as to his knowledge of reports of particular and specific charges of the commission of acts inconsistent with the character which he is called on to prove.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

William A. Hightower was convicted of murder, and he appeals. Affirmed.

William F. Herron, of San Francisco, E. J. Emmons, of Bakersfield, Albert Mansfield, of Redwood City, and W. W. Laidley, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was accused by information of the crime of murder. He was convicted and sentenced to life imprisonment. A motion for a new trial was made and denied, and this is an appeal from the order denying the motion and from the judgment.

It is not contended that the evidence is insufficient to convict, but it is claimed that it is of such a character as to leave room for grave doubt as to the defendant's guilt, and, this being so, that the errors complained of become important where they might be considered otherwise under section 4½ of article 6 of the Constitution in a case where they did not result in an unjust conviction.

[1] The crime itself which gave occasion to this trial is of its nature the most horrid and atrocious that can well be conceived by the human mind, and words are inadequate to express in proper colors its barbarous enormity.

Father Patrick Heslin, a man over 60 years of age, was the priest of Holy Angels parish at the town of Colma, San Mateo county. He resided at the parish house adjoining the church, which is a few hundred feet from the state highway, which forms the main thoroughfare of that little community. Miss Magdalena Wendell was Father Heslin's housekeeper. On the evening of August 2, 1921, at about 9 o'clock, while the priest was in his study, a Ford automobile stopped in front of the premises, and the occupant of the machine rang the parish doorbell. Miss Wendell answered the call. She was confronted by a strange man wearing a slouch hat and large, dark-colored glasses. He inquired if the father was in, and, on being informed that he was, the visitor expressed a desire to see him. He was invited to enter the house. This invitation he refused, giving as a reason that he was in a hurry. Father Heslin was then called by his housekeeper, and he immediately came to the door, spoke a few words with the visitor, re-entered the house, went up stairs, and a few moments later descended with his hat and his stole (a religious vestment). He carried with him a morocco-bound case containing the sacrament and holy oils for anointing the sick. Upon being asked by his housekeeper if it was a sick case, he answered her in the affirmative. He then entered the church, and shortly thereafter joined the visitor, who in the meantime had turned his machine around so that it pointed away from San Francisco and in the direction of Salada Beach, a small settlement some six miles distant, located close to the sea to the west. Father Heslin entered the machine; it was operated from the seat by the driver, indicating that it was equipped with a self-starter. The occupants then proceeded upon their journey, and Father Heslin was never thereafter seen alive. The next morning,

August 3d, the church bell failed to ring at the accustomed hour, and the housekeeper, upon making an investigation, discovered the edifice locked. Other circumstances aroused her suspicions, caused her to become apprehensive, and she notified the authorities. The same morning, at about 10 or 11 o'clock and before Father Heslin's disappearance had become generally known, there was received at St. Mary's Cathedral, in San Francisco, a letter, dated August 3d. This letter was opened, and it proved to be a lengthy anonymous document, partly typed and partly written, and in substance it contained the information that the writer had Father Heslin in a bootleg cellar. The sum of \$6,500 was demanded in currency for his release. The letter also contained the information that the priest had been injured, was unconscious from brain pressure, and it advised haste. It was suggested that the money be brought to the parish house where the priest had lived at 9 o'clock that evening, at which time and place, so it was stated, a messenger would furnish instructions. The letter contained certain threats as to what might happen in the event that the instructions were not followed and the money not forthcoming.

Subsequent to the receipt of this letter various rewards were on the 8th day of August offered by the Roman Catholic archbishop and public authorities for the return of Father Heslin, dead or alive. On the evening of August 10th defendant appeared at the residence of the archbishop in San Francisco for the stated purpose of registering for the offered reward. He claimed that he had a clue to the grave of the missing priest. At the very moment of his call an Examiner representative was admitted to the home of the archbishop. Before an interview was accorded either visitor defendant entered into conversation with the newspaper representative concerning his supposed clue, and informed him that the place was in the vicinity of Colma. Upon repeating this statement to the archbishop defendant was advised to communicate with the police. He expressed his reluctance to do so, giving as his reasons that his right to the reward might be jeopardized, he fearing the police would claim it. He further stated that he had in mind the possibility that his clue might reveal a liquor cache, in which event he did not want the police to know anything about it, as he desired to give the liquor to the friend who gave him the information, as she was engaged in that business.

After this interview with the archbishop defendant agreed to accompany the newspaper man to the office of the Examiner, where he imparted his information to the city editor of the paper. His story, in substance, was to the effect that he had met a woman of the night life on the street, who told him that one of her patrons, while drunk, had

stated to her that he had something valuable buried "in a cave" which was being guarded by a man "cooking hot cakes." Defendant recalled, so he stated, that there was an Albers flapjack flour sign just off the road which ran between Colma and Salada Beach, having a picture thereon depicting a man frying flapjacks. He further stated that the following day he visited this place and was attracted to a niche or cave in the cliff which was near the sign; that he dug around in the sand until he extracted a piece of bur-lap covered with blood and had found several discharged pistol cartridges near there. Several days later he made another tour of inspection, and by prodding into the sand with a stick had turned up a piece of black cloth, but had made no further investigation. Upon receiving this information the city editor telephoned the police. Certain police officers and newspaper men made up a party to investigate defendant's story. The party was led by him to a spot which proved to be the priest's grave. The place was a shelf or ledge some 10 feet below the rim of the cliff. The body of the priest was removed, and the autopsy subsequently held revealed that death had resulted from a blow on the top of the head and two bullet wounds in the side. It was the opinion of the autopsy surgeon that the body had been dead for a week or more. The next day a thorough search was made by the authorities in the vicinity of Father Heslin's grave. There was there found several articles which subsequently proved to be important. They consisted of pieces of lumber which had a string or cord tied about them. The string bore evidence of having been cut with a knife. There was also imbedded in the sands tent stakes and a cinch block used to tighten the guy ropes of a tent.

Following the finding of the body defendant was detained for questioning. He repeated his story to the police that a woman of the underworld, named Dolly Mason, had informed him of a conversation which she had had with a drunken foreigner, and that, acting on this information, he had made his discovery. On the night of the priest's disappearance defendant was living at a downtown hotel with a woman named Dorris Shirley, who had accompanied him to San Francisco from Salt Lake City. His room was visited and searched by the authorities and a tent with stakes and a cinch block were there found of the same make and similar in design to those found at the priest's grave. In the seams of the tent was sand and on the side thereof in large block letters was printed the word "Tuberculosis." Defendant admitted having printed the word upon the tent with his fountain pen, giving as a reason that prowlers would not bother him in his use of the same. The tent had attached to it pieces of string which bore evidence of having been cut with a knife.

Upon examination this string proved to be identical in material and structure with that tied around the planks found at the grave. Other articles found in the room consisted of an incomplete machine gun, defendant's own invention, and another of his inventions consisting of shotgun shells grouped together and described in the record as an infernal machine. This contrivance was wrapped in a piece of burlap covered with human blood. Defendant had had this contrivance buried in the vicinity of the priest's grave, so he stated, prior to the time he had located it, having taken it there to experiment with. He further stated he had brought the machine back to San Francisco wrapped in the bloody piece of burlap above referred to.

Defendant was thereafter charged with the murder of Father Heslin. It was proved at the trial that he had been seen in the vicinity of Salada Beach prior to the time when the crime was committed, and other evidence showed that he was familiar with the country. The niche where the body was found was about 10 feet below the rim of the surface, and in front thereof was a narrow ledge, the overhang of which formed almost a perpendicular cliff which dropped off abruptly a considerable distance to the beach below. At the time defendant first led the authorities to the grave he showed his familiarity with the surroundings by immediately jumping down upon the narrow ledge and locating the exact position of the body, although the night was thick in darkness between Colma and the ocean by reason of a drizzling fog which prevented the searchers from seeing a few feet ahead. The party had no artificial light except that furnished by matches, which it was impossible to keep burning on account of the strong wind which was blowing, and no light was procured until after the body was found. It was proved that defendant had rented a self-starter Ford automobile on August 1, 1921, but had not used it except for a short period until August 2d. This machine was left by him in front of the premises of the owner some time after 11 o'clock of the evening of that day, the owner's place of business being then closed. In accounting for his whereabouts on the evening of the murder defendant stated to the authorities different stories on different occasions. He first claimed that he was driving the hired machine back and forth on the state highway between the towns of Colma and Redwood City for the purpose of meeting a stranger on a motorcycle to arrange with the stranger for the purchase of bootleg whisky. Again he stated that he was driving the machine with Dorris Shirley as a companion; that he had started about dusk and had gone to San Jose; and he entered into a detailed description of the trip, and claimed that he had returned somewhere about midnight. It further appeared that defendant had met

Dorris Shirley in Salt Lake City, and that she had accompanied him to San Francisco, where they had lived together as man and wife in various hotels. She testified that while she had gone to dinner with defendant the early part of the evening of August 2d she had left him immediately thereafter, and had accompanied one Lee Putman to Pantages Theatre, where she spent the entire evening, and that she was not with defendant on a trip to San Jose or to any other place. Defendant admitted that his statement that the Shirley woman had gone to San Jose with him was false in this particular, but he still maintained that the object of renting the machine was to meet a bootlegger, and that he had driven the machine as far down the highway as Redwood City for that purpose. Defendant was questioned concerning a .45-caliber automatic pistol that he had purchased from a man in Nevada. He admitted that he had made the purchase, but claimed that he had sold the same to a stranger in a park prior to the time the murder was committed. He also admitted he had pawned the holster of the weapon with three cartridges in it similar to those found at the priest's grave. In pawning this article defendant gave the name of Davis. Other facts were proved at the trial. Experts in handwriting testified positively that the block letters contained in the ransom letter were written by defendant, and Marie Wendell, the housekeeper, positively identified defendant as the nocturnal visitor with whom the dead priest was last seen alive. When arrested a knife was found on defendant's person. A microscopical examination was made of it with the object of determining the purpose of its last use. Two photomicrographs were also made and enlarged, and they showed that attached to a nick in the blade were pieces of cotton fiber similar to and corresponding with the cord used on the tent.

Taking all these facts together, we cannot agree with counsel for the defense that the case presents a situation where there is a grave doubt as to defendant's guilt. In our opinion the facts and circumstances show guilt to a moral certainty, and the evidence is so strong as to be less fallible than any result arrived at by direct evidence. Where, as here, it is so convincing as to necessarily produce certainty and conviction, it matters not that it is of a circumstantial character, and indeed it affords at least as satisfactory proof as if it were direct. Evidence of facts that might have thrown light upon his acts is missing. The very existence of several persons, namely, Dolly Mason, the purchaser of the revolver, one Sairgrease, to whom defendant claims he loaned the tent, and the persons with whom he stated he used it in connection with a picnic are wholly unaccounted for, and indeed, it would seem they are purely mythical. Other

facts might be commented upon, but we believe no useful purpose would be subserved thereby, as no complaint is made as to the insufficiency of the evidence.

[2, 3] As ground for reversal appellant first complains of misconduct on the part of the trial judge in restricting the cross-examination of the Putnams. The Putnam woman, also known as Dorris Shirley, testified upon her direct examination that upon the evening of August 2, 1921, the date of the disappearance of the priest, she had ridden with defendant in the Ford machine down to Market street and had dinner with him; that she left him on that street at about 7:30 p. m.; that she later met Putman, with whom she visited the Pantages Theatre, and that when she started home she looked at her watch and it was 10 minutes of 11; that she undressed and went to bed, and that some time later defendant arrived, but she could not fix the hour. Upon cross-examination she was asked how she fixed August 2d as the date on which she visited the theater with Putman, and she answered that she met Putman on the 1st and went there with him the following evening. When asked how she knew it was the first of the month that she met Putman, she answered, "By the date —by the calendar." The defense sought to pursue the inquiry further by testing her recollection as to her action upon other dates, but it was manifest from her answers that she could throw no further light upon the subject, and the court properly exercised its discretion in closing the inquiry. Lee Putman corroborated her with reference to the date of their visit to the theater, and the trial court restricted his cross-examination concerning his occupation. This matter was also one for the proper exercise of the court's discretion. The same may be said with reference to the cross-examination of Marie Wendell, the housekeeper.

[4] As further ground for reversal appellant complains of certain remarks of the trial judge referring to the qualifications of one of the experts. The remarks were made during cross-examination and after the witness had qualified. In order to expedite the proceedings the court stated:

"I assume, gentlemen, that, considering the standing of this expert, it would be sufficient for him to say after a sufficient examination with these exemplars that have been admitted in evidence and the letter which was received at the cathedral, it would be sufficient for him to give his opinion as to the authorship of that letter and then stop and let the matter rest."

And again, in reference to this same witness, the court restated:

"He has been an expert for more than a quarter of a century in my court. Of course if you think it essential you may proceed."

We fail to see how these remarks affected the substantial rights of the defendant. They merely referred to the qualification of the witness, which it was the duty of the court to pass upon, and not to the weight of his evidence. Furthermore, no objection was made by counsel for the defendant to either of the remarks.

[5] It is also urged that the trial judge was likewise guilty of misconduct in permitting the district attorney to read in the presence of the jury an affidavit concerning one of the women members thereof and one of defendant's counsel. The incident grew out of the act of the attorney driving the juror about town in his automobile during the course of the trial. Upon the conclusion of the reading of the affidavit the court declined to hear the attorney, and cited both him and the juror for contempt of court. We fail to see how this incident affected the rights of the defendant. Both the attorney and the juror were subsequently exonerated, the jurors so advised, and they were instructed not to permit the matter to enter into their consideration in determining the guilt or innocence of the defendant, but to obliterate it entirely from their minds.

[6, 7] And, finally, it is claimed that the district attorney was guilty of misconduct. Defendant had produced certain character witnesses. One of these witnesses had testified that the reputation of defendant for peace and quiet was good when defendant had lived in Bakersfield. He was then asked by the district attorney if he did not know that defendant had been hired to construct a contrivance consisting of shotgun shells so arranged as to kill a Mexican when he crossed a certain path, and that the Mexican was killed and buried by defendant. An objection to this line of examination was sustained, and the jury was instructed to pay no attention to it whatever. A character witness may be cross-examined as to his knowledge of reports of particular and specific charges of the commission of acts inconsistent with the character which he is called upon to prove, such questions go to the weight of his evidence. Underhill on Crim. Ev. (2d Ed.) 82. There is nothing in the record to show that the district attorney did not act in good faith in asking the question. The question in our opinion was within the proper bounds of cross-examination. *People v. Fodera*, 33 al. App. 8, 164 Pac. 22. But, even if it be assumed the question was improper, we do not think the asking of it in any manner prejudiced the substantial rights of the defendant, as an objection to it was sustained, and the jury admonished to disregard it.

In conclusion it may be said that the record upon the whole shows that defendant was given a fair and impartial trial, and the evidence of his guilt seems so clear and convincing that one reading it cannot escape

the conclusion that he has been very leniently dealt with. There certainly has been no miscarriage of justice so far as he is concerned.

The judgment and order are affirmed.

We concur: ST. SURE, J.; SHORT, Justice pro tem.

(65 Cal. App. 315)

BOYLES v. LEONARDO. (Civ. 4442.)

(District Court of Appeal, First District, Division 2, California. Jan. 17, 1924.) Hearing Denied by Supreme Court March 17, 1924.)

1. Attorney and client ⇨143—Contract to pay fee held supported by consideration.

Contract of woman seeking divorce from her husband, to pay attorney's fees in return for services, held supported by a consideration.

2. Work and labor ⇨10—Attorney entitled to reasonable value of services though guilty of fraud.

Even though an attorney was guilty of fraud in inducing client to sign contract, in that he overreached the client in the matter of charges, the attorney was entitled to recover the reasonable value of the services rendered on an implied contract.

3. Attorney and client ⇨143—\$5,000 fee for services held not so excessive as to show fraud in contract therefor.

A contract to pay attorney \$5,000 for services in divorce case held not shown fraudulent in that client was overreached in the matter of the size of the charge.

4. Attorney and client ⇨166(3) — Evidence held admissible on question of reasonableness of fee charged.

Where plaintiff attorney believing that one element in setting the fee in a divorce case was the amount involved, and defendant, apparently believing that in setting the fee the sole question was the amount of time that should have been consumed and not the amount of time that was actually consumed, asked certain questions accordingly, the court did not err in sustaining in the matter of admission of evidence the theory of the plaintiff, and in overruling the theory of the defendant, which was incorrect.

5. Appeal and error ⇨173(2)—Question of fraud in procuring allowance of fees held not before appellate court in action to recover agreed compensation.

In an action by attorney to recover agreed compensation of \$5,000 from woman employing him in divorce case, defendant cannot claim that fraud was practiced on the trial court in that plaintiff placed defendant on the stand to ask an allowance of attorney's fees under Civ. Code, § 137, the question not then being presented.

6. Divorce ⇨197—Attorney. In divorce case held entitled to recover agreed compensation notwithstanding allowance by court of attorney's fees.

An attorney was entitled to recover \$5,000 agreed compensation for services in divorce case, though he placed defendant client on the stand to ask an allowance of attorney's fees under Civ. Code, § 137, and \$5,000 was then allowed, defendant committing no act that destroyed her valid contract, under sections 1697-1699, and since facts working an estoppel as to her will not necessarily work an estoppel as to plaintiff, who was once her attorney and who sues sui juris, in view of Code Civ. Proc. § 1908.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by E. M. Boyles against Mary Leonardo. Judgment for plaintiff, and defendant appeals. Affirmed.

L. Gonsalves, of Oakland (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

STURTEVANT, J. The action was brought to recover a judgment for attorney fees which the plaintiff alleged were performed by his assignors for the plaintiff in a certain divorce case commenced by the defendant. The trial court awarded the plaintiff a decree, and the defendant has appealed therefrom.

Prior to May 23, 1921, Joseph J. Leonardo and Mary Leonardo had been husband and wife. Either as his separate property in part, or as community property at least in part, they were at that time possessed of a number of pieces of property of considerable value. Some of those properties were in Portugal, and some were in California. Prior to the date last mentioned, Mary Leonardo called on plaintiff's assignors, complained to them that her husband was in the habit of brutally beating and whipping her, and consulted them as to her rights. Mr. Donahue at first took charge of the matter and commenced a series of conversations in which he attempted to settle the troubles existing between the Leonardos. Failing in that effort, a further conference took place between him and Mrs. Leonardo. At that time it was determined to commence the divorce case. Mr. Donahue testified that at that time he stated the fee would be \$5,000, and Mrs. Leonardo said, "All right." Thereupon, May 23, 1921, the action in divorce was filed. Later an application for temporary maintenance and for costs and an attorney fee was made. The application was brought to a hearing and on June 3, 1921, an order was made awarding the plaintiff \$250 per month pending suit, \$250 costs, and \$500 on

account of her attorney fees. While the court proceedings stood at that stage, the attorneys for the respective parties conducted such negotiations as led to a tentative property settlement. On July 11, 1921, the husband paid \$500 to his wife for attorney fees, and on the same day a conversation was had between plaintiff's assignors and their client which resulted in a writing dated July 11, 1921, which is as follows:

"When a settlement is made between J. J. Leonardo and myself entered into this day and when said ten thousand dollars is paid and said note for \$35,000.00 is executed I agree to pay to Donahue and Hynes the sum of \$4,500.00 less \$500.00 already paid by said J. J. Leonardo, for attorney's fees and costs. Dated: July 11th, 1921. Mary Leonardo."

Mr. Donahue testified that when that paper was written by him that Mrs. Leonardo signed it and expressed her satisfaction with the terms stated in it. Later several papers were written and signed by the respective parties, but they were not delivered because the husband had some trouble in getting the cash to make a cash payment. Consultations and conferences continued. Later matters so fell out that the wife did not accept or act on the tentative agreement as to a settlement of property rights, and furthermore she caused the divorce action to be dismissed. However, she did accept a property settlement which was drawn up by her husband's attorney.

Shortly after the dismissal of the divorce action the plaintiff filed this action. The complaint pleads the rights of the plaintiff in two counts. The first count pleads an express contract. The second count pleads an implied contract resting on the reasonable value of the services rendered. The defendant filed an answer in which she denied the material allegations contained in the complaint, and a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiff on the issues presented by the first count and the answer thereto.

[1] The appellant contends that the contract was without any consideration. A most casual reading of the record shows the point is without merit as thus stated. Later the question arises from another aspect, and then it is more serious. We pass it for the present.

[2, 3] The appellant's second point is that the contract was vitiated by fraud. In this connection the appellant's argument is twofold. She claims the contract was fraudulent as being an attempt on the part of an attorney to overreach his client in the matter of charges. Even though the charge had been sustained as to the first count, nevertheless the plaintiff would have been entitled to the reasonable value of the services ren-

dered in response to the issues tendered by the second count. However, the plaintiff assumed the full burden of proving the issues as tendered by both counts. He introduced proof, which, if the court believed it, would have warranted a judgment on either count. The trial court saw fit to rest its judgment on the first count. Clearly we have no power to disturb it on such a record. Two disinterested attorneys testified that the charge was reasonable, and Mr. Donahue testified the same way and submitted himself to a cross-examination which did not break down his testimony given on direct examination. There was no overreaching proved.

[4] At this time and in this connection it may be stated that the appellant made objections to questions, the objections were overruled, and she noted exceptions to the rulings which are of one class and may be so treated. The respondent, believing that one element in setting a fee was the amount of money involved, and the appellant, apparently believing that in setting a fee the sole question was the amount of time that should have been consumed and not the amount of time that was actually consumed, asked certain questions accordingly. The theory of the respondent was clearly correct, and the theory of the appellant was incorrect.

[5, 6] The second ground on which appellant charges fraud is that a fraud has been practiced on the trial court. In other words, it is her contention that if the oral contract was made, as testified to by Mr. Donahue, then it followed that later Mrs. Leonardo should not have been placed on the stand to ask an allowance of attorney fees under the provisions of Civil Code, § 137. Be this as it may, the question was not then presented and is not now before this court. However, we have before us a claim that before appearance was made in the divorce case Mrs. Leonardo entered into a contract to pay an attorney fee of \$5,000. She had a perfect right to do so. She committed no act thereafter that destroyed that valid contract. Civil Code, § 1697-1699. Neither did plaintiff's assignors. If Mrs. Leonardo were now suing on the contract, some question might arise as of the nature of estoppel. But she is not suing. Facts working an estoppel as to her will not necessarily nor ordinarily work an estoppel as to one who was once her attorney and who sues *sui juris*. Code Civ. Proc. § 1908. The question has not been passed on in this jurisdiction. The authorities in other jurisdictions are against this appellant and in favor of this respondent. *Culley v. Badgley*, 196 Mich. 414, 163 N. W. 33; *State v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 385

BATCHER et al. v. HOEPPNER et al.
(Civ. 2691; Sac. 3496.)

(District Court of Appeal, Third District, California. Jan. 22, 1924. Rehearing Denied Feb. 20, 1924. Hearing Denied by Supreme Court March 21, 1924.)

1. Appeal and error —80(4)—Judgment calling for accounting held not final.

A judgment that plaintiffs take nothing by their action, except "in the manner hereinafter indicated," and that an accounting be forthwith had for the purpose of determining the actual amount of moneys which defendants expended in developing a mine under a contract, and that a sale be had upon the coming in of the account, *held* not a final judgment, under Code Civ. Proc. § 963, subd. 1.

2. Sales —82(1)—Agreement to pay for properties out of profits and proceeds construed.

Where one enters into an agreement for the purchase of property, and payment therefor is to be made out of the net proceeds of the operation of the property or of the products thereof, a sale of the properties by the purchaser, or the putting them out of his power to produce any net proceeds, renders the agreement immediately enforceable, and the sums covenanted to be paid out of the proceeds due and payable, but this rule has no application, where the contract expressly provides for sale, and the amounts to be paid by the purchaser are only payable out of the profits received by him from a sale or out of dividends or profits received by him for and on account of his share in a corporation that may be organized to operate the properties.

3. Appeal and error —1036(6)—Permitting third party to file cross-complaint held not reversible.

In an action for judgment for purchase price of mining property, *held*, that, if it was error, it was not reversible to permit a corporation organized by defendant to operate the mine to file a cross-complaint, and thereby come into the case, the corporation simply coming in and admitting that it held the properties subject to the terms and conditions of the contract of sale, and praying for sale thereof to defray expenses and to terminate the contract and further useless expenditure of money, in view of the fact that plaintiffs cannot complain of disposition of property in which they have no ownership.

4. Appeal and error —877(2)—Third person cannot complain of manner of giving up property by corporation.

Plaintiffs suing an individual for money judgment for purchase price of mining property, transferred by defendant to a corporation for operation, cannot complain of the manner in which a corporation coming into court on a cross-complaint delivers over its properties for sale; plaintiffs not being members of the corporation.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by John H. Batcher and others against E. A. Hoeppner and another, cross-complainant. Judgment for defendant and cross-complainant, and plaintiffs appeal. Affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Dozier & Dozier, of San Francisco, and C. F. Kimball, of Redding, for appellants.

W. H. Carlin, of Marysville, for respondents.

PLUMMER, J. Plaintiffs began this action to obtain a judgment against the defendant Hoeppner in the sum of \$29,300, with interest thereon at the rate of 7 per cent. per annum from the 22d day of July, 1916. The defendant and cross-complainant had judgment herein, and plaintiffs appeal.

It appears from the pleadings in this action that prior to the 22d day of January, 1916, the plaintiffs were interested in certain mining properties situated in the county of Yuba, state of California, known as the B. A. Campbell, Reuben Clark, and Ida Ruff properties; that on or about the said 22d day of January, 1916, the plaintiff John H. Batcher, for and on behalf of himself and his coplaintiffs, made and entered into an agreement with the defendant E. A. Hoeppner concerning said properties, which agreement is in words and figures as follows, to wit:

"This agreement made and entered into this 22nd day of January, 1916, by and between John H. Batcher of the city and county of San Francisco, state of California, the party of the first part, and E. A. Hoeppner, of the same place, the party of the second part:

Witnesseth, that for and in consideration of the cancellation by said Hoeppner of said Batcher's note to said Hoeppner of three thousand (\$3,000.00) dollars and the payment to said Batcher by said Hoeppner of the sum of five thousand (\$5,000.00) dollars gold coin, receipt whereof is hereby acknowledged by said Batcher and the promises of said Hoeppner hereinafter contained, said Batcher hereby agrees to transfer to said Hoeppner all of his right, title and interest in and to all property both real and personal situate in section twenty-six (26) T. 19 N., R. 6 E., M. D. B. & M., and being the B. A. Campbell, Reuben Clark and Ida Ruff properties, more fully described in that certain deed to said Hoeppner dated the 22nd day of January, 1916, and executed by said Batcher, and said Batcher for the same consideration guarantees the complete transfer to said Hoeppner of all right, title and interest both real and personal of W. S. Graham and B. Hartley in and to the same property described in said deed and as a further consideration of the foregoing transfers said Hoeppner agrees to assume said Batcher's note to the Nevada City National Bank for the sum of five thousand (\$5,000.00) dollars, on account of which amount said Hoeppner has already paid said bank the sum of one thousand (\$1,000.00) dollars; said Hoeppner also agrees to assume payment of said Batcher's obligation to reimburse B. Hartley in the

sum of six thousand and three hundred (\$6,300.00) dollars cash advanced by said Hartley and reimburse said Graham to the amount of six thousand (\$6,000.00) dollars cash advanced by said Graham in the mining enterprise and partnership formerly carried on in connection with said property, said amounts to be paid only out of said Hoeppner's share of the net proceeds to be derived from the operation of said property or sale profits received by said Hoeppner or his share in any corporation which he may cause to be created to carry on such operations, and said Hoeppner further agrees to assume the California Extraction Company bill and all bills of the mining enterprise contracted during the partnership and operation of said property by said Hoeppner and said Batcher; said Hoeppner further agrees to pay said Batcher the further sum of seventeen thousand (\$17,000.00) dollars, but only out of said net proceeds of operation or sale of said property that said Hoeppner may receive, and any money that may be paid said Batcher and Graham and Hartley out of said net proceeds on account of the amounts herein specified, shall be paid as follows: So that the amount to which said Batcher is entitled shall be first paid in full, and then the amounts to which said Graham and said Hartley are entitled shall thereafter be paid pro rata to said Hartley and Graham, said Hoeppner being entitled to retain the remaining one-half of said net proceeds for his own use.

"In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

E. A. Hoeppner.

"John H. Batcher."

It is further alleged in plaintiffs' complaint that the defendant Hoeppner, paid to the plaintiff Batcher the sum of \$5,000 mentioned in said agreement, and also paid and discharged a note given by Batcher to the Nevada City National Bank in the sum of \$3,000, and also assumed the indebtedness due from the mining copartnership of the plaintiffs and defendant E. A. Hoeppner to the California Extraction Company as provided in said agreement, but that the defendant Hoeppner had not paid to plaintiff Batcher the sum of \$17,000 provided for in said agreement, or to the plaintiff Hartley the sum of \$6,300 specified in said contract, or to the plaintiff Graham the sum of \$6,000 as set forth in said contract or any portion of said sums.

It is also alleged in the complaint that said sums were to be paid within a reasonable time from and after the said 22d day of January, 1916; that a period of six months after said date was a reasonable time for the payment of said sums, and that a reasonable time for the payment thereof has wholly expired. It is further set forth that the defendant has wholly failed and neglected to operate said mining properties or to extract the gold or other minerals therefrom either in his proper person or by a corporation created to carry on said operations, and that the defendant has sold and conveyed said

properties to another, and thereby put it out of his power to operate said property. It is further alleged that, after the execution of said agreement, the plaintiff Batcher delivered to the defendant a deed of conveyance transferring all of the right, title, and interest of the plaintiffs in and to the real and personal property mentioned in said contract, and conveyed and transferred the same to the defendant Hoeppner named in this action. It is further alleged that on the 22d day of July, 1916, under and by virtue of the terms and conditions of the contract hereinbefore set out, there became due and payable to the plaintiff Batcher the sum of \$17,000, to the plaintiff Graham the sum of \$6,000, and to the plaintiff Hartley the sum of \$6,300, with interest thereon at the rate of 7 per cent. per annum from the said 22d day of July, 1916.

The defendant Hoeppner filed an answer, admitting the execution of the contract, and denying all of the allegations as to his failure to comply with the terms and conditions thereof, and setting forth, among other things, that immediately after the execution of the contract referred to, he entered upon said premises, and by himself, and through the corporation created as provided for in said contract, had diligently operated said mining properties, extracted all the valuable ore found therein, and had expended in so doing a sum approximately of \$150,000, but had only been able to realize and extract from said properties mineral-bearing ores of the value of \$500. After the beginning of the trial of the action and the taking of some testimony therein, on the application of the defendant E. A. Hoeppner and the B. A. C. Company, a corporation, cross-complainant, the court made the following order:

"It is hereby ordered that the cross-complaint presented by the said cross-complainants against plaintiffs be filed herein, with leave to plaintiffs to plead to said cross-complaint within fifteen days after service upon them of notice of the filing of said cross-complaint."

This cross-complaint sets forth that the B. A. C. Company was incorporated on or about the 10th day of March, 1916, and then sets forth the execution of the contract by Hoeppner and Batcher, as hereinbefore referred to, and then alleges that the said E. A. Hoeppner on the said 10th day of March caused the B. A. C. Company, a corporation, to be organized for the purpose of operating the properties referred to in said contract. The transfer of the properties from Batcher to Hoeppner is then alleged, as hereinbefore mentioned, and that after the incorporation of said cross-complainant, with the knowledge, consent, and approval of the plaintiff Batcher, said Hoeppner, by deed of grant, bargain, and sale transferred the fee in all of said properties so received by him to the corporation B. A. C. Company. The amounts of money ex-

pendent in the operation of said properties is then set forth, and, in addition, the sum of \$80,000 is alleged to have been expended for mining machinery and equipment. It is then alleged that the total proceeds derived from the operation of said properties during the course of several years was not to exceed the sum of \$500.

The impossibility of ever receiving or realizing any net proceeds out of the operation of said properties is then set forth, and the cross-complainants concluded their pleading with a prayer that the amount expended upon said properties be ascertained by the court, and the properties sold to pay the same, and the balance, if any, applied in payment of the amounts contracted to be paid by the defendant Hoeppner to the plaintiffs herein out of the net proceeds of the operation or sale of said mining properties. After the conclusion of the trial and its submission to the court, the court made and entered its findings and conclusions of law, and entered judgment in said action substantially as follows, to wit: The findings are to the effect that the contract, as set forth herein, was entered into by the respective parties; that payment was to be made only out of the net proceeds derived from the operation of said properties or sale thereof; that the transfer of the properties by Hoeppner to the corporation was made for the purpose of operating the properties; that the corporation took, with knowledge of the agreement executed by Batcher and Hoeppner; that the properties had been operated for a number of years; that such operation had demonstrated that it was humanly impossible to ever realize any net proceeds therefrom; that there had been expended in such operation and also in the prospecting of said properties many thousands of dollars, to wit, \$62,000, in operating said properties, paying the bills agreed to be paid, and over \$98,000 in the purchase of materials used in connection with the operation of said properties, and over \$13,000 on account of certain options relating to the Clark and Ruff properties. That, in making the transfer of the properties referred to by the defendant Hoeppner to the B. A. C. Company, said corporation received the same, subject to the terms and conditions of said contract, and assumed and agreed to carry out and perform all of the agreements, covenants, and conditions therein contained, to be performed and required to be performed by and on the part of the defendant Hoeppner. Upon these findings the court made and entered the following judgment:

"Now therefore, by virtue of the law and the findings aforesaid, it is by the court ordered, adjudged, and decreed as follows:

"(1) That plaintiffs take nothing by their action herein, except as and in the manner hereinafter indicated and directed.

"(2) That an accounting in this action be forthwith had for the purpose of determining

the actual amount of moneys which have been by the defendant E. A. Hoeppner and cross-complainant B. A. C. Company, a corporation, expended and actually and necessarily paid out in prospecting, developing, operating, working, and preserving the property hereinafter described and referred to and mentioned and referred to in the contract of January 22, 1916, in plaintiff's complaint in this action set forth; that thereupon all of said property be sold in the manner to be by this court directed and determined at the termination of said accounting, and that proceeds of said sale after payment of expenses of sale be applied, first, towards repaying and refunding to said defendant E. A. Hoeppner and said cross-complainant B. A. C. Company such an amount of said proceeds as by said accounting they and each of them may be determined entitled to, and the balance of said proceeds then remaining, if any, be applied and paid over next to plaintiff John H. Batcher to the extent of seventeen thousand dollars, or so much thereof as said balance of said proceeds will pay of the same, and the remainder of said proceeds of said sale, if any, shall be paid over next to said plaintiffs W. S. Graham and B. F. Hartley pro rata, in the payment to said W. S. Graham of the sum of \$6,000, and to said B. F. Hartley \$6,300, or so much of said respective sums as said remaining proceeds of said sale will pay of the same; and the balance of said proceeds of sale, if any, then remaining shall be paid over to said cross-complainant B. A. C. Company."

Thereafter an accounting was had ascertaining the exact amounts expended by the respondents under and by virtue of the agreement entered into between Hoeppner and Batcher, and judgment was entered directing the sale of the properties referred to and application of the proceeds, first in repayment of the amounts expended thereon as was found and ascertained, and the remainder, if any, to be applied upon payment of the various sums agreed to be paid the plaintiffs out of the net proceeds of the operation of said mines.

No appeal was taken from the judgment herein set forth but only from the judgment entered after the accounting had been had as therein provided to be taken, and it is insisted on the part of the respondent that such judgment is final in its terms, and has become conclusive upon the parties herein as to the matters therein adjudicated.

Upon the question of the finality of the decree adjudicating equitable rights, but reserving settlement of accounts upon the coming in of the report of the master, the authorities seem to be in hopeless conflict. 5 Ann. Cas. 176.

Respondent relies upon subdivision 1 of section 963 of the Code of Civil Procedure and the cases of Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161; Sharon v. Sharon, 67 Cal. 193, 7 Pac. 456, 635, 8 Pac. 709; People v. Bank of Mendocino County, 133 Cal. 107, 65 Pac. 124; and Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

In *Rossi v. Caire*, supra, in an action by a stockholder of a corporation which had forfeited its charter to enjoin the defendants, the former directors, from carrying on the business of the corporation, and to compel them, as trustees thereof, to wind up its affairs, pay its debts, and distribute its assets to the stockholders, orders directing the trustee to distribute moneys in their hands, derived from the property of the corporation, and to sell the remaining real and personal property of the corporation at public auction for cash, after giving a prescribed notice, it was held that such orders constituted a final judgment so far as the property to be disposed of was concerned, and appealable as such.

In *Sharon v. Sharon*, supra, it was held that a judgment that is conclusive as to any question is final as to that question.

In the *Mendocino Case* it was stated that the general rule applicable in determining whether a judgment is final or merely interlocutory is that, if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only.

In the *Zappettini Case* the court made an order dissolving a partnership, adjudging that the property of the partnership be sold in one parcel, and that the receiver appointed to make the sale, after deducting the costs and expenses of sale, pay the remainder of the proceeds into court to abide the further order of the court, adjudging that the proceeds of the sale be paid and applied as follows:

"(1) To the payment of fees and expenses of the receiver, the same to be fixed and determined by this court, (2) to the payment of the fees and expenses of a referee theretofore appointed, the same to be fixed and determined by the court, and (3) to the payment of the debts of said copartnership upon the determination thereof by this court, and that the determination thereof be and is hereby reserved by this court until after the return upon the sale of said property."

The court held such a judgment final, and in so doing said the partnership was dissolved, all the property was ordered sold, the manner in which the proceeds should be divided was finally adjudicated, including the respective proportions of the two partners in any money remaining after payment of costs of sale, fees of receiver, fees of referee, and the debts of the firm. Nothing remained to be done by the court, except the mere ascertainment of the amounts due to others than the parties on account of fees for services in the action and debts owing by the parties as partners, and to see that the decree already made was properly executed. In this case it appears that nothing further remained to be done except to carry the judgment into effect.

The last case upon this subject which has come to our attention is that of *Pomper v. Superior Court of the County of Los Angeles* (Cal. Sup.) 216 Pac. 577. The original action involved was one to quiet title to certain lands and to recover the rents, issues, and profits thereof. The court made and entered a judgment which was entitled an interlocutory judgment and decree, declaring the legal title vested in *Emilia Pomper*, expressly reserving for future determination the question of the amount of the rents, issues, and profits to be paid by the respective defendants, etc. The court said:

"While it is true that the so-called interlocutory judgment purported to settle the basic issue involved in the case, it expressly left for future determination the rights of the parties with relation to the rents, issues, and profits, which was one of the issues raised by the complaint, as the plaintiff prayed for judgment for the value thereof.

"The general rule is that, where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Juris. §§ 19, 20, p. 142; *California National Bank v. Statelet*, 171 U. S. 447, 19 Sup. Ct. 6, 43 L. Ed. 233; *Clement v. Duncan* (Cal. Sup.) 215 Pac. 1025; *Doudell v. Shoo*, 159 Cal. 448, 453, 114 Pac. 579."

[1] Measured by these cases, is the judgment entered in this cause in words and figures, as hereinbefore set forth, final? We think not. The first paragraph of this judgment shows that as to the basic rights or claims of the plaintiffs the judgment is not determinative or conclusive of anything specific. This paragraph reads as follows: "That plaintiffs take nothing by their action herein except as and in the manner herein-after indicated and directed." It will be remembered that the plaintiffs have sued for the recovery of \$29,300 and interest thereon at the rate of 7 per cent. per annum from the 22d day of July, 1916, until paid. This paragraph does not determine how much money the plaintiffs are to take, or how that money is to be obtained, or from what source it is to be derived. The second paragraph of the judgment provides that an accounting be forthwith had for the purpose of determining the actual amount of moneys which the defendant *Hoepfner* and the corporation has expended and actually paid out in prospecting, developing, operating, working, and preserving the properties, and that, upon the coming in of the account, or the ascertainment of such amounts, the property be sold in such manner as might be determined upon by the court, and that the proceeds of the sale should first be applied to the payment of such sums as the defendant *Hoepfner* and the company may be determined to be en-

titled to, and further provides as to how the remainder of the money derived from the sale of the properties shall be distributed. This paragraph requires a judicial determination of the amount of money necessarily paid out in prospecting, developing, and operating the properties covered by the contract. A considerable sum of money was expended in prospecting, a considerable sum of money was expended in development work, and a considerable sum of money was expended in operating the properties. Whether these sums of money were necessarily paid out or properly paid out under and in accordance with the terms and the conditions of the contract were and are questions calling for judicial action on the part of the trial court, and the plaintiffs could take nothing by reason of their action until all such matters were finally determined, the property sold, and the amount available for application toward the plaintiffs' claims ascertained and fixed by the trial court. It thus appears that the rights to enforce which the plaintiffs began their action were not finally determined, nor was it ascertained that they actually had any rights in the properties or to any of the proceeds thereof. The trial court did make a number of findings, all in accordance with the allegations of the answer filed by the defendant Hoepfner and the cross-complaint filed by the B. A. C. Company, and as a conclusion of law therefrom declared as follows: "That plaintiffs take nothing by their action herein." The judgment entered, however, to which we have referred, does not follow this conclusion of law, but makes this conclusion of law dependent upon certain contingencies and also facts thereafter to be adjudicated and determined, to be followed by sale of the properties in such manner as the court might order. Under these circumstances we think the principle of law announced in the Pomper Case, supra, applicable, and not the cases relied upon by respondents.

[2] The first point relied upon by appellant for reversal which we will consider is the claim that the defendant Hoepfner has sold and transferred the property to another, and has thereby put it out of his power to operate the properties referred to in the agreement or produce any net proceeds therefrom. To sustain this contention appellants rely upon the cases of Wolf v. Marsh, 54 Cal. 228; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; and Linn v. Butler, 8 Colo. 355, 8 Pac. 588.

In the case of Wolf v. Marsh, the agreement reads:

"For value received, I promise to pay to S. Wolf, or order, \$449. * * * This note is made with the express understanding that, if the coal mines in the Marsh ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void."

Some time after the execution of this note the defendant sold and transferred the properties referred to, and the court held that in so doing he voluntarily put it out of his power to comply with his contract, and the amount of money mentioned in the note immediately became due and payable.

In the case of Poirier v. Gravel, the contract, after fixing the amount to be paid, concluded in these words:

"The said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation."

After entering into the contract and taking possession of the properties, the defendant sold the same, and put it out of his power to realize anything therefrom. Upon this state of facts the amount of money agreed to be paid out of the proceeds immediately became due and payable.

In the Bagley v. Cohen Case it was held that, where one agrees to pay a certain sum out of the specific business, and thereafter sells the business, the money agreed to be paid out of the profits of the business immediately became due and payable.

In the case of Linn v. Butler, supra, it was agreed that the sum of \$5,000 should be payable only out of the net proceeds derived from the sale of ore taken from the mine, but it was also provided that in case of sale by the second parties the \$5,000 should become immediately due and payable. A sale was made, and the court, in pursuance of the terms of the contract, held that the sum agreed to be paid forthwith became due and payable upon the sale of the properties.

It seems to be well settled that, where one enters into an agreement for the purchase of property, and payment therefor is to be made out of the net proceeds of the operation of the property or of the products thereof, a sale of the properties, or the putting them out of one's power to produce any net proceeds, renders the agreement immediately enforceable, and the sums covenanted to be paid out of the proceeds due and payable, unless there is something further or otherwise in the contract which prevents the application of the principle enunciated in the foregoing cases. Does such principle apply to the contract in this case? It is therein provided, after fixing the amount to be paid, that "said amounts to be paid only out of said Hoepfner's share of the net proceeds to be derived from the operation of said property or sale profits received by said Hoepfner or his share in any corporation which he may cause to be created to carry on such operations," and further, that "said Hoepfner agrees to pay said Batcher the further sum of \$17,000, but only out of said proceeds of operation or sale of said property that said Hoepfner may receive," etc. The contract by its terms contemplates the creation of a cor-

poration to carry on the operations of the mining properties conveyed by the plaintiff to Hoepfner. It is true that nothing appears in the contract as to the manner in which the corporation to be organized shall be vested with the power or authority to enter upon said premises and operate the same, but it is clearly within the intent, as well as the language of the contract, that a corporation is to be organized, and that the payments to be made by Hoepfner to the plaintiff herein are only to be made out of the proceeds of the properties mentioned therein or profits received by him, or his share in any corporation which he may cause to be created for the purpose of carrying on said operations. The language of the contract may be again repeated to make this thought clear. It reads:

"Said amounts to be paid only out of said Hoepfner's share of the net proceeds to be derived from the operation of said property or sale profits received by said Hoepfner or his share in any corporation which he may cause to be created to carry on such operations."

Even though Hoepfner should have disposed of the properties mentioned in the agreement absolutely and without any reference to the contract, and under such circumstances that a court of equity would not be justified in holding that this grantee took with knowledge of the contract and subject to its terms and conditions, yet, unless such transfer were tainted with fraud, the plaintiffs in this case would not be entitled to succeed, unless the testimony established the fact of Hoepfner having received net profits available to the payment of their claims, either by sale of the properties or by dividends or other income received on account of his share in the corporation or corporations organized by him to operate the properties.

From this it is apparent that the cases cited by appellants and other cases having to do with the same questions, wherein it is held that the sale of property out of which payment of the purchase price is to be made from profits derived from the operation of the property or the products grown thereon, have no application whatever to the case at bar, where the contract explicitly provides for sale, and that the amounts to be paid by Hoepfner are only payable out of the profits received by him from a sale or out of dividends or profits received by him for and on account of his share in the corporation or corporations that may be organized to operate the properties to such corporations as the properties mentioned in the contract may be transferred.

The pleadings in this case raise no questions of fraud or concealment, and tender only, so far as the defendant Hoepfner is concerned, the question of profits received from sale of the properties, that the transfer made by him as herein referred to rendered

payments, provided for in the contract, immediately due and payable, and, also, that the operation of the mine might have been such as to have yielded sufficient profits to pay the several amounts alleged to be due to the plaintiffs herein. Considerable testimony was taken by the trial court upon the value of the properties involved in this action and referred to in the contract and as to the possibilities of being made to yield profitable returns. The court, upon conflicting testimony, has made and entered its findings herein concerning the value or valuelessness of such properties and also as to the issue of whether said properties have been intelligently and properly operated with the intent and purpose of obtaining a profit therefrom. Considerable testimony was introduced pro and con as to the value of the premises covered by the contract for mining purposes, some of the witnesses testifying that minerals of considerable value are contained therein, and others that the minerals are found in such varying quantities and infrequent places in the ledges as to render the mineral ores valueless and such as to render profitable returns impossible; that the expense of extracting the ores and the reduction of the same would never yield any net returns. These questions were all addressed to the trial court, which had to do with weighing the testimony given by the respective witnesses, also to consider the various theories advanced and determine the facts as to the worth or worthlessness of the premises for mining purposes.

The fact that here and there may be spots in the ledges which yield assays of promising value cannot justify this court in setting aside the findings of the trial court which had before it all the witnesses testifying to the value and also to the valuelessness of the properties in question, as well as the hopelessness of ever making them yield a profitable return, and hence the futility of further expenditures thereon by any of the parties to this action under obligations, contractual or otherwise, to the plaintiffs herein, and the trial court having determined from all the testimony that it is humanly impossible to ever realize any net proceeds from the operation of said mining premises, we cannot, from anything we find in the transcript, see any reason for disturbing such conclusion.

Before taking up the alleged errors of the trial court in permitting the B. A. C. Company, a corporation, to come into this action by way of filing a cross-complaint, we may state that, under the contract entered into by Batcher and Hoepfner in order for the plaintiffs to succeed, even though the corporation had not been permitted to come into the case, it will be necessary for the plaintiffs to establish that the defendant Hoepfner had first, out of the operation of the properties, derived net proceeds sufficient to

pay the plaintiffs' claims or net proceeds properly applicable toward their payment, or that he had received "sale profits" from said properties that should be applied in payment of the plaintiff's demands, or that he had received as his share of the profits of the operation of the corporation which had been operating the premises dividends or profits applicable as net proceeds toward the payment of plaintiffs' demands, or that the defendant Hoepfner or the parties to whom he had transferred the properties had been guilty of fraud or of such negligent mismanagement as prevented the realization of any profits. All these issues have been decided by the trial court upon conflicting evidence against the contentions of the appellants herein. It is true, as appears from the testimony and the findings of the court, that the defendant Hoepfner received all but a little over 2,000 of the 10,000 shares of the capital stock of the corporation, and also received on the books of the corporation a credit in his favor of something over \$68,000. The court finds that none of the capital stock of the company was ever sold; that no one has ever received any profit therefrom; and that the mine has not yielded minerals in excess of around \$500. The book credit of \$68,000 appears from the testimony simply to be entries evidencing money advanced by Hoepfner; the testimony being to the effect that all of the moneys expended, as hereinbefore referred to, were advanced by the defendant Hoepfner. The corporation itself, as a corporation, has not any money, or secured any funds, except through the advances made by the defendant Hoepfner.

[3, 4] Even though we admit it to be irregular, does the ruling of the trial court in permitting the B. A. C. Company, a corporation, to file a cross-complaint in this action constitute reversible error? We think not, for the simple reason that under the terms and provisions of the contract hereinbefore set forth, and considered the appellants have not shown themselves to be in anywise injured. The corporation has simply come in and admitted that it held the properties subject to the terms and conditions of the contract referred to. We fail to see how the plaintiffs have or could suffer detriment by such admission. They are rather favored, because if there then existed any possibility of obtaining returns from the property the door was open for such opportunity. There is another view which seems to us to render the presence of the corporation in this action necessary to a determination of the rights of the parties thereto. The plaintiffs would have a right at any time to come in, establish what we have hereinbefore set forth as the requisite and necessary facts in order to lay sufficient foundation or show sufficient cause to warrant a judgment in their favor, because, as against the defendant Hoepfner and any one claiming under

the contract through him, there would exist a continuing obligation to operate the properties for the purpose of securing net proceeds therefrom with which to discharge payments agreed to be paid to the plaintiffs by the defendant Hoepfner whenever so received by him. This obligation or continuing duty could only be terminated by a decree of court ascertaining and determining the impossibility of such profits ever being realized and the legal futility of expending any more money upon properties worthless for mining purposes.

It must also be borne in mind that the persons expending money in the operation of the properties covered by the contract are, by the very terms of the contract, to first receive repayment of the moneys so expended, and as soon as it is made to appear that such moneys never can be recovered by mining operations and the properties having been transferred by the plaintiffs without any provision for their return and without any intent that they should be returned, the only thing the trial court could do, or could have done, was to order a sale of the properties. Again, if such sale is irregular, the plaintiffs have no reason to complain; they having no ownership in the property. The trial court has found upon conflicting testimony that they never can be paid out of the operation of the premises, which works, perforce, an extinguishment of the liability of any one to make payment of the plaintiffs' demands. From this it follows that the ordering of a sale of the premises works no injury to the plaintiffs, but offers, though it may be very slight, the possibility of some money being derived or obtained that the court may say should be applied in making payment of the items set forth in plaintiffs' complaint. With our views thus expressed, we do not think it necessary to consider the questions tendered by appellants as to alleged conflict in the findings upon questions other than those hereinbefore set forth which are determinative, or whether a corporation, can in this manner deliver over its properties. Of this latter question the plaintiffs, not being members of the corporation, are not in a position to complain.

For the reasons set forth herein, we think the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

Opinion of Supreme Court In Bank,
Denying Hearing.

PER CURIAM. In denying the application for transfer and decision by this court, after judgment by the District Court of Appeal, we express no opinion upon the question of the finality or conclusiveness of the so-called "interlocutory judgment." The determination of that question was not necessary to the decision affirming the judgment

appealed from. Assuming that the first judgment was not final or conclusive, and that the questions discussed by counsel herein were available to the appellants upon this appeal from the later judgment, we are satisfied with the reasoning and conclusion of the District Court of Appeal affirming the same.

65 Cal. App. 452

RADICH v. CERNOKUS. (Civ. 2663.)

(District Court of Appeal, Third District, California. Jan. 26, 1924. Rehearing Denied Feb. 25, 1924. Hearing Denied by Supreme Court March 24, 1924.)

1. Brokers ⇨42—Contract for sale of real estate not invalidated because agent was without license at time of execution.

Where owner authorized a real estate agent to sell his property, that agent at the time of execution was without a broker's license was immaterial where he had such license at the time he procured a purchaser.

2. Appeal and error ⇨1010(1)—Question is whether evidence is sufficient to support findings for prevailing party.

In determining whether the evidence is sufficient to support a judgment for the prevailing party, the question is not whether there is evidence which would support a judgment in favor of the losing party, but whether there is substantial evidence to justify the material findings in favor of the prevailing party, notwithstanding there may be ample evidence to support contrary findings.

3. Brokers ⇨86(1)—Evidence held to show sale lost through owner's unreasonable delay in accepting bona fide offer.

In a broker's action for commissions, evidence held to show that an opportunity to make a sale was lost through owner's unreasonable delay and refusal to accept a bona fide offer to purchase upon the terms authorized, and to sustain findings for the broker.

4. Brokers ⇨54—Broker entitled to commissions upon finding purchaser able and willing to buy on owner's terms.

Where a broker procured a purchaser ready, able, and willing to buy the property upon the terms of the owner, he was entitled to the agreed commission.

5. Brokers ⇨40—Description in listing contract held sufficient.

Owner's property which was described in a listing contract as "forty acres located four miles of Fresno on Church Ave. road" was sufficiently described, where owner owned no other land at the time, and did not pretend that he did not understand what land was intended.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by R. P. Radich against George Cernokus. Judgment for plaintiff, and defendant appeals. Affirmed.

Everts, Ewing & Wild, Sam P. Coy, and Richard Stewart, all of Fresno, and Marion J. Mazuran and George D. Collins, Jr., both of San Francisco, for appellant.

James W. Campbell and Frank Kauke, both of Fresno, for respondent.

FINCH, P. J. This appeal is from a judgment in favor of plaintiff for the amount of an alleged commission for finding a purchaser for defendant's land.

The complaint alleges that a real estate broker's license was issued to plaintiff on the 27th day of January, 1920; that in that month the defendant authorized plaintiff to sell defendant's land as the latter's agent; that plaintiff procured a proposed purchaser who was ready, willing, and able to buy, and who offered in writing to buy defendant's land at the price and on the terms provided in the authorization, but that defendant refused to sell.

Plaintiff's license, dated January 1, 1920, was admitted in evidence. In December, 1919, defendant signed a listing card appointing plaintiff his agent to sell the land, but the card was dated January 1, 1920, for the reason that defendant had theretofore listed the land with another agent whose authorization would not expire until the latter date. The written appointment of plaintiff as defendant's agent contained the following terms, the italicized parts being in writing and the others in print:

"I hereby appoint *R. P. Radich* of Fresno, my agent, with exclusive right to sell the property described on the reverse side of this card, for the price and under the conditions hereon described, or for any less amount hereafter authorized by me, and to receive deposit on the same. * * * I hereby agree to pay *twenty-five hundred* commission on the selling price. This authorization is to remain in full force and effect for *30 days*, and thereafter until revoked by me in writing. * * * *40* acres \$60,000. * * * Terms \$60,000 cash; balance \$18,000 cash 7 p. c. Amt. Mtg. on Place \$4,000 Held by 4,000 Int. Int.—. How payable, —."

Neither party is proficient in the use of the English language and the listing card was written by another person at their request and was signed by defendant. It is apparent that the terms of the authorization to sell are uncertain. There was no uncertainty in the mind of the defendant, however, as to the terms intended by the parties in the execution of the listing contract. He testified as follows:

"Q. And the way you talked about the matter of selling, you were willing to sell for the \$18,000 and \$4,000 a year? A. Yes, sir. Q. That was satisfactory to you? A. Yes, sir. Q. And interest at 7 per cent? A. Yes, sir. * * * Q. So you remembered, didn't you, all clearly as to just how you were willing to sell the land, from the beginning on? You had in

mind what you had told Radich, you would deal for \$60,000, \$18,000 cash, and \$4,000 a year, and 7 per cent., the trays and boxes to go with the land? A. Yes, sir."

[1] Appellant contends that the listing contract is void because the plaintiff did not have a broker's license at the time of its execution. He had such a license at the time he procured a purchaser. The contention is without merit. *Houston v. Williams*, 53 Cal. App. 267, 200 Pac. 55.

[2-4] It is urged that the evidence is insufficient to support the findings and judgment. In an effort to sustain this contention appellant sets out certain favorable parts of his own testimony. The question is not whether there is evidence which would support a judgment in favor of defendant, but whether there is substantial evidence to justify the material findings in favor of plaintiff, notwithstanding the fact that there may be ample evidence to have supported contrary findings. The plaintiff testified that on the 30th day of January, 1920, he procured a written offer from Alex Josephian to purchase the property on the terms agreed upon between plaintiff and defendant. The writing was addressed to defendant, and, omitting the description of the property, was as follows:

"I hereby offer to purchase your ranch * * * for the total purchase price of sixty thousand dollars. (\$60,000) payable: Eighteen thousand dollars cash upon the execution and delivery of a written contract of sale; four thousand dollars yearly thereafter on the principal, together with interest on deferred payments at the rate of 7 per cent. per annum, payable annually; and enter into usual written contract."

The plaintiff further testified: That at the same time Josephian gave the witness a check for \$500 as a deposit on the purchase price; that on the same day he informed defendant of the transaction with Josephian, and it was agreed that the parties would meet the next day. That the next morning defendant said "he no feel like come through the deal, but he says, 'I going to think over what I'm going to do.'" That witness and Josephian went to defendant's place on the 3d of February, and there showed him the check for \$500 and asked him to sign an acceptance of Josephian's offer, but that defendant said "he no want to sign anything. He says this all the time; he want his listing card back; and sometime he says his wife no like sell property. * * * He say he

no sign anything, he no want to take that check for \$500 deposit I offer him." That on the 11th of February defendant refused to accept the offer of Josephian, saying "he going to think over what he do." That on the 16th of February Josephian informed defendant that if he did not sign the contract then Josephian would "ask for his money back," and that defendant replied: "I no sign anything. * * * I like better spend two or three or five thousand dollars for fight than come through with this." That one or two days later the defendant said to plaintiff and Josephian, "I guess we going through with the deal; I drew the contract out;" and that Josephian replied, "It is too bad, now, I paid my money for the other property when I came back from your home."

Another witness for plaintiff testified that on the 11th of February certified checks in the sum of \$18,000 were tendered to the defendant, and a formal demand made for the execution of a contract of sale in accordance with the terms of the listing contract, and that the defendant "declined to go ahead with the transaction."

There was much other evidence to corroborate plaintiff's testimony, as well as some in contradiction thereof, but enough has been stated to support the findings. The opportunity to make a sale to Josephian was lost through the defendant's unreasonable delay and refusal to accept a bona fide offer to purchase upon the terms authorized. Having procured a purchaser who was ready, willing, and able to buy the property upon such terms the plaintiff become entitled to the agreed commission.

[5] There is nothing in the contention that the property was not sufficiently described in the listing contract. It was described as "40 acres * * * located 4 miles of Fresno on Church Ave. road." The defendant testified that he owned no other land at the time the listing contract was executed, and there was no pretense at the trial that he did not understand what land was intended by the description.

It is contended that plaintiff was not entitled to a commission until a sale was consummated. The contention is fully answered by reference to the case of *Purcell v. Firth*, 175 Cal. 746, 167 Pac. 379, 3 A. L. R. 1396.

The judgment is affirmed.

We concur: PLUMMER, J.; YOUNG, Justice pro tem.

(65 Cal. App. 420)

Ex parte LAKE. (Cr. 1166.)

(District Court of Appeal, First District, Division 2, California. Jan. 24, 1924.)

1. Contempt ⚡67—Habeas corpus ⚡17—Remedy of person adjudged in contempt is by certiorari or habeas corpus.

Under Code Civ. Proc. § 1222, providing that the judgment in cases of contempt is final and conclusive, the only remedies of a person adjudged in contempt is habeas corpus or certiorari proceedings, involving the question of whether the court had jurisdiction or exceeded its jurisdiction to question the jurisdiction of the court.

2. Contempt ⚡67—Habeas corpus ⚡92(3)—Inquiry of court on certiorari or habeas corpus by person adjudged in contempt limited to determination of whether court had or exceeded jurisdiction.

In habeas corpus or certiorari by a person adjudged in contempt, the inquiry cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining whether jurisdiction existed and whether jurisdiction was exceeded.

3. Contempt ⚡67—Habeas corpus ⚡92(3)—Review on habeas corpus or certiorari involving question of whether jurisdictional facts were proved extends to the evidence itself.

In habeas corpus or certiorari by a person adjudged in contempt, in which the question involved is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself.

4. Habeas corpus ⚡92(3)—Appellate court on application for writ of habeas corpus may inquire into question of whether contempt was in fact committed.

On an application for a writ of habeas corpus by a person adjudged in contempt, the appellate court, in determining whether the lower court had jurisdiction, can inquire into the question whether the contempt was in fact committed.

5. Contempt ⚡54(1)—Affidavit essential on constructive contempt, but on direct contempt court may proceed summarily.

In case of a constructive contempt, an affidavit must be filed containing a formal charge upon which a hearing must be held, but, where a contempt has been committed in the immediate view and presence of the court, the court may proceed summarily without a charging affidavit, but must state the facts in order of commitment.

6. Contempt ⚡63(4)—Order of commitment in case of direct contempt must state facts establishing legal contempt.

In a case of direct contempt, the order of commitment must state the facts constituting the contempt, under Code Civ. Proc. § 1211, and is void, unless it shows on its face acts sufficient to constitute a legal contempt; mere conclusions being insufficient.

7. Contempt ⚡54(4)—Affidavit charging constructive contempt must state facts showing that contempt has been committed.

Affidavit charging constructive contempt to give the court jurisdiction must contain a statement of facts showing that a contempt has been committed; mere conclusions being insufficient.

8. Contempt ⚡40—Conviction can be supported only on a showing that acts charged come within a statutory definition of offense.

Contempt proceedings are of a criminal nature, and a conviction can be supported only on a showing that the acts charged come within the statutory definition of the offense.

9. Contempt ⚡63(3)—Order of commitment held insufficient to support adjudication.

Order of commitment adjudging an attorney in contempt for filing an affidavit of prejudice against the court, under Code Civ. Proc. § 170, and causing the affidavit to be read in open court in the immediate view and presence of the court, containing merely the conclusions of the trial judge that certain allegations in the affidavit were false, and that they contained imputations upon the motives of the judge, and an attack upon his integrity, and statements that certain allegations were made upon information and belief, rather than upon competent and substantial information, without finding that the affidavit was not prepared, filed, and presented in absolutely good faith, or that any contempt was willfully, maliciously, or intentionally committed, held void, being insufficient to show that the attorney had been guilty of disorderly, contemptuous, or insolent behavior toward the judge, tending to interrupt the due course of the trial, or rather judicial proceedings, under section 1209, in view of the presumption that the attorney was innocent of all wrong and other presumption that the evidence as to the contempt, if produced, would have been favorable to the attorney.

10. Habeas corpus ⚡85(3)—Evidence presumed to have been favorable to person adjudged in contempt in absence thereof in habeas corpus proceeding.

In habeas corpus proceedings by a person adjudged in contempt, it will be presumed in the absence of the evidence as to the contempt that it would have been favorable to petitioner.

11. Contempt ⚡60(3)—Must be established by clear and satisfactory proof.

Contempt must be established by a clear and satisfactory proof; a mere preponderance of the evidence being insufficient.

12. Habeas corpus ⚡85(3)—Findings and conclusions of trial court as to contempt disregarded in habeas corpus proceedings where contrary to evidence in record and presumption available to petitioner.

In habeas corpus proceedings by a person adjudged in contempt, the findings and conclusions of the trial court as to the contempt must be disregarded where contrary to the evidence in the record, and the presumption available to the petitioner.

Application by Fred W. Lake for writ of habeas corpus directed to the sheriff of Alameda county to secure petitioner's release

from custody on commitment for contempt of court. Writ granted.

Henry C. McPike, of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., Fitzgerald, Abbott & Beardsley and M. W. Dobrzensky, all of Oakland, for respondent.

NOURSE, J. This is an application for relief under habeas corpus from a commitment of the petitioner on a judgment finding him guilty of contempt of court. The charges of contempt upon which the commitment was based arose out of the action of the petitioner in filing and presenting to the court in open session a certain affidavit charging the judge of the trial court with bias and prejudice in respect to the defendants in an action then pending before the court. That action was entitled *Central Savings Bank of Oakland v. Fannie D. Lake, F. W. Lake, A. F. Lake, and E. D. Lake*, and was an action in ejectment by the purchaser at a trustees' sale under a deed of trust given to secure the payment of a promissory note. The case was before this court on June 18, 1923 (Cal. App.) 217 Pac. 563, on an appeal by the defendants from the judgment of the superior court rendered by the same judge who issued the order of commitment involved in the pending proceeding. At that time we reversed the judgment, which was in favor of plaintiff, upon the ground that the recitals in the trustees' deed of the substitution and appointment of the trustees executing such deed in the place and stead of one of the trustees named in the deed of trust is not prima facie evidence of such substitution and appointment. Following this reversal the same cause was again called for trial before the same judge of the superior court, and at the opening of the second trial thereof the petitioner herein, as attorney for the defendants in that action, and acting under the authority of section 170 of the Code of Civil Procedure, filed an affidavit claiming that the trial judge was disqualified because of interest in the subject-matter growing out of his business relations with the plaintiff bank and other interrelated corporations; personal bias and prejudice against the defendants; and a fixed and determined state of mind consisting in his prejudice against the character of defenses which the defendants were interposing against plaintiff's cause of action, which prejudice grew out of the judge's connection as a stockholder and director of a large title insurance and trust company, which company in turn was engaged in an extensive business with the plaintiff in that action and others, out of which there arose many actions which involved the same questions that were to be litigated in the action then pending before the court. It was the claim of the defendants' counsel, as set forth in the affi-

davit referred to, that, because of this state of mind of the trial judge, and because the defenses upon which he relied were more or less of a technical nature, the defendants would be unable to have a fair and impartial trial in that court. This claim was based to some extent upon the attitude of the trial judge at the first trial of the cause, but was based mainly upon the belief of the affiant that because of the judge's state of mind he would be unable to give to the defendants patient consideration of their defenses. On the filing of the affidavit the trial judge filed a counter affidavit, denying some of these allegations, and thereupon found that he was not prejudiced or biased and continued with the trial of the case. At the same time he stated that some of the matters contained in the petitioner's affidavit were contemptuous, and cited the petitioner to appear at the close of trial to show cause why he should not be punished for contempt. The record of these proceedings is not before us, but we have the affidavits and the judgment or order of commitment, which recites that a hearing was had and that the petitioner was found guilty of contempt.

[1-3] On the hearing before us the petitioner urges that the order of commitment was in excess of the jurisdiction of the court because the record does not disclose that any contempt was committed. Respondent makes the preliminary attack that this court is without power to review the proceedings in habeas corpus, because the superior court had jurisdiction of both the person and the subject-matter, and its judgment is therefore final. This point has been raised and determined on so many occasions that we had assumed that it was no longer a debatable question. The statute, section 1222 of the Code of Civil Procedure, declares that the judgment in cases of contempt is final and conclusive. Thus, one who has been adjudged guilty of contempt has but two remedies—habeas corpus and certiorari. The scope of the inquiry which the court can make upon either habeas corpus or certiorari is precisely the same. *Ex parte Drew*, 188 Cal. 717, 207 Pac. 249, 250; *Commercial Bank, etc., v. Superior Court* (Cal. Sup.) 220 Pac. 422, 423. While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. *Hotaling v. Superior Court* (Cal. Sup.) 217 Pac. 73, 75. This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. *Stumpf v. Board of Supervi-*

ors, 131 Cal. 364, 367, 63 Pac. 663, 82 Am. St. Rep. 350; McClatchy v. Superior Court, 119 Cal. 413, 419, 51 Pac. 696, 39 L. R. A. 691; Estate of Paulsen, 179 Cal. 528, 529, 530, 178 Pac. 143; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 185, 149 Pac. 35; Van Hoosear v. Railroad Com., 189 Cal. 228, 207 Pac. 903, 907; Hotaling v. Superior Court (Cal. Sup.) 217 Pac. 73, 75. In Van Hoosear v. R. R. Com., supra, the Supreme Court, on this point, say (189 Cal. 236, 207 Pac. 906):

"That under a writ of review, the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if jurisdiction is without support in the evidence, is beyond dispute."

In the same case (189 Cal. 236, 207 Pac. 907) the court quoted with approval the following passage from McClatchy v. Superior Court, supra:

"While the writ of certiorari is not a writ of error, 'it is nevertheless,' as suggested in Schwarz v. Superior Court, 111 Cal. 112, 43 Pac. 580, 'a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact.' If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose."

[4] The next question which presents itself for consideration is: Does the inquiry whether a contempt has in fact been committed go to the jurisdiction of the lower tribunal? Upon the weight of authority this question must be answered in the affirmative. Van Hoosear v. R. R. Com., supra; Hotaling v. Superior Court, supra; Commercial Bank, etc., v. Superior Court, supra. In these cases the judgment of contempt was annulled by the Supreme Court and in the Hotaling Case it was said:

"But we think that, if all the facts alleged in the affidavits constituting the complaint had been proved by competent and conclusive evidence, this order should still be annulled *because those facts do not amount to a contempt of court.*" (Italics ours.)

The reason for this rule is clearly stated in the Hotaling Case, from which we quote (217 Pac. 74):

"Contempt of court is a specific criminal offense. McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; Ex parte Hollis, 59 Cal. 408; Reymert v. Smith, 5 Cal. App. 380, 90 Pac. 470. A contempt proceeding is not a civil action, either at law or in equity [herein disagreeing with Ex parte Salowsky, 64 Cal. Dec. 119, 120, 208 Pac. 99, 100], * * * but is a separate proceeding of a criminal nature

and summary character (McClatchy v. Superior Court, supra; In re McCarty, 154 Cal. 534, 98 Pac. 540; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Selowsky v. Superior Court, 180 Cal. 404, 181 Pac. 652), in which the court exercises but a limited jurisdiction. * * * The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient."

Following this statement of principles the court then announces the rule in such clear and succinct language that we can do no better than quote it in full:

"While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. Schwarz v. Superior Court, supra; McClatchy v. Superior Court, supra; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35. *In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused* (Schwarz v. Superior Court, supra), *and no intendments or presumptions can be indulged in aid of their sufficiency* (Frowley v. Superior Court, supra). *If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled.* Frowley v. Superior Court, In re McCarty, and other cases above cited." (Emphasis ours.)

[5-7] The court was there considering a case of constructive contempt. The case before us is one charging a contempt committed in the immediate view and presence of the court. The difference is that in cases of constructive contempt an affidavit must be filed containing a formal charge upon which a hearing must be held while in these cases the court may proceed summarily without a charging affidavit. In the latter case the order of commitment must state the facts constituting the contempt (section 1211, Code Civ. Proc.), and, on review, this order must bear the same scrutiny as is given the affidavit in the former case. There is no deviation from the rule that, unless the affidavit charging constructive contempt "contains a statement of facts which shows on its face that a contempt has been committed, the court is without jurisdiction to proceed in the matter, and any judgment of contempt thereon is void." 5 Cal. Jur. pp. 938, 939. There is the same unanimity of opinion supporting the rule that in cases of direct contempt the order of commitment is void, "unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt; and such facts must prove the contempt. Mere conclusions are not sufficient." 5 Cal. Jur. pp. 950, 951.

[8] The proceeding being one of a criminal nature, a conviction of the offense can be supported only on a showing that the acts charged come within the definition of the offense. Contempt is defined in section 1209 of the Code of Civil Procedure. The only provisions of that section which could be applicable here are those contained in the first subdivision: "Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." With this in mind we come to the merits of the petition, which alleges that "no public offense, to wit, a contempt in respect to the said Hon. T. W. Harris or of the authority of the said superior court was committed by your petitioner." The order of commitment to which we must refer for the statement of the facts constituting the contempt sets forth that it lay "In the filing of said affidavit and the presentation of the same and causing the same to be read in open court and in the immediate view and presence of the court." Taking the entire judgment or order from beginning to end, we find nothing but the conclusions of the trial judge that certain allegations in the affidavit were false, that they contained imputations upon the motives of the judge and attacks upon his integrity, and that other allegations were made upon information and belief, but that the petitioner "relied primarily, if not exclusively, upon his beliefs and opinions rather than upon any competent or substantial information."

[9, 10] There is no charge or finding that the affidavit was not prepared, filed, and presented in absolute good faith, or that any contempt was willfully, maliciously, or intentionally committed. In this respect the petitioner is entitled to the benefit of all the presumptions, and particularly of the presumption of innocence of wrong. To charge him with having knowingly and intentionally made false allegations would have implied the charge of perjury. Another presumption available to petitioner herein is that from the failure to produce such evidence we must presume that if produced it would have been adverse—that is to say, it would have been favorable to petitioner. Here, as in *Works v. Superior Court*, 130 Cal. 304, 308, 62 Pac. 507, 508—

"There is no finding or recital or charge that the affidavit was presented otherwise than respectfully and properly, or with any other object than to secure the legal rights of petitioner's client, or with any intention to reflect upon or give offense to the judges of said court."

From the failure to so charge and so find it must be presumed that the affidavit was filed in good faith, because no presumptions can be indulged in to support the judgment. *Hotaling v. Superior Court*, supra. The rights of the petitioner are defined in *Works*

v. Superior Court, p. 307 (62 Pac. 508), from which we quote:

"For it cannot be doubted that since the amendment of section 170 of the Code of Civil Procedure, adopted in 1897 (Stats. 1897, p. 287), any party to an action may object to a judge upon the ground that he is so prejudiced and biased as to be incapable of trying the cause fairly and impartially, and that he may support his objection by affidavit showing such bias. Having this clear legal right, neither the party nor his attorney can be held guilty of a contempt of court in making the objection or in supporting it by proof, unless he goes out of his way to introduce something purposely and gratuitously offensive."

A case very similar to the one under consideration in *Tjosevig v. U. S.*, 255 Fed. 5, 166 C. C. A. 333. There the Circuit Court of Appeals had under review a contempt order based upon an affidavit charging the judge with bias because of his close political intimacies with the plaintiff, and because the plaintiff had through his political influence been instrumental in securing the judge's appointment. Though the trial court found that the charges were false, that they were defamatory and scandalous, and not filed in good faith, the circuit court set aside the commitment, because the evidence was not sufficient to show bad faith. The rule of the case appears in the quotation made from 6 R. C. L. p. 494, as follows:

"An attorney may in a proper case, in a respectful manner, as, for example, on an application for change of venue, allege that the judge is prejudiced against his client, and unless the act is done with reckless disregard of truth, or with the express intention to reflect upon the honor and integrity of the judge, it is not a contempt."

Here the further finding is made that these allegations contained imputations upon the motives and integrity of the judge. This must be true to a certain degree of every charge made against a judge on the grounds of bias and prejudice, as well as in a charge of personal interest. *Works v. Superior Court*, supra. If a judge has a personal prejudice against a party or a bias as to the subject so that he cannot give the party a fair and impartial hearing, his motives in insisting upon conducting the trial are in a measure impugned. The question of bias or prejudice on the part of the judge is one which usually goes to his state of mind. To lay the foundation of the attack it is necessary for the party to allege what he believes to be the state of mind of the judge. If this charge is made in a proper and respectful manner, and in good faith, for the purpose of protecting the rights of his client, the attorney is not guilty of contempt unless he goes out of his way to introduce something, "purposely and gratuitously offensive." *Works v. Superior Court*, supra, 307 (62 Pac. 507). See, also, *Mullin v.*

People, 15 Colo. 437, 24 Pac. 880, 9 L. R. A. 566, 22 Am. St. Rep. 414; 13 Corpus Jur. p. 32; 6 R. C. L. pp. 494-495. Here there is no charge, recital, or finding that in the case before us any matter was included in the affidavit for the sole purpose of giving offense, or that the facts therein alleged from which the judge himself drew the inference that they were attacks upon his motives or integrity, were not alleged in good faith and without the intention to reflect upon the judge. Here, again, we must presume that good faith and good intentions existed.

Finally it is argued that certain matters alleged in the affidavit were based upon information and belief, and that, upon the oral examination of petitioner, it was determined that he "relied primarily if not exclusively upon his beliefs and opinions rather than upon any competent or substantial information." From this it is argued that we must apply the rule stated in *Lamberson v. Superior Court*, 151 Cal. 458, 464, 91 Pac. 100, 102 (11 L. R. A. [N. S.] 619):

"So, while it is true that matters which are pertinent to the consideration and which are charged as facts are admissible, without reference to their effect upon the reputation of the judge, or of any one else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact."

But in the *Lamberson Case* the affidavit charged the judge with corruption, and was thus contemptuous per se. Such is not the case here, because the affidavit merely charges bias growing out of the judge's business and social associations without any direct imputation upon the judge's motives or integrity. If, as seems to be urged by respondent, the failure to state the sources of information was contempt in itself, the answer is that this merely goes to the sufficiency of the affidavit as proof of the fact of bias. It never has been held that in the trial of an issuable fact an attorney is guilty of contempt in merely offering insufficient, or even incompetent, evidence in an effort to prove that fact.

[11, 12] Here the direct finding is that these allegations were not based "upon any competent or substantial information." Again we have the mere conclusion of the judge unsupported by any of the facts appearing on the oral hearing. The order recites that the affidavit of the petitioner and the counter affidavits were before the court, and were considered on the hearing. These comprise the only evidence in the record before us. Taking the record as we have it, it appears that the sworn affidavit of the petitioner alleges that he did have such information and belief. This allegation is not

denied by the counter affidavit of the trial judge or by any other denials or evidence appearing in the record. It therefore stands as an admitted fact in the case. If the allegations were untrue, then the petitioner committed perjury when he supported them with his oath. The presumption, of course, is that he did not commit perjury. In the face of this presumption, taken with the clear record before us, it is necessary to conclude that the finding of the trial judge is unsupported. As said in *Hotaling v. Superior Court*, supra:

"The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient."

It was said in *Re Buckley*, 69 Cal. 1, 3, 10 Pac. 69, 70:

"We know of no rule of law in this state authorizing any court to fine and imprison a person on a mere preponderance of evidence as to his guilt. The guilt must be established by clear and satisfactory proof, and generally, if not always, in criminal actions, beyond a reasonable doubt."

So when the only evidence in the record and the presumptions available to the petitioner are contrary to the findings and conclusions of the trial court, these must be disregarded.

For the reasons given, the order of commitment is annulled, and the petitioner discharged.

We concur: LANGDON, P. J.; STURTEVANT, J.

(65 Cal. App. 359)

PEOPLE v. MAHACH et al. (Cr. 709.)

(District Court of Appeal, Third District, California. Jan. 22, 1924. Hearing Denied by Supreme Court March 21, 1924.)

1. Criminal law — 1134(8)—Evidence brought up for review and reviewable though appeal is not from order denying new trial.

Under Const. art. 6, § 4½, where correctness of rulings on evidence and the charge was challenged, all evidence is brought up for review with the appeal from the judgment, to enable the reviewing court to determine whether errors would result in a miscarriage of justice if the judgment be sustained, and, in passing on points so raised, the appellate court is required to pass on the question of sufficiency of evidence to uphold the verdict, notwithstanding there was no motion for new trial, and consequently no appeal from order denying new trial.

2. Criminal law — 384—Refusal of evidence as to trail from place defendant was found to place his suit case was discovered, held proper.

Where defendant was discovered by a posse in pursuit of bank robbers off the beaten highway, and later his suit case was found near by, witness having gone to such places three months

thereafter to ascertain whether there was a well-defined trail from the open space where defendant was found to the place his suit case was discovered, there was no error in refusing to permit witness to testify as to the trail, it not being shown that the conditions at the time of inspection were the same as at the time of defendant's apprehension.

3. Criminal law §658 — Jurors held not to have become disqualified because of trial incident committing witness for perjury.

Where during prosecution for robbery, while jury was absent, the court ordered a witness into custody and advised that question whether his testimony was perjurious be submitted to the grand jury, in absence of affidavits showing that newspaper publication of the incident was read by the jury or that they had obtained any knowledge of it, there was no evidence showing that jurors became disqualified by reason of the incident.

4. Criminal law §1163(1)—Prejudice must be shown from errors alleged.

Under Const. art. 6, § 4½, it is incumbent on the complaining party to make an affirmative showing that prejudice followed from the error relied upon.

5. Criminal law §658—Witnesses not intimidated by commitment of another witness for alleged perjury.

In a prosecution for robbery intimidation of other witnesses held not to follow from commitment of defense witness for alleged perjury.

6. Criminal law §655(5)—Rebuke of attorney for stating defense witness had been tampered with by district attorney held justified.

In a prosecution for robbery where there was no justification for accusation made by defense attorney that the district attorney had tampered with a witness for defendant, such remark justified a rebuke by the court.

7. Witnesses §277(2)—Cross-examination of defendant as to still he claimed he was attending at the time of robbery held proper.

In a prosecution for robbery where defense of one of accused was that at the time of the robbery he was attending a still for manufacturing whisky and that he was at the still continually for several days prior to and after the robbery, cross-examination as to the installation of the still ownership, whether by defendant alone or jointly with others, and whether any one assisted him in installing it, and the names of the parties who manufactured equipment, was proper.

8. Criminal law §1170½(5)—Threatening to strike testimony of contumacious witness if he did not disclose pertinent matter held without prejudice.

No rule is known authorizing a court to strike out testimony already given by a witness as a penalty for refusing to answer some specific proper question, and in prosecution for robbery, where it is proper on cross-examination to question defendant as to the person from whom he procured equipment for the still he claimed he was attending prior to, at the time, and after the robbery, and the court

threatened to strike his entire testimony from the record if he persisted in his refusal, such method adopted to force an answer was without injury to defendant.

9. Criminal law §396(2)—Irrelevant and incompetent testimony not authorized by rule in statute.

Under Code Civ. Proc. § 1854, where a part of a conversation or a writing, material and relevant to the issue, is given in evidence, the other parts of the conversation or writing having relevant reference to the part given may be introduced, and if the part not given is explanatory, or in any way qualifies or modifies the part given, then the part not given by the witness may be shown, but irrelevant and incompetent testimony was not intended to be admitted under the authority of such section.

10. Criminal law §396(2)—Allowing redirect examination of state's witness as to terms under which defendant submitted to arrest not error.

In prosecution for robbery where defense had brought out fact that there was an agreement for defendant to surrender, but left it in such manner as to convey the impression that some pressure or undue influence had been practiced on him and his wife to induce a surrender in such way as to make it appear that he had done so under consciousness of guilt, state had the right to straighten this matter by proper cross-examination of the witness.

11. Criminal law §1186(4)—Errors in view of evidence of guilt held not to result in miscarriage of justice.

In a prosecution for robbery, in view of evidence of guilt near, if not entirely, conclusive, under Const. art. 6, § 4½, no miscarriage of justice would result on an affirmance of judgment, notwithstanding errors of which complaint was justly made.

12. Robbery §24(1)—Evidence held to sustain conviction.

In prosecution for robbery of a bank in the daytime, evidence held sufficient to sustain conviction.

Appeal from Superior Court, Humboldt County; Charles O. Busick, Judge.

Lawrence Mahach and another were convicted of robbery, and they appeal. Affirmed. See, also, 213 P. 539.

T. H. Selvage and Eugene Selvage, both of Eureka, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants, who are Indians, and who were, by an information filed in the superior court of Humboldt county, jointly charged with, and, upon their trial, found guilty by a jury of, the crime of robbery, have brought the case to this court by an appeal from the judgment of conviction. The appeal is supported by a transcript of all the proceedings in the case, including the testimony. The defendants made no motion

for a new trial. The points upon which reliance is placed for a reversal of the judgment are that the evidence is insufficient to support the verdict and judgment and that the court, in rulings involving questions of the admissibility of certain testimony, committed errors, the effect of which was to deny to the accused a fair and impartial trial.

[1] The Attorney General preliminarily urges the proposition that, the defendants having failed to apply for a new trial, and, therefore, there not being here an appeal from an order refusing a new trial, the question whether the evidence supports the verdict cannot be reviewed, since, so it is contended, such question is reviewable only upon an appeal from such order. It has been held that the question whether the evidence is sufficient to support a verdict in a criminal case is reviewable on appeal from the judgment. *People v. Clayton*, 33 Cal. App. 357, 165 Pac. 37; *People v. Bailey*, 33 Cal. App. 521, 176 Pac. 880. But granting that the question of the sufficiency of the evidence cannot, in a criminal case, be reviewed on an appeal from the judgment, where no motion for a new trial has been made, and there is, consequently, no appeal from an order denying a new trial, it is still true that, since the adoption into our Constitution of section 4½ of article 6, it is, nevertheless, essential, where the correctness of rulings upon the evidence and the charge of the court is challenged, that all the evidence shall be brought up for review with the appeal from the judgment in order to enable the reviewing court to determine whether the errors so complained of, if errors they be, would result in a miscarriage of justice in the event the judgment be sustained. *People v. Clayton*, supra. And, in passing upon the points so raised, the appellate court would, in effect, be required to pass upon the question of the sufficiency of the evidence to uphold the verdict.

The record is unusually voluminous. It embraces some 1,200 pages of evidence, both direct and circumstantial, which, in our investigation of the case, has been carefully read and considered. The defendants testified and each took the witness stand and positively denied having any connection with the commission of the robbery or having any knowledge as to the identity of the perpetrators of the crime. They also contradicted, or attempted to explain, upon a theory consistent with their innocence, certain circumstances which, considered with other more direct proof of their guilt, were and are of an incriminatory character of more or less potent significance. Yet, with their denials and their explanations, the people presented a very strong case against them. Indeed, accepting, as it must be assumed that the jury did, the testimony of the witnesses introduced by the prosecution as verity, the case made by the people, in support of the charge

stated in the information, is well nigh, if, indeed, not entirely conclusive of the guilt of the accused. If, therefore, the record here disclosed no errors in the rulings of the trial court admitting incompetent and irrelevant, or excluding competent and relevant, testimony, or in the charge to the jury, the judgment of conviction of the accused would stand supported by an impregnable foundation. There were, however, errors made by the court below in the trial of the case, and we are now called upon to examine these assignments by the light of the evidence presented by the people (for it is not the office of this court to determine evidentiary conflicts) and to say whether, after such examination, they involve errors of so egregious a nature from a legal point of view as to compel the conclusion that a miscarriage of justice would attend and follow an affirmation of the judgment. Much of the evidence is of multifarious circumstances. Hence, a detailed statement thereof cannot be presented herein. It is conceived to be sufficient, therefore, to state the facts in a general way.

The robbery charged in the information occurred in the town of Fortuna, Humboldt county, on Wednesday, the 3d day of May, 1922, near the hour of 11 o'clock a. m. It appears that, on the day just mentioned, two masked men entered the Bank of Fortuna situated in said town and, holding revolvers in their hands, and after closing the front door of the bank, ordered the parties then in charge of the bank to deliver to them "your money." The bandits not only had white handkerchiefs over their faces, but also had their foreheads and the back of their necks covered with talcum powder and rouge. They also wore gloves. One of the bandits jumped over the counter, through the cashier's window, and, with a revolver in one hand, proceeded to deposit all the currency in sight and other moneys which were in the vault, which, on his command, was opened by one of the officers of the bank, into a white sack a couple of feet in length. This sack the bandit took from some part of his clothing after he got behind the counter. The coin taken by the robbers was in a Federal Reserve Bank sack, and this sack with the coin was placed in the larger sack. While he was thus engaged, the other robber held at bay with a revolver two customers or visitors in the bank, commanding them to make no move. After securing all the money in sight or shown to them by the officers of the institution, the robber who operated back of the bank counter backed out of the door into the lobby of the bank, thence, still backing, went out of the building and carried the money in the sack to an Oldsmobile car which was parked in front of and next to the sidewalk of the bank building, and threw the sack into the front part of the car next to the driver's seat. While this was going on, the other robber held his revolver upon the

people who were in the bank until the man with the sack had safely deposited it in the car, and he thereupon followed his confederate and jumped into the back part of the car. The car was then started by the man who carried the money away in the sack and proceeded at a rapid rate of speed "around the corner" of the street near which the bank was situated, and proceeded in a northerly direction from Fortuna. The sum of approximately \$19,000 was taken by the robbers. Of this amount, a sum a trifle in excess of \$3,000 was in gold and silver—the bulk thereof being in gold—and the balance in currency. Immediately following the departure of the robbers in an automobile from the bank building, the parties in the bank at the time of the commission of the crime rushed to the street and raised "a hue and cry" and so notified the people then about the streets, of the robbery. The fact that the crime had been committed immediately became known to substantially all the people of the town. The sheriff's office at Eureka, a distance of 30 or 35 miles from Fortuna, was at once apprised of the robbery by telephone, and, at the same time, a posse of Fortuna citizens, under the leadership of the local police officers, was being organized, and within less than half an hour after the robbery, the posse, consisting of some 30 or more people, was on its way in pursuit of the criminals, said posse going in automobiles in a southeasterly direction and towards the village of Carlotta, situated a distance of some eight or nine miles from Fortuna. Reaching a point about two miles from Carlotta, the posse discovered on the roadside the car—an Oldsmobile touring car—in which the bandits were seen to leave the bank building. When so found, the car was without an occupant, and no one in sight was near it.

At this juncture, it is appropriate to explain the theory of the district attorney in the prosecution of the case in the court below with respect to the Oldsmobile referred to and which theory seems to be well supported by the record. The evidence, without conflict, shows that, on the evening of the 29th day of April, 1922, one O. J. Pidgeon, a citizen of Eureka, drove his Oldsmobile to and parked it in front of the Elks' building in said city, and thereupon went to the Elks' lodgeroom to attend a session of the local organization of that order and also a banquet to be given in said hall upon the adjournment of the session. When Pidgeon returned to the sidewalk, near the hour of 11 p. m., his car was missing, and he did not recover it until the following Thursday, which was the day immediately succeeding that upon which the robbery of the bank occurred. The Oldsmobile above referred to as the one in which the robbers left the bank with the money they had taken from that institution and later found deserted on the highway near Carlotta was the car which was stolen

from Pidgeon in Eureka on the night or evening of April 29, 1922. The hypothesis upon which the people proceeded in the presentation of the case against the defendants in the trial court was that the parties who committed the bank robbery had stolen and taken the Pidgeon car on the night of the 29th day of April from where it was parked in front of the Elks' building, in the city of Eureka, and used it to facilitate the commission of the crime and "a get-away" upon the success of their scheme to rob the bank. The importance of the testimony presented in support of this theory will presently more clearly be made to appear.

The country in the neighborhood of Carlotta is mountainous and covered with heavy growths of brush, wild bushes, and trees. Running through that country are several streams of water. Among these are Yager creek and the Van Duzen river. The first named is the nearest of the two to the village of Carlotta and the point on the highway at which the Oldsmobile was found. The posse of Fortuna citizens had started from where the Oldsmobile was left by the bandits and proceeded in a search for the fugitives before the officers connected with the sheriff's and district attorney's offices arrived on the scene. They observed footprints of two different persons leading from the highway near where the bandits left the car into the woods and these tracks they followed to a point between Yager creek and the highway. At said point they observed that the footprints or tracks of one of the parties pointed in the opposite direction from that in which it clearly appeared the two individuals had traveled together to the point referred to. One of the men in pursuit of the criminals—Emerson by name—followed a trail to some brush which he found had been broken through, and passing through the brush, came to an open space, formed by the brush and other timbers, in the shape of a horseshoe, and there he discovered the defendant Mahach lying on the grass. This "open space" immediately borders on Yager creek. Mahach was ordered by Emerson to rise to his feet and throw up his hands. He obeyed the command, but asked Emerson "What is the matter with you?" to which Emerson replied that the bank at Fortuna had been robbed and that the robbers were believed to be in hiding in that vicinity. Mahach then proceeded to explain that he had been the night before at a place called Wildwood (a distance of a few miles from Carlotta), and had there engaged in gambling and drinking liquor; that he became intoxicated and left Wildwood at a late hour of the night and unconsciously wandered in the direction of Carlotta; that he did not realize where he was until the dawn of day, when he recognized certain landmarks with which he was familiar, he having at one time been employed for several months at the Holmes

lumber camp, which was situated only a few miles from Carlotta; that, being tired from the want of sleep and feeling sick, the effect of his excessive drinking the night before, he went into the brush and to the spot where he was found to lie down and sleep. He told Emerson that, in his wanderings during the night, he had lost his suit case. Emerson, not supposing that he was one of the bandits, said to Mahach that he had better leave that locality immediately, as the officers and other citizens were searching the woods thereabouts for the men who committed the crime and that he (Mahach) might be shot and injured by some one of the searchers; that he (Emerson) had only a few minutes before heard some shots. Mahach replied that he hoped they would capture the robbers, for then, so he declared, he would not be suspected of having been implicated in the robbery. Mahach thereupon left the place where he was found, and went to Holmes camp. Shortly after Mahach departed from the woods on his way to Holmes camp one of the posse, G. H. Hudson, who was with Emerson for a short time, found a suit case in some brush—a sort of thicket—a couple of hundred feet from the spot where Mahach was lying when found. It should here be stated that Mahach, when discovered, was attired in an overseas uniform, he having been a soldier in the late war. On opening the suit case an old suit of clothes, a brown cap, a pair of old tan shoes and seven or eight .38-caliber cartridges were found therein. The suit case also contained a box of talcum powder and some rouge. There was a sprinkle of talcum powder on the coat found in the suit case and also on the outside of the suit case, as well as on the ground near where Mahach was lying. On examining the shoes, they were found to be damp and in one of them there was a fresh green leaf from a tree or bush. It was also noticed that at the time he was found by Emerson Mahach's face appeared to have been recently washed and that there were indications near the edge of Yager creek near where he was found that he had washed his face in the water of said creek. Emerson and other witnesses testified that Mahach had talcum powder on the back of his neck and behind his ears. They also testified that the clothing, leggings, and shoes he had on when found did not have any mud, dust or other marks indicating that he had walked any considerable distance. All these circumstances were revealed to the sheriff upon his arrival, and also he had been informed of the fact that the men who committed the robbery had their necks and faces covered with talcum powder and rouge and therefrom he formed the belief that Mahach was one of the bandits who committed the crime. He, accompanied by one of his deputies, thereupon immediately went to Holmes camp and there placed Mahach under arrest and returned with him to

the place where the automobile had been abandoned on the highway. The suit case found, as explained, was shown to Mahach on his return with the sheriff, and he admitted that it belonged to him. Mahach was thereafter taken to the bank where a mask and a cap were placed upon him and he required to walk back and forth in the bank in the presence of the bank officials and others who were present at the time the robbery took place. He was then taken by the officers in an automobile to Eureka. The witnesses in the bank at the time of the robbery testified that as thus exhibited to them his appearance and manner of walking were the same as those of the robber on the outside of the counter when the crime was committed. During the course of the trip to Eureka Mahach did not deny having been connected with the robbery nor did he admit that he was one of the robbers. He remarked, though, that it was just as well that he should go to prison, as there was no chance for him to secure work by which he could make a living. He further stated, in effect, that the bankers had said that he would get a long term for the robbery. As a matter of fact, Mahach, in his conversations with the officers and before he pleaded to the information, never did at any time make a specific denial that he was one of the two parties that committed the robbery.

On the 7th of May, J. H. McCallum, who, with others, spent several days in searching the woods near Carlotta for the bandits, discovered the coin (amounting to over \$3,000) in a Federal Reserve Bank sack cached in a wood rat's nest, about 200 feet from where the Oldsmobile was found. The currency was not and had not, up to the time of the trial, been found.

About the time Mahach was discovered by Emerson there were, as stated by the latter to the former, several pistol shots heard. It appears that a member of the posse, Bert Robinson, followed the footprints of the two persons and came to a certain point in a thicket and heard a noise as if some person or persons had "jumped up," as the witness described the noise, and he proceeded in the direction from which the noise came. In the meantime he met a Mr. Stewart, the owner of the land near where the pursuit was being prosecuted, and he (Robinson) said to Stewart that he was going into the brush, and, if he (Stewart) should see any one, to whistle or give some alarm to attract him. Robinson had not proceeded far when Stewart whistled and the former came out of the brush in time to see a man running toward Yager creek with his shoes and a sack in his hands. He yelled at the man and commanded him to halt. The man hesitated a moment and then started to run when Robinson shot at him two or three times. Robinson saw the bare footprints of a man going in the direction in which he saw the fleeing individual, and he

(Robinson) followed. The man was within his sight for a considerable distance. Robinson saw him running down the bank of Yager creek and passing under the cliff for a considerable distance when he left the creek and started toward the Van Duzen river, Robinson in pursuit. Finally the latter lost sight of the man, but proceeded to said river where there was a canoe moored to the bank. To this point the bare footprints of the man were plainly discernible; but it seems from there on the footprints were made by shoes, the theory being that he put his shoes on at that point. The man proceeded on until he reached a point of several hundred yards from where Robinson was and then forded the river, holding the sack in his hand and passed on up a hill into the woods, and there all further trace of him was lost.

The fact that Mahach and the defendant Rube were and had been constant companions ever since the former returned from the war was generally known in and about Eureka, Pepperwood, Scotia, Wildwood, Rio Dell, and other small towns in Humboldt county. The fact was known to the sheriff's office, and after the arrest of Mahach upon circumstances which have been detailed and which were extremely suspicious, it occurred to the sheriff and the other officers that the robbers were the defendants. The suspicion that such was the truth was strengthened by the fact that the parties who saw the fleeing man at whom the shots were fired described him as being of dark complexion and corresponding in build and stature with those physical characteristics of Rube. Rube resided with his family in Pepperwood and from the evening of the 3d until the evening of the 11th of May his residence was constantly watched and guarded day and night by the officers. Mrs. Rube was informed by one of the officers that her husband was suspected of being one of the parties who robbed the bank, and finally negotiations were entered into between her and the sheriff's office looking to the consummation of an arrangement whereby she would induce her husband to surrender. On the evening of the 11th of May he appeared at his home and immediately thereafter Deputy Sheriff John Long went to his residence and placed him under arrest. Rube was shortly thereafter taken to Eureka and placed in the county jail. When Rube entered the county jail, the first question he asked was whether the other bank robber was there. At no time did he deny being connected with the commission of the crime. When asked questions by the officers tending to elicit from him some information concerning the crime, Rube stated that he did not care to discuss the matter. He did, however, in substance, say to the officers that while they and the citizens were searching for him some of them came so near where he was in hiding that he could have shot

some of them if he had had a pistol. It also appeared that the sheriff or one of his deputies stated to him that if the missing money was restored to the bank by him, his wife would receive the reward or a certain per centum on the amount of the money. Rube replied to the officer making this proposition by asking him: "How do you know that I took or have the money," or words to that effect.

We will next consider certain circumstances happening a few days before the day of the robbery, as well as those leading up to the time of the robbery on the 3d day of May. As has been shown, the Oldsmobile found on the highway near Carlotta was the property of the Mr. Pidgeon above referred to, it having been taken by some one from in front of the Elks' building in Eureka on the night of the 29th of April. The evidence shows, and, indeed, the defendants admitted the fact, that the latter were in the city of Eureka on the 29th day of April. In this connection it should be stated that, as before stated, Mahach and Rube were and had been for a long period of time constant companions. They traveled together from place to place in Humboldt and Del Norte counties, ostensibly in search of work. It was also shown that on the 25th day of April, 1922, one Ray Purcell sold to the defendant Mahach at Eureka a .38-caliber revolver. It was further shown that a few days thereafter and before the day of the robbery, Mahach and Rube were in Crescent City, Del Norte county, and occupied together a room in the Travelers' Hotel at said place and that an officer, having occasion to visit the room saw Mahach in the possession of a .38-caliber revolver. The evidence shows that on the morning of the 30th of April, which was Sunday, parties bent on fishing and picknicking, when passing through the woods about two miles from Pepperwood, saw an Oldsmobile, closely resembling the one in question, parked behind a large redwood tree about 200 or 300 yards from the highway. At the time the Oldsmobile was thus seen there was no one in or about it. Later in the afternoon some of these same parties repassed the spot where the car had been seen, and it was then not there. Several witnesses testified to having seen the Oldsmobile found on the highway near Carlotta, or one closely resembling it, being driven around a block in Pepperwood in the neighborhood of 9 o'clock on the morning of May 3d, the day of the robbery. A number of other witnesses—men employed on the highway between Pepperwood and Carlotta—saw an Oldsmobile between the hours of 9 and 10 o'clock on the morning of May 3d, being driven at a rapid rate of speed from the direction of Pepperwood and going in the direction of Fortuna. Neither at Pepperwood nor along the highway were the parties who saw the machine able to tell who was driving it. The curtains on the machine

were drawn or down and if any one was sitting in the rear seat he could not be seen by reason of that fact.

Irwin Traverse, a student at the Fortuna High School, testified that at about 11:20 a. m. on Wednesday, the 3d day of May, he had been sent by the principal of the school to the Fortuna Bank to have a dollar changed into pennies "for the purposes of the school cafeteria"; that as he was approaching the bank he observed an Oldsmobile of a deep brown color parked in front thereof; that the curtains on the car were down so that the car was inclosed; he proceeded on, and when he reached the sidewalk and was about six feet of the door of the bank he saw a man with a mask and talcum powder and rouge on his face, wearing a brown jumper, emerge from the bank carrying a sack; that the man left the bank hurriedly and went to the front of the automobile and threw the sack "over in the seat where the second person in front would sit"; that the man then jumped into the car and drove away at a rapid rate of speed. He stated that he thought that there was at least one man in the car besides Rube at the time that he saw the latter throw the sack into the car. This witness positively and unqualifiedly identified the defendant Rube as the person who left the bank with the sack and placed it in the car.

Charles H. Haight, a merchant of Fortuna, testified that he was in the bank at the time that the bandits entered it and committed the robbery. He testified that after one of the men had jumped over the counter, secured the money and was in the act of leaving, his mask "dropped down as he passed by me" and thus he was enabled to and did recognize him. He positively testified that Rube was the man who had the sack. He also testified with equal positiveness that Mahach was the other bandit. This witness gave a full description of the circumstances under which the robbery was executed and of the actions of the bandits in executing it. These circumstances are related above. He and other witnesses in the bank at the time testified that the robber on the outside of the counter said to the bandit on the inside, "Make it snappy." The witness Thompson, one of the parties in the bank at the time of the robbery, testified that he had often heard Mahach talk, and one of his favorite expressions was "Make it snappy."

Either on the 28th or 29th of April Mrs. Rube went to a store in Pepperwood, and asked for talcum powder and some rouge. A Mrs. Holmes, who was in charge of the store at the time, stated that she had just received an invoice of "Armour's" talcum powder, but that the price mark had not yet been placed upon the boxes. Mrs. Rube bought the powder and rouge. Mrs. Holmes was shown the box of powder taken from the suit case of Mahach and declared that it was of the same make that she sold to Mrs.

Rube. The witness examined the box, and was unable to find any price mark thereon.

The parties who were in the bank at the time of the robbery, when testifying at the trial, were shown the cap and coat taken from Mahach's suit case, and testified that they were exactly like the cap and coat worn by one of the robbers at the time of the commission of the crime. All the parties in the bank when the robbery occurred testified that the defendants, as to size, build, complexion, color of hair and eyes, answered the description of the bandits. Some of the same parties testified that the pistols used by the robbers had the appearance of being .38-caliber weapons.

Bert Robinson and other persons who were at the spot where Mahach was found testified that the place where he was lying when found did not show any indication of having been used or lain upon for any considerable time. In fact, Robinson testified that the grass did not show that it had been used "as a bed" at all. He also testified, as did other witnesses, that Mahach showed no signs of intoxication or of having been intoxicated and that there was not discerned any odor of liquor from his breath.

There were many other circumstances of a less incriminating nature than those recited above to which attention need not herein be given. The above is a sufficient statement of the facts presented by the people for the purposes of this decision.

The defendants, as stated above, denied being in Fortuna on the 3d of May and of being implicated in the robbery. As to the incident of the stealing of Pidgeon's Oldsmobile, as above explained, Rube declared that, while it was true that he was in Eureka on the night of the 29th of April, 1922, and went to his home at Pepperwood, a distance of 25 or 30 miles from Eureka, that night, he was taken about 2 miles from there by a friend of his by the name of Burcham. Rube also explained his absence from his home for the period beginning with the 3d and ending on the 11th day of May, by testifying that he was at an illicit still which he was maintaining in the woods a short distance from Pepperwood. It was at this point that Burcham left him, he testified. He further testified that he went to his home on Monday night, the 8th of May, and remained there overnight, returning to the still the next morning. He also testified that his wife on the night of the 8th of May told him that the officers had been there and were guarding the house, as they suspected him of being one of the parties who robbed the bank. The man Burcham, referred to, corroborated Rube's testimony that he (Burcham) took Rube to Pepperwood, or a point near that place, from Eureka on the night of the 29th of April in an automobile which he had borrowed from a friend by the name of E. L. Hartwell. Mahach's testimony consisted of

a denial of any connection with the robbery and an explanation, which it has herein hitherto been shown that he gave to Bert Robinson and others, of his presence near Carlotta on the day of the robbery. Mahach also testified that he was and had been for a long time accustomed to using talcum powder on his face and neck.

A witness by the name of McCovey testified that Mahach and Rube visited him at his place on the Klamath river on the 28th day of April, 1922, and that Rube left his place on the following day and Mahach on the 30th of April; that Mahach by mistake left a .38-caliber Smith & Wesson revolver at his (witness') place. McCovey testified that, although not subpoenaed as a witness in the case, he went to Eureka during the course of the trial and took the pistol with him; that he had never before the trial told any one that he had the pistol; that he met Mrs. Rube in Eureka on his arrival there and that, upon her suggestion, he, accompanied by her, called at the office of the attorneys for the defendants and told them of the pistol and how he came into possession of it. The pistol was introduced in evidence in connection with the testimony of the witness. He admitted that he was a particular friend of Mahach and was personally interested in his case.

Having now presented herein what is believed to be a fair and sufficiently full recital of the facts and circumstances developed by the people in support of the charge set forth in the information, and also a general, yet a sufficient, statement of the testimony introduced by the defendants to show the nature of their defense, it will be next in order to consider such of the assignments of error as it is conceived call for special notice herein for the purpose of determining the question whether any such errors were, in their effect upon the rights of the accused, so grievous or damaging as to forbid the conclusion that, in view of the entire record, a miscarriage of justice would not follow from an approval of the judgment. There are many of these assignments. Some of the rulings complained of, however, do not involve error. There are others which, while not strictly correct, resulted only in the bringing into the record and before the jury matters of such little importance that of them it can justly be said, when viewing them by the light of the evidence, that they could not have exerted any influence in bringing about the result arrived at below. There are then a few assignments which are more serious.

[2] The first assignment involves the ruling of the court refusing to allow a certain witness for the defendant to testify as to an alleged well-defined trail leading from the open space where Mahach was first found after the robbery to the place in the thicket where his suit case was found. The witness

referred to, at the request of the defendants, went to the places mentioned during the progress of the trial—three months or more after the day of the robbery—to view the situation there and ascertain whether there was such a trail as we have just referred to. The object of the testimony was, manifestly, to show that Mahach did not purposely leave the suit case in the thick growth of brush in which it was found for the purpose of hiding or concealing it so that pursuers of the bandits would probably not come across it; that there was an open, well-marked trail to the spot which was readily noticeable by any one at the place where Mahach was found. The objection to the testimony was that it was not shown or attempted to be shown that conditions at the place and surroundings where the suit case was found were the same at the time that the witness visited the place during the course of the trial as they were when it was found. The ruling sustaining the people's objection to the proposed testimony on the ground stated was proper.

[3] After the witness Burcham had completed the giving of his testimony, and while the trial was still in progress, the court, the jury then being absent from the courtroom, stated that there were "probable grounds for believing that perjury had been committed by this witness" (referring to Burcham), and thereupon ordered Burcham into the custody of the sheriff and recommended or advised that the question whether his testimony, or certain portions thereof, was or were perjurious be submitted to the grand jury of the county. Counsel for the defendants in their brief state that the incident was given publicity through the columns of the local newspapers, and insist that the action of the court in that particular worked great prejudice to the rights of the accused. There is no showing here that the incident was referred to in the newspapers of the city of Eureka, but if we assume, as well we may, that the said papers made a news item, even under sensational headlines, out of the circumstance, still the assignment can be of no purpose to defendants, since there is no showing, by affidavits or any other appropriate legal mode, that the jurors, or any of them, obtained any knowledge of the incident, either by reading the item in regard thereto or otherwise. *People v. Ruef*, 14 Cal. App. 576, 606, 114 Pac. 48, 54. There is, therefore, no evidence in this record showing or tending to show that the jurors or any of them became disqualified to fairly try the case by reason of said incident.

[4] Since the insertion of section 4½ into article 6 of the Constitution the rule is not, as formerly, that prejudice is presumed from error, but it is now incumbent upon the complaining party to make an affirmative showing that prejudice followed from the error relied upon. *People v. O'Bryan*, 165 Cal. 55, 65, 130 Pac. 1042; *People v. Stephens*, 29 Cal.

App. 616, 621, 157 Pac. 570, 572; *People v. Lapara*, 181 Cal. 66, 67, 183 Pac. 545; *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 554, 147 Pac. 238.

[5] In connection with the complaint that the conduct of the court in directing that Burcham be held for investigation on a charge of perjury was highly prejudicial to the defendants, we may pertinently consider the contention of counsel for the defendants that one of the results of that order of the court was to intimidate other witnesses for the defense to the extent that they were put in fear of giving an honest statement of any facts relevant to and in support of the defense of which they might have knowledge. As in verification of this contention, counsel call attention to the fact that the defendants' witness, Nelson, who resided near Carlotta on the day of the robbery, and saw the officers and certain members of the posse while in pursuit of the bandits, when asked by one of the attorneys for the defendants the course taken by certain of the posse from his (witness') place on the morning of the robbery, before answering the question stated that he desired some advice as to "the distance from one place to another" in his neighborhood; that he had stated on the witness stand the day before that it was "500 yards from my house up to the road. If it was measured and if there was any less or any more," he proceeded interrogatively, "do I break the laws of this country by not stating it right?" The court replied to the witness: "You give the best of your information, and I say you are not violating any laws of this country." There is nothing in the foregoing to show that the witness was intimidated, nor is there anything in his subsequent testimony or any showing by any other mode that he was intimidated. Moreover, no witness desiring or intending to tell the truth would or could be intimidated into telling an untruth or into refusing to tell all the pertinent facts he had knowledge of by any act or conduct of the court.

[6] In this connection, however, we may consider another proposition maintained by the defense, to wit: That the attorneys for the defendants brought out the fact by an examination of the witness that the preceding day said witness had been in the district attorney's office and was interviewed, presumably as to his testimony, by a deputy in that office, and thereupon the attorney for the defendants made the remark that "it is absolutely wrong for the district attorney's office to tamper with the witnesses," whereupon the court declared:

"Mr. Selva, there is no evidence here that the district attorney's office has tampered with any witness. Don't make a grandstand play before the jury now. You have no right to make any such remarks. If you want to play to the gallery, rent a hall and do it; don't come in here and make such remarks as that in the presence of the jury."

There does not appear to have been any justification for the accusation made by the attorney that the district attorney or any of his deputies had "tampered with" any of the witnesses in the case. Such a charge is a serious one, as to say that one has "tampered with" witnesses or jurors in a case implies that the tamperer has wrongfully and criminally induced or attempted to induce them to pursue a course as such which is contrary to the fact or the real truth of the matter to be judicially determined, and, in the absence of any ground for such a charge by an opposing attorney in a case and in the presence of those who are required to decide the facts, such remarks justify a rebuke of the accuser by the court. At the same time we are constrained to say that some of the language of the court, for obvious reasons, should have been omitted. While it is known that attorneys, in their zeal in espousing and defending the cause and protecting the rights of their clients, will sometimes transcend the limits of forensic propriety and thus exhaust the patience of the judge, the latter should always at least attempt to maintain that attitude of judicial equanimity which would stand in the way of any remarks coming from so high a position which might have the effect of depriving a party to the action of a fair and just trial of the issues. But, however this all may be, the record here shows that the court repeatedly, during the progress of the trial, admonished the jury in very clear and positive language that any remarks exchanged between court and counsel in the discussion of questions arising at the trial should not be considered by them in passing upon the question whether the defendants were or were not guilty; that that issue was to be determined by them solely upon the evidence, considered in the light of the law applicable to the case as given them by the court. We must assume that the jury heeded this admonition in their deliberations upon the case.

[7] The defendant Rube, in support of his claim of alibi, voluntarily, or through invitation by his own lawyers, stated that he was, and had been for some time prior to the commission of the robbery charged here, maintaining a whisky still in the woods about two miles from his home, and, as elsewhere herein shown, testified that he was at the still day and night, with the exception of Monday night, the 8th of May, from the 3d to the 11th day of May, 1922. On cross-examination, and over objections by the defendants, the people were permitted to inquire minutely into the matter of the installation of the still, the ownership thereof, whether in the defendant alone, or in him jointly with some other person or persons, whether any one assisted him in installing it and as to the names of the parties who made or manufactured the essential equipments thereof, etc. It was thus developed that the defendant had some bar-

rels and other equipments of the plant made by a plumber in the city of Eureka. Upon being asked the name of the party, the defendant flatly and persistently refused, even when directed to do so by the court, to reveal the name of said party. The district attorney, after futile efforts to elicit information from the defendant as to the name of said party, made a motion that the entire testimony of Rube be stricken from the record. The court declared the conduct of Rube in refusing to answer a pertinent question to be contumacious, but that, since Rube was already confined in jail, an order committing him to jail until he was prepared to answer the question would possess no efficacy or force, and that, therefore, the only course open to the court to force obedience by Rube to the direction that he answer the question would be to grant the motion. The court then stated that the motion to strike would be granted unless the question was answered by the defendant. The latter finally answered the question, stating, however, that he did not know the name of the party but described the place where said party was conducting business in Eureka so that the district attorney was able to identify him. It is contended that the cross-examination was improper and that the court exceeded its authority when it threatened to strike out all of the defendant's testimony theretofore given as a penalty for not answering the question, thus intimidating the witness into returning an answer, and that the conduct of the court in the matter was, therefore, highly prejudicial to the accused. In the main, there was nothing improper in the cross-examination of Rube as to the still. The "plant" was the scene of his alibi, and the people were entitled to go into the questions as to who conducted it, whether he alone or assisted by others, whether he was the owner of it or only employed by others, and the name and names of any party or parties he had obtained the materials from to construct the still, all to the end that it might be determined, if thus it could be, whether, as a matter of fact, Rube was the owner of the still or interested to an extent that would cause him to remain there during the days that he was sought by the officers.

[8] As to the means adopted by the court to compel him to name the party from whom he had obtained the barrels, etc., it is sufficient to say that, while we know of no rule in this state authorizing a court to strike out the testimony already given by a witness as a penalty for refusing to answer some specific proper question propounded to him, yet it is perfectly plain that the method adopted by the court to force an answer to the question could not have injured the defendants or their case in the slightest degree. Indeed, Rube's refusal to return a candid answer to the question would seem to be more damaging in its effect upon the case of the defend-

ants than the answer itself. He had voluntarily admitted that he had been for a long time engaged in breaking the law in maintaining a whisky still, and his refusal to name the party furnishing him the materials from which the still was made would be apt to leave the impression with the jury that he was not telling all the truth regarding the ownership and the establishment of the still. The answer could not have intensified or added to the gravity of the crime which he had already admitted having committed. The only motive that could have prompted him in refusing to answer the question, and doubtless that was his purpose in refusing to answer, would seem to be that thus he hoped to save the party from whom he had obtained the materials from prosecution in joining with him in the installation of the machinery necessary to the carrying on of an unlawful or a criminal occupation.

[9] The next and last of the assignments to which attention will herein be given, and which are regarded as involving the most serious complaints urged against the court's conduct of the case, relate to certain features of the redirect examination of the witness Long, the deputy sheriff who arrested Rube, and the cross-examination of Mrs. Rube by the district attorney. On cross-examination the attorney for the defense conducting it asked Long, referring to the circumstance of the arrest of Rube, the following questions, to which the answers following were made by the witness:

"Q. Marion Rube surrendered voluntarily that night to you? A. I don't know whether Marion done that or not; he did not state anything about surrendering voluntarily. Q. He was right there when you went into the house? A. He was in the house; yes, sir. Q. Was there not an agreement made between you and Mrs. Rube before that that he was to be at the house and surrender himself? A. She made an agreement in the sheriff's office on Sunday night, May 7th. Mr. Ross [the sheriff], Mr. Hill, and myself were present in the office. Q. And she was there in compliance with that agreement? A. She wished to see all parties; she wished to see Mr. Hill [deputy district attorney] herself that evening. Q. Mr. Long, Mr. Rube was at his own house because of an agreement entered into between you and Mrs. Rube? * * * A. Not to my knowledge. Q. Did Mrs. Rube make an agreement with any one that he would be there at that time and place? A. Well, speaking for myself, not with me."

On redirect examination the district attorney was permitted by the court to examine the witness in detail regarding the terms of said agreement. The district attorney was allowed to ask many questions which had no relevant bearing upon the case; for instance, he asked Long if Mrs. Rube did not say at the time that the alleged agreement was discussed that when "he [Rube] gets a job of work some one will say, 'There is the man that killed McCurdy,' then he loses his job."

Many other similar questions were propounded in the leading form to the witness, who was required by the court to answer them. Mrs. Rube was subjected to a similar line of cross-examination by the district attorney over the objection of counsel for the defense, many questions being asked which, like the one last above referred to, could not have thrown any light upon the issues of the case and had no relevancy to any agreement which might have been made for the surrender of Rube, and their effect could only be to place the accused in a bad light before the jury. The defense objected to the entire redirect examination of Long on the ground that it was not proper redirect examination, inasmuch as the terms or nature of the agreement were or was not shown or attempted to be shown by the cross-examination. They also objected upon the ground that the questions asked of Long on redirect examination and those asked of Mrs. Rube on cross-examination were not pertinent redirect or cross examination. The court allowed the redirect examination and cross examination referred to upon the theory that it came within the rule enunciated in section 1854 of the Code of Civil Procedure, which reads:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

The court by its rulings subjected that section to a misinterpretation of its purpose and scope. What is meant thereby is that where a part of a conversation or a writing material and relevant to the issues of a case is given in evidence, the other parts of such conversation or writing having relevant reference to the part given may also be introduced. If the part not given is explanatory of or in any way qualifies or modifies the part given, then, in such case, the part not given by the witness may be shown. It was certainly never intended that under the guise of said section there may be lugged into the record of a case a mass of irrelevant and incompetent testimony which might have a tendency to militate seriously against the rights of the party against whom it was admitted.

[10] The court made no error when it allowed the people properly to question Long on redirect examination concerning the nature and terms of the agreement. The defense had brought out the fact that there was such an agreement, but left it in such manner as possibly to convey the impression to the jury that some sort of pressure or undue influence had been practiced by the officers on Rube and his wife to induce Rube to surrender in such way as to make it appear

that he had done so under the force of a consciousness of guilt. The people, therefore, had the right to straighten this matter out by a proper examination of the witness for that purpose. As seen, however, the court permitted the people to go too far.

[11] But, by a careful examination and consideration of all the evidence in the case, we have been irresistibly persuaded to the conviction that, with all the errors of which complaint has justly, from a legal point of view, been made, some trifling and others which, in their nature and their effect, under other circumstances, would be of serious consequence, the evidence of the guilt of the accused is so near, if not entirely, conclusive, that, in obedience to the command of section 4½ of article 6 of the Constitution, we are compelled to announce the conclusion that a miscarriage of justice would not and could not result from an affirmance of the judgment. Indeed, it is our unqualified belief generated from a thorough consideration of the evidence, that of the defense as well as that of the people, that should the judgment be reversed and the accused perchance escape conviction upon a second trial, a positive miscarriage of justice would follow.

[12] We need not essay a résumé of the facts and circumstances disclosed by the evidence which seem unerringly to point to the defendants as the perpetrators of the robbery. It seems to us that no fair-minded person, after reading the evidence, even as in conspectus form it is herein produced, could fail to reach the conclusion that the jury by their verdict laid their hands squarely on the shoulders of the guilty parties. We have here a case in which there is not only positive identification of one of the defendants and almost like identification of the other as the robbers, but in which there was shown circumstance after circumstance of the most incriminatory nature that, taken together, alone would be sufficient to support a verdict of guilty. That the robbers were dark-skinned persons is shown, not alone by the positive testimony of eyewitnesses to the commission of the crime, but by the circumstance that the criminals undertook to conceal their identity, in addition to the use of masks for that purpose, by having plastered their foreheads and necks with large quantities of talcum powder and rouge and also the very significant circumstance that they wore gloves, presumably, in their minds, the surest means of concealing the color of their hands and hence the racial class to which they belong. All the circumstances following the enactment of the robbery—Mahach's presence in close proximity to the point in the highway at which the Oldsmobile was abandoned, the finding of talcum powder on his neck, coat, and in his suit case, and the resemblance of the fleeing bandit in color of face and hair, stature and build, to the defendant Rube, and

the circumstance of the known companionship of Mahach and Rube for many months before the robbery, and the many other circumstances which have been above recited—would seem to lead with direct certainty to the defendants as the authors of the crime. As to the evidence presented in behalf of the defendants and their own testimony, the reading thereof will readily and upon slight reflection convince any person of average intelligence desiring to be fair and just, that, save the express denials by the accused of their guilt, there is no such inconsistency between it and the facts and circumstances brought to light by the people (except, also, the claim of Rube that he was at his still when the robbery occurred) as would have the effect of destroying one circumstance or fact making up the people's case. Rube's story on the witness stand from the beginning to the end thereof, was such as would not bear logical analysis. But, as stated, it is not necessary that there should be an analytical examination of the overwhelming testimony of guilt produced by the people to convince any fair-minded person that the result reached by the jury in this case is as it should be. If, in such a case, section 4½ of article 6 of our Constitution does not apply, then it would be difficult to imagine a case wherein its application would be legally pertinent.

The judgment as to each of the defendants is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

65 Cal. App. 474

L. C. MORGAN CO. v. CHRISTENSEN.
(Civ. 4729.)

(District Court of Appeal, First District, Division 2, California. Feb. 1, 1924. Hearing Denied by Supreme Court March 31, 1924.)

Sales 77(1)—Contract for sale of railroad ties held to protect purchaser against fall in prices until he disposed of his ties.

Contract for sale of railroad ties on commission held to protect purchaser against fall in prices until he had disposed of ties already manufactured, to avoid a resulting oversupply.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the L. C. Morgan Company against Con Christensen. Judgment for plaintiff, and defendant appeals. Affirmed.

Puter & Quinn, of Eureka, for appellant. Mahan & Mahan, of Eureka, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover moneys alleged to be due according to the terms of a written contract. Judgment

went for the plaintiff, and the defendant has appealed.

On May 21, 1921, the plaintiff and defendant entered into a written agreement as follows, to wit:

"May 21, 1921.

"Mr. Con Christensen, McCann, Calif.—Dear Sir: In harmony with our conversation of this date we agree to handle your ties at \$1.00 per M feet commission from date until Nov. 1st 1921, applying same on our orders until filled. Basing the price at \$27.00 per M feet until the railroads place additional orders to establish a price.

"Then if it is higher we are to pay you the additional amount and if lower you are to protect us on the decline.

"Payments to be made as soon as received from the company to whom they are sold.

"In the event that you get an order direct we will cancel this agreement.

"Yours truly, The L. C. Morgan Co.,
"By L. C. Morgan."

It was the theory of the plaintiff in the trial court, and is its theory in this court, that the above instrument by its terms, when properly construed, protected the purchaser against a fall in prices on railroad ties both before and after November 1, 1921, and until the plaintiff had sold and turned over the railroad ties which it had already manufactured. On the other hand, it was and is the theory of the defendant that said instrument protected the purchaser against a decline in prices down to, but not subsequent to, November 1, 1921. As we view the instrument a proper interpretation of it requires a consideration of the circumstances under which it was executed. Although the written instrument does not so state, the writing was executed in Humboldt county, and the subject-matter of the contract was railroad ties that had been manufactured and were then in the Humboldt redwood timber belt. Immediately before the paper was executed, Mr. L. C. Morgan, representing the plaintiff, and his brother, B. F. Morgan, another officer of the plaintiff corporation, and the defendant, Mr. Christensen, were together in the office of the plaintiff discussing the matter of the purchase by the plaintiff of railroad ties from the defendant. At that particular time the defendant had on hand a quantity of ties, and had not any orders for the purchase thereof. At the same time the plaintiff had on hand a quantity of ties, and was still engaged in manufacturing additional and other ties. Moreover, the plaintiff had secured orders covering its output. When the circumstances stood thus, the parties were assembled as above stated and endeavoring to contract one with the other. Regarding that conversation the witness L. C. Morgan testified:

"At the time the shipping season started Mr. Christensen came to me a number of times and asked me to let him ship his ties on our orders, as we had received some orders, and he had not

been able to secure any. I told him that we had obligated ourselves to take all ties that we had orders for, and for that reason we could not take his ties, but to see Ogle and see if he could not go in on them. After several interviews he came out from Eureka on the 21st day of May a year ago, and told us that he was unable to make any sale of his ties, and that he needed money to meet certain demands and carry on his business; I again told him that we had—that we could not get additional orders if we took his ties on our orders, and we would have ties left of our own, that we had contracted for. For that reason we would not be able to do anything. So we discussed the matter at some length, and I finally suggested to him about taking his ties, having some left on hand, that we would be in a bad position, as the market looked like it would be lower, but that if he would be satisfied at whatever the market price on the ties would be, if he would be agreeable to taking that price that we would, as an accommodation, take those ties, or a part of his ties, if we could, and apply them on these orders of ours. He finally agreed to that, and then came up the way to determine what the price would be on the ties. I told him I was sure the price would be lower than they had been paying from the fact that they were not in the market, the supply was filled. I told him I was sure they would not be over \$25. He insisted they would be more and he figured on a \$30 price. I told him I would make up an agreement and allow for them whatever we could get for them from the railroads; we would work on the basis of \$25. He said 'No,' he had to have money to operate, and would have to get higher prices. He thought he ought to have more money. We finally arrived at a rotary price, a basis of accounting at \$27 from the fact that was the last price that the railroad had bought ties at. At that time we thought everything was thoroughly understood. We talked it over. After I wrote the little memorandum of agreement I passed it to my brother in the office, and he said we would have ties left over. Q. Was that in Christensen's presence? A. Yes, sir. He said we would have ties left over. I said we want them left over, and when the railroad bought them the price that we would get would be—we would be protected on any decline in the price."

Later the instrument was signed. Mr. B. F. Morgan was later called as a witness by the plaintiff, and the defendant took the stand as a witness in his own behalf. Neither one of those witnesses gave any testimony contrary to that given by Mr. L. C. Morgan of and concerning the conversation held by the parties at the time of the execution, or immediately prior or immediately subsequent to the execution of the written instrument.

By deciding the case in favor of the plaintiff it must be assumed that the trial court accepted as true the testimony given by the witness L. C. Morgan. If it did, it cannot be claimed that there was not presented to the trial court the circumstances under which it was made, and the matter to which

it relates. Furthermore, it is obvious that the written instrument did not purport to protect the purchaser against increased prices by the railroads if such increased prices should be made before November 1, 1921, because in that event the defendant would have had the right to go into the market and resell the same ties on the increased prices, and by the last clause in the instrument he was entitled to cancel it. The written instrument on its face showed that the plaintiff was to take the defendant's ties and apply them toward the fulfillment of orders which the plaintiff already held. Such an act on its part would manifestly result in the plaintiff having ties left over, and which, as it surmised, the plaintiff must market the following year at a figure lower, perhaps, than it was paying to the defendant. To avoid such a contingency the parties made "the price at \$27 per M feet until the railroads place additional orders to establish a price." From the uncontradicted testimony it appears that the railroads did not place such additional orders until February and March thereafter, and that the price at which such additional orders were placed was \$22 instead of \$27. If the construction which the defendant contends for should prevail, it would render nugatory the last covenant contained in the written instrument. As we have pointed out above, that passage authorized the defendant to resell and at the same time have the plaintiff cancel the written contract with it. However, during the life of the contract an increase in price was available to the defendant without going to the trouble of negotiating a sale, because it had been provided above, "Then, if it is higher, we are to pay you the additional amount, and, if lower, you are to protect us on the decline." In other words, the clause last quoted is so broad as to include the covenant last stated in the instrument and more besides, but it is the duty of the courts to give some force and effect to each and every clause contained in the contract.

In the trial court the respondent contended that a custom prevailed in Humboldt county to the effect that the price on railroad ties is made by the railroad companies annually at some time during the months of December, January, and February. In the view that we have taken of the first point it is unnecessary for us to take up a discussion of the second point.

While the second point was being presented, some rulings regarding the admission of evidence were excepted to. For the reasons last stated it becomes unnecessary to discuss those rulings.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 402

CARNAHAN v. MOTOR TRANSIT CO. et al.
(Civ. 4420.)

(District Court of Appeal, Second District, Division 1, California, Jan. 23, 1924. Hearing Denied by Supreme Court March 20, 1924.)

1. Appeal and error ⇨193(1)—Objection to form of pleading cannot be first raised on appeal.

In the absence of any demurrer to a complaint, or of any objection to testimony offered in support thereof, objection to the form rather than the substance of its allegations cannot be first raised on appeal.

2. Pleading ⇨408, 433(5)—Sufficiency of facts alleged to constitute cause of action may be raised at any time during trial, or after judgment.

The objection that a complaint does not state facts sufficient to constitute a cause of action may be made at any stage of trial, even after judgment, where there is a total want of facts stated, rather than an imperfect or defective statement of necessary facts.

3. Carriers ⇨314(2)—Allegation of negligence of motor stage driver held sufficient.

A complaint in an action for personal injuries sustained when the motor stage in which deceased was riding collided with another automobile in the midst of a pool of oil on the highway, occasioned by the breaking of a nearby pipe line, which alleged that the driver "negligently and carelessly caused said stage to collide with the automobile," held to sufficiently allege negligence.

4. Negligence ⇨111(1)—General allegation sufficient.

Negligence may be pleaded in general terms.

5. Negligence ⇨119(4)—Evidence admissible under general allegation.

Under a pleading of general negligence, any evidence tending to prove negligence is admissible.

6. Carriers ⇨315(1)—Evidence of defective lights on motor stage admissible under general allegation of negligence of driver.

Under a general allegation of negligence, in that the driver of a motor stage caused it to collide with another automobile, evidence that the car was equipped with defective lights is admissible as tending to prove the charge of negligent driving.

7. Carriers ⇨316(4)—Burden on carrier to establish freedom from negligence causing collision.

When one seeking to recover for injuries sustained while a passenger in a motor stage from a collision with another automobile has shown defendant a common carrier, himself a passenger for hire, and that a collision occurred in which he was injured, the burden is upon defendant to prove freedom from negligence.

8. Carriers ⇨315(1)—Defense of surprise and lack of preparedness to meet issue of defective lights held not available to motor transportation company.

A motor transportation company being sued for personal injuries sustained by a passenger in a collision may not complain that it was surprised and unprepared to meet the issue of defective lights, since upon the making of a prima facie case by plaintiff the burden was upon it to establish its freedom from negligence, including proof of proper lighting equipment.

9. Trial ⇨243—Instructions as to use of defective lights and as to recovery for negligence not alleged held not conflicting.

In an action for personal injuries, where only general negligence of defendant transportation company had been alleged, an instruction permitting a recovery if defendant's motor stage was equipped with defective lights held not in conflict with other instructions that no recovery could be had for any negligence other than that charged in the complaint; the general allegation being inclusive of that of defective lights.

10. Negligence ⇨12—Care required in emergency.

One suddenly confronted with unexpected danger without fault on his part is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence, and is not required to choose the most judicious course of action.

11. Negligence ⇨139(1)—Instruction on care required in emergency held erroneous.

An instruction which stated in effect, that a person suddenly confronted with unexpected danger, without fault on his part, would be required "to use that degree of care that would be required of a person under a stress of circumstances," but which did not specify the degree of care required of a person under a stress of circumstances as that degree of care which would be exercised by an ordinarily prudent person, held erroneous, and properly refused.

12. Carriers ⇨321(12)—Denial of instruction as to care required when confronted with sudden danger held not error.

In an action for personal injuries sustained by a passenger in a motor stage when it collided with another automobile due to its inability to stop because of oil on the pavement from a broken pipe line near by, denial of an instruction as to the degree of care required of the driver when confronted with the sudden danger held not erroneous where the principal negligence alleged consisted in his conduct before entering upon the oily portion of the pavement, and in the use of defective lights which failed to reveal the presence of the oil and the car with which the collision was had.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by H. L. Carnahan, as special administrator of the estate of George Schuster, deceased, against the Motor Transit Com-

pany and the General Pipe Line Company. From judgment for plaintiff, the first-named defendant appeals. Affirmed.

B. P. Gibbs, E. B. Drake and H. W. Kidd, all of Los Angeles, for appellant.

Carnahan & Clark, of Los Angeles, for respondent.

CURTIS, J. Appellant was the owner of an auto stage line operated between the city of Bakersfield and the city of Los Angeles. On September 17, 1920, respondent's intestate, George Schuster, was a passenger in one of appellant's stages, and shortly after leaving San Fernando on its regular trip from Bakersfield to Los Angeles, and while passing along and upon San Fernando boulevard, said stage collided with another automobile standing upon said highway, and as a result of said collision the said George Schuster was seriously injured. This action was instituted by him to recover damages against appellant and the defendant the General Pipe Line Company, a corporation. The jury rendered a verdict in favor of Schuster in the sum of \$12,500 against both of the defendants in said action. Upon a motion for a new trial the court granted the same as to the defendant the General Pipe Line Company, but denied said motion as to appellant. After the perfecting of said appeal the said Schuster died, and respondent was appointed special administrator of his estate, and as such is contesting said appeal.

The circumstances of said collision were as follows:

San Fernando boulevard is a paved highway, the paved portion thereof being about 20 feet in width. Near to said highway, and parallel with it, the defendant the General Pipe Line Company maintains a pipe line for the purpose of conducting oil through the same. Shortly after dark on the day of the collision this pipe line broke, and the oil therein ran out upon said highway, and at the point in said highway where the collision occurred it extended across the entire width of the paved portion of said highway and was from 1 to 5 inches in depth. Just before the accident an Italian, with a truckload of watermelons, was traveling upon said highway going from a point near San Fernando to the city of Los Angeles. When his truck encountered the oil on the highway it began to slip and skid, and finally came to a full stop, practically across the highway and on the northerly side thereof, its rear wheels resting near the northerly edge of the pavement and its front wheels standing at about the center of said pavement, with its radiator pointing south. An auto stage, belonging to the Original Stage Line, which left San Fernando a few minutes before the one in which Schuster was riding, was following the truck, and was probably 500 feet behind the truck. The driver thereof, observing

lights in front of him, drove his stage slightly to the south side of the highway, and stopped the same about opposite the truck standing across the highway, and about 3 feet therefrom. The stage of appellant, after leaving San Fernando for Los Angeles, proceeded down the highway, and encountered the oil thereon about 100 feet distant from the scene of the collision. The driver, however, failed to discover the presence of the oil until his car began to slip and skid on the highway as a result of oil being thereon. He testified that he then endeavored, by first applying his brakes, and then by changing to second speed and shutting off the power, to control his car. These efforts on his part were ineffectual, and his car crashed into the rear of the stage belonging to the Original Stage Line standing on the highway as above described. The grade of the highway from San Fernando to the point of collision was a slight down grade of about 2 per cent. The car in which the deceased was riding was equipped with two headlights and a spotlight, but these lights did not light up the highway in front of the car for a distance of over 100 feet. The highway was of asphaltum, and was similar in color to the black oil flowing thereon. The driver stated that he was traveling, at the time he encountered the oil at a rate of speed not exceeding 25 miles per hour, while there was other testimony which placed the speed of his car at this time as high as 40 miles per hour. There was nothing to obscure from his view the truck standing across the highway, nor the stage of the Original Stage Line standing opposite the truck, nor the tail light of the latter car, at least not until he ran into the oil, when, according to his testimony, the oil splashed against the windshield of his car and made it difficult to see objects ahead of him. The oil, however, was not encountered to any extent until he was within 100 feet of the point of the collision.

The first ground advanced by appellant for a reversal of the judgment is that the complaint does not state a cause of action against the appellant. It is alleged in the complaint that—

"The employee of defendant Motor Transit Company * * * negligently and carelessly caused said stage then and there to collide with, and vigorously to strike, an automobile."

[1] Appellant contends that in the foregoing allegation there is no fact alleged at all, but the mere conclusion of the pleader is stated, that is, that the driver "negligently and carelessly caused said stage to collide with an automobile." Had the complaint alleged that the employee of appellant carelessly and negligently drove his stage against another automobile, appellant concedes that it would have stated a good cause of action; but that when it alleges that the employee

carelessly and negligently caused his stage to collide with another automobile it fails to state the necessary facts. No authority is cited by appellant which supports its contention. The case of *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29, comes as near to being an authority in appellant's favor as any case cited in its brief, but the facts in that case were so different from those before us that it is of but little assistance in the decision of the present action. There was no demurrer, either general or special, filed to the complaint in this action. Neither was there any objection to any testimony offered in support thereof on the ground that the complaint did not state facts sufficient to constitute a cause of action. The case was tried upon the assumption that the complaint was sufficient, and, as the objection now made to it goes more to the form than to the substance of its allegations, it is too late to raise for the first time such an objection after judgment.

[2] It is true that the objection that the complaint does not state facts sufficient to constitute a cause of action may be made at any stage of the trial, and even after judgment; but this rule only applies when there is a total want of facts stated in the complaint, and not to an imperfect or defective statement of the necessary facts. As was said in the case of *Arnold v. American Insurance Co.*, 148 Cal. 660-663, 84 Pac. 182, 183 (25 L. R. A. [N. S.] 6):

"Facts essential to a cause of action appearing by reasonable implication only, and allegations made in the form of a legal conclusion, which merely implied the necessary material facts, have been held sufficient as against such an objection [one made after judgment]. An example of this is the case of *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772, where there was no other allegation of the essential fact of non-payment except the allegation that 'there is now due and owing,' etc. This was held sufficient after judgment, the ground of the ruling being that the objection was rather to the manner of pleading an essential fact than to the total failure to allege such fact, and that such faults, in the absence of demurrer, are cured by the judgment."

The complaint in this case is very similar, in its allegation of the fact of negligence, to that in the case of *Renfro v. Fresno City Ry. Co.*, 2 Cal. App. 317, 84 Pac. 357, wherein it was charged that—

"The employees of said defendant * * * negligently and carelessly caused said car to be suddenly and violently jerked and started and put in rapid motion without allowing plaintiff sufficient time to alight therefrom."

A judgment in plaintiff's favor was sustained by the appellate court. Counsel for appellant in that case strenuously assailed the judgment, and, after an adverse ruling in the District Court of Appeal, filed petitions, for rehearing both in the District

Court of Appeal and in the Supreme Court, each of which was denied. It is true that the particular objection made to the complaint in the present case was not urged in the *Renfro* Case, but, considering the strenuous efforts exerted by counsel in that case to secure a reversal of the judgment of the trial court, it is hardly to be conceived that they would have failed to have presented in the appellate courts the point now relied upon by appellant herein, had they considered that there was any merit in such a contention.

[3] The complaint was therefore, in our opinion, sufficient to sustain the judgment.

[4-6] Appellant's next contention is that the court erred in instructing the jury that they might find for the plaintiff if the evidence showed that the auto stage of appellant was equipped with defective lights, or lights failing to meet with the requirements of the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382, and by St. 1919, p. 191), and that the absence of such lights upon the stage was the proximate cause of the injury sustained by plaintiff. Appellant insists that no such issue is presented by the pleadings. Its counsel contend that the complaint, if it states any cause of action at all, charges only that the driver of the stage negligently operated the same so that it collided with another car, whereby plaintiff was injured, and that no mention whatever was made in the complaint of the defective lights upon the stage. We have already held that in our opinion the complaint states a cause of action. It is well settled in this state that negligence may be pleaded in general terms. *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Stephenson v. S. P. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Opitz v. Schenck*, 178 Cal. 636-638, 174 Pac. 40. The effect of this rule, permitting plaintiff to allege negligence in general terms, is to make admissible in evidence any and all testimony which would tend to prove this allegation of negligence. The negligence might consist in driving upon the wrong side of the highway, or at an excessive rate of speed, or driving a car with defective brakes, or with insufficient lights, or of any other act of the owner or driver of the car which would amount to negligence in its operation. These specific acts need not be set forth in the complaint, in view of the rule permitting negligence to be pleaded in general terms; but, when any of said acts are sought to be proven, such evidence is to be received in proof of the allegations of the complaint, and, if it is sufficient to support said allegation, and no contributory negligence is shown on the part of the plaintiff, entitles plaintiff to a judgment in his favor. With such evidence before the court it becomes its duty to instruct the jury regarding the law applicable to such evidence. To be more specific, under the general charge of negligence in

driving a car so that it collided with an object upon the highway, evidence that the car was equipped with defective lights would be admissible, and would tend to prove the charge of negligent driving. In such a case it would be the duty of the court to charge the jury to that effect. This the court did in the present action, and in so doing it committed no error.

In *Stephenson v. Southern Pacific Co.*, supra, at page 147 (34 Pac. 620), a reference is made to the following illustration taken from Bliss on Code Pleading:

"The driver upsets a stage coach and breaks a passenger's arm; careful driving will hardly have such a result; the passenger knows there has been negligence, but he may not know in what it consisted. The driver may have been drunk and asleep; he may have so harnessed the horses that they would not obey the rein, or may have made them unmanageable by improper treatment. The plaintiff can only prove that the coach was turned over; the presumption is that it was the result of negligence; if not, the defendant can show it."

The court used this illustration in explanation of the reason for the rule permitting negligence to be pleaded in general terms. In the supposed case mentioned therein all that the plaintiff need allege, to make out a case of negligence against the owner of the coach, was that the stage coach was negligently overturned. All that he need prove under such an allegation would be that the coach was overturned. If the evidence of the plaintiff should go farther, and show, or if the evidence of the defendants should show, that the cause of the overturning of the coach was the improper harnessing of the horses, then we apprehend that it would be within the province of the court to instruct the jury that, if they believed that the horses were improperly harnessed, and that the failure to properly harness them was the proximate cause of the overturning of the coach, then they should find for the plaintiff, notwithstanding the fact that the complaint merely alleged that the driver negligently drove the coach so that it was overturned.

[7, 8] Appellant claims that it was taken by surprise, and was not prepared to meet the issue of defective lights. This claim is untenable. Appellant is a common carrier, and the deceased, Schuster, was a passenger for hire in one of its stages. All the plaintiff was required to prove was that he was such a passenger, and that a collision happened in which he was injured. The burden was then upon appellant to prove that it was free from negligence. To do so it must show, among other things, that the car was properly equipped with all necessary appliances, including proper lights, so that the same could be safely operated. If it was not prepared with this evidence it was its

misfortune, and not the fault of the pleadings.

[9] Nor did this instruction conflict with other instructions given by the court at the instance of appellant, wherein the court instructed the jury that they could not find the defendant the Motor Transit Company guilty of any other negligence than that charged in the complaint. The general allegation of negligence in the complaint embraced every specific act of negligence that might be proven thereunder. Therefore, if under the allegations of negligence contained in the complaint, evidence of improper lights with which appellant's stage was equipped was admissible, and we have held that it was, then, legally speaking, the complaint charges such negligence the same as if the condition of the lights had been specifically set out in the complaint.

What we have said regarding the objections made by appellant to the instructions given by the court answers the further point made by appellant that—

"This lawsuit was based solely upon one allegation of negligence (the negligent operation of the stage) and recovery was permitted upon another, to wit: A failure to have statutory headlights on the stage."

The general allegation of negligent operation of the stage included the operation thereof with defective headlights, or lights not complying with the statutory requirements, and under such a general allegation a recovery could be had by showing any act of the driver which directly contributed to the negligent operation of the stage, whether that act be driving without proper brakes, or with defective headlights, or at an excessive speed, or any, or all of such acts.

It is finally contended by appellant that the court erred in refusing to give the following instruction:

"If you find that the driver of the autostage of the defendant Motor Transit Company was suddenly confronted with danger through the negligence, if any, of the General Pipe Line Company, by reason of oil being upon the highway, or if he was confronted with danger without fault on his part and got into same, then, even in the exercise of the highest degree of care he would only have to use that degree of care that would be required of a person when under a stress of circumstances, and not that degree of care that would be required of a person when not under a stress of circumstances, and you are not to decide whether the driver was guilty of negligence by what the after-developed facts may have shown would have been best for him to have done, or what you think he should have done. * * *"

[10, 11] A person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence, and he is

not held to that strict accountability which would require that the course chosen be the most judicious one. *McPhee v. Lavin*, 183 Cal. 268, 191 Pac. 23. It was evidently the intention to state the above principle of law in the proposed instruction refused by the court. It is apparent, however, that there was a failure to carry out this intention. It is stated in effect in said proposed instruction that a person suddenly confronted with unexpected danger without any fault on his part would only have to use that degree of care that would be required of a person when under a stress of circumstances; but just what degree of care a person under a stress of circumstances would be required to use, the instruction fails to set forth. There is absolutely nothing in the instruction that would tend to inform the jury that a person so confronted would only be required to use such means for avoiding the danger as would be used by a person of ordinary prudence in a like situation. The proposed instruction, therefore, failed to correctly state the law applicable to the degree of care required of a person suddenly confronted with danger, and was therefore properly refused.

[12] Furthermore, the refusal to give the proposed instruction, even if it correctly stated the law, would not, under the facts proven in this case, have constituted error on the part of the trial court. The negligence which the evidence shows the appellant to be guilty of was not his failure to control his car after he encountered the oil on the highway, but was the driving of his car into the oil under such circumstances that he lost control thereof to such an extent that he was unable to prevent the collision. It may be conceded that it was beyond his power to control his car after he had driven on the highway where the oil covered the same the entire width of the paved portion thereof. There is evidence in the record that this condition only prevailed for a distance of 25 feet to the rear of the car with which the collision was had; but, admitting that the oil covered the paved portion of the highway to its full width 100 feet to the rear of said car, the negligence of the driver consisted in driving his car with lights so defective that he was unable to distinguish the oil on the highway in front of him, even though it was similar in color to the paved portion of the highway, and furthermore, that on account of his defective lights he failed to see the truck and the stage of the Original Stage Line as they stood on the highway in plain view of him. A cautious driver would have discovered objects upon the highway practically as soon as they came within the range of his lights, and, if the car of appellant had been equipped with proper lights, that is, lights throwing their rays at least 200 feet in front of

the car, the driver thereof, in the exercise of that care and diligence enjoined upon one in charge of a vehicle of a common carrier, would have discovered the objects upon the highway in sufficient time to have brought his car under control before he reached the point in the highway where the oil completely covered the entire paved portion thereof. The proposed instruction only referred to the condition produced after the appellant's car encountered the oil on the highway, and, as the acts of the driver of the car which constituted the negligence in the case were all performed prior thereto, the proposed instruction was not applicable to the facts in the case, and was therefore properly refused.

Judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

65 Cal. App. 467

McCLENAHAN v. KEYES. (Civ. 4582.)

(District Court of Appeal, First District, Division 2, California. Feb. 1, 1924. Rehearing Denied Feb. 27, 1924. Hearing Denied by Supreme Court March 31, 1924.)

1. Appeal and error §1099(7)—Review on second appeal held limited to determining whether different aspect was presented because of new evidence.

Where the Supreme Court in a former appeal has established the law of the case and determined the weight, sufficiency, and effect of the evidence given at the first trial, the question on appeal from a second trial is merely whether the case wears a different aspect because of any new evidence given at the second trial.

2. Physicians and surgeons §24(3)—Evidence held insufficient to prove mother's agreement to pay for medical services rendered to daughter.

In a physician's action against mother's executor for services rendered her wealthy daughter where there was no proof of any previous transaction tending to establish the relation of debtor and creditor between the physician and the mother, declarations of a nurse, that the mother had made statements to her angrily "storming" daughter that she would pay the physician, or that her lawyer got the physician, or that she had employed him herself, were insufficient to show such a relation.

3. Evidence §472(1)—Opinion of one performing services as to who is liable for them not admissible.

Whether a liability of one for services performed for another exists must be made to depend on facts in evidence uninfluenced by personal opinions of the one performing the services.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by H. C. McClenahan against Alexander D. Keyes, executor of the last will and testament of Anna Dwight Howard. Judgment for plaintiff, defendant appeals. Reversed.

See, also, 50 Cal. App. 309, 195 Pac. 68, and 188 Cal. 574, 206 Pac. 454.

Herbert W. Erskine and Morse Erskine, both of San Francisco, for appellant.

Dozier & Dozier and Dozier, Kimball & Dozier, all of San Francisco, for respondent.

JOHNSON, Justice pro tem. This case is based upon a claim of \$1,821 for professional services rendered by plaintiff as an alienist by reason of a serious mental disorder suffered by Miss Frances Howard, a daughter of the decedent, Anna Dwight Howard. The claim consists in part of a charge for medical treatment and observation of Miss How-

ard, beginning on January 8, 1915, and in part of a charge for attendance as an expert witness in certain contested proceedings instituted with a view to having Miss Howard declared incompetent and her person and estate placed under the care of a guardian. These proceedings were dismissed without prejudice in October, 1915. In the following January, however, a new proceeding was instituted, which was uncontested, and which, without testimony from plaintiff, resulted in the appointment of a guardian.

Thereafter plaintiff brought suit against Miss Howard to recover for the same services for which claim is made here. In that action plaintiff recovered judgment for only \$45, and on his appeal the judgment was affirmed on the ground that, with the exception of attendance when Miss Howard was unconscious and in need of medical aid, the services of plaintiff could not be held to have been rendered at her request or for her benefit. *McClenahan v. Howard*, 50 Cal. App. 309, 195 Pac. 68. Thus failing to recover compensation in full from Miss Howard, plaintiff, in July, 1918, presented a claim, and in due time instituted the present action, against the estate of Miss Howard's mother, Anna Dwight Howard, who had meanwhile died, and by his complaint in this action plaintiff asserts that the services were rendered at the mother's special instance and request. The case has been tried twice. In the first trial judgment was rendered in plaintiff's favor for \$1,798.50. An appeal from the judgment was taken by the defendant and the judgment was reversed, primarily on the ground that no employment by the mother had been proved. *McClenahan v. Keyes*, 188 Cal. 574, 206 Pac. 454. Since that decision the case has been retried, with a judgment resulting in favor of the plaintiff for \$1,821 and interest, and the case now comes here on appeal by the defendant, who contends that the same vice which impaired the former, infects the present, judgment.

[1] In the former appeal the Supreme Court established the law of the case and determined the weight, sufficiency, and effect of the evidence given at the first trial. *Goldner v. Spencer*, 31 Cal. App. 13, 15, 159 Pac. 462; *Burr v. U. R. R.*, 173 Cal. 211, 212, 159 Pac. 584; *Anderson v. Aronsohn* (Cal. App.) 219 Pac. 1017.

Consequently, the question on this appeal is merely whether or not the case now wears a different aspect because of any new evidence given at the second trial.

[2] The facts being given in detail in the opinion of the Supreme Court, a brief statement will suffice here. Miss Howard was a young woman of about 33 years of age and possessed of property worth over \$100,000. On January 7, 1915, her mental condition was such as to alarm her relatives, and she was placed in a sanitarium conducted by

Dr. Bering, who on the following day, while Miss Howard was unconscious, summoned Dr. McClenahan to her aid. This was the beginning of a service which continued for a considerable period. At the time when plaintiff was first called, Miss Howard's mother was in the East, and on being informed of the daughter's condition, Mrs. Howard hastened to San Francisco in company with her son-in-law, Mr. Whitwell. When Mrs. Howard arrived she and Dr. McClenahan had a conference, as to which the testimony, embodied in the doctor's deposition, was precisely the same at both trials; and the Supreme Court has held that nothing occurring at that conference constituted an employment of the doctor by Mrs. Howard.

Prior to Mrs. Howard's arrival, Dr. McClenahan had had a meeting with Miss Howard's attorney, Halsey Rixford; and on that occasion Mr. Rixford showed the doctor a telegram which had come to Mr. Rixford from the East. The authorship of this telegram was left in doubt at the first trial, the evidence being that the message was sent either by Mrs. Howard or her son-in-law, Mr. Whitwell. At the second trial Mr. Rixford's recollection was that he received two telegrams; one before Mrs. Howard left Boston, which was either from her or Whitwell, the other while Mrs. Howard was on the way, which, as Mr. Rixford recalls, was signed by her and "expressed a maternal solicitude for her daughter's welfare," and stated the date of the mother's probable arrival in San Francisco. This latter telegram, however, was not, according to Rixford's recollection, shown to the doctor. The telegram which the doctor saw must then have been the first telegram received; and its authorship is left in the same doubt at the second trial as at the first. Accordingly, under the ruling of the Supreme Court, that telegram must be deemed immaterial. Even if the later telegram had been shown to the doctor, it contained nothing authorizing his employment; hence neither telegram serves to strengthen the plaintiff's case. Were it to be assumed, however, that Mr. Rixford did have express authority from Mrs. Howard to employ a physician, the testimony shows without conflict that no employment in her behalf was in fact attempted. Mr. Rixford testified positively that he did not undertake to employ Dr. McClenahan for any one, but gave the doctor to understand that if Miss Howard should be declared incompetent or insane, compensation for his services would be payable out of her estate. And the testimony of Dr. McClenahan himself in the guardianship proceedings, found also in the record here, shows that he made no arrangements for compensation, but that he expected Miss Howard, or some one in charge of her affairs, to compensate him adequately for his time and services. There is nothing,

therefore, in the new testimony of Mr. Rixford that lends support to the plaintiff's case.

In an effort at the last trial to establish an employment by Mrs. Howard, the plaintiff called as a witness Mrs. Vandever, who did not appear at the previous trial. Mrs. Vandever was Miss Howard's nurse, and was present at several meetings, described as stormy, between Miss Howard and her mother, at which mention was made of the doctors. The first of these conversations was at the Adler Sanitarium in February, 1915, and the witness testified as follows:

"Every time the question came up, the daughter would say to the mother: 'How long am I to have these nurses? How long am I to have these doctors? I don't want them. There is nothing the matter with me.' That is what the daughter said always to the mother, and she would say, 'Frances, this will soon be settled, and then you will be all right.' She said, 'I don't want Dr. McClenahan, and I am not going to pay him.' That is the statement the daughter would make every time. The mother would say: 'Well, now, Frances, you are not to worry about paying. That is my business. I am going to pay Dr. McClenahan. It was me that got him in the first place, through my attorney.' She said, 'It was through the lawyer that I got Dr. McClenahan.'"

Speaking again of a conversation in April, the same witness said:

"The mother came to have lunch in San Mateo with the daughter and me, and after lunch, in the living room, Miss Frances Howard started the same question, and again the mother told her that: 'It is going to be settled in court, and you will probably go with me East, and I will take care of your affairs, and you don't have to pay. I am going to pay. I have employed Dr. McClenahan myself.' She made the statement that she was glad to have him."

Proceeding further the witness gave also the following testimony:

"I was with the daughter four times that I can remember at the Adler, and when the daughter did first ask the mother how she got the doctor, and I do not recall that she said exactly by telegraph, but I know she said: 'My lawyers got Dr. McClenahan. I want Dr. McClenahan, and I continued with him.' And at the San Mateo home and at the Peninsular Hotel the matter would come up at luncheon, during the time I was with Miss Howard.

"Q. You said at the Peninsular Hotel, did you not? A. Yes.

"Q. In San Mateo? A. Yes, in San Mateo. And there was no time that the daughter would not bring this same conversation up of how long she was going to have a doctor and how long she was going to have a nurse, and the same question, 'I am not going to pay them.' And the mother each time would try to make her quit talking money, and each time would say: 'I will take care of that for you. I will pay the doctor.' That statement was made every time to the daughter by the mother in my presence.

"Q. You are not able to state just exactly the

date of each of the conversations, are you?
A. No.

"Q. The one at the sanitarium, the one at the home in San Mateo, and the one at the Peninsular Hotel? A. No, she would generally be storming—the daughter would storm with the mother.

"Q. Storm? A. Yes; be angry, you know, with the mother.

"Q. You mean, find fault with her? A. She was very noisy and very loud at times."

Such being the supplemental testimony, we are to determine whether with its aid the evidence as a whole can now be said to support a finding of an employment of Dr. McClenahan by Mrs. Howard.

In deciding the former appeal the Supreme Court declared the general rule of law to be that one who calls upon a physician to render services to another is not liable for those services, in the absence of an express agreement to pay therefor; and, though a parent requests medical service for an adult son or daughter, such request does not raise even an implied promise to pay.

The court further determined that nothing in the dealings had by Dr. McClenahan either with Mrs. Howard herself or any of the attorneys showed an employment of the doctor by Mrs. Howard, or a promise binding her either expressly or impliedly to pay his charges. That being the case, surely there is nothing in Mrs. Vandever's testimony which supplies proof ever so slight of an express promise on the part of Mrs. Howard to Dr. McClenahan.

In order to create a contract there must be a meeting of minds between parties treating either directly or through some agency. And without a shadow of proof of any previous transaction establishing the relation of debtor and creditor between Mrs. Howard and Dr. McClenahan, Mrs. Howard's statements to her angrily "storming" daughter that she herself would pay the doctor, or that her lawyers got the doctor, or that she had employed him herself, cannot give body to that which is bodiless or infuse the breath of life into the stuff of dreams. If there were any evidence of an actual contract, Mrs. Vandever's testimony would then be corroborative. But neither Mrs. Howard herself nor any attorney made to the doctor any promise to pay; and without evidence of some authentic contract previously made, there is no art in the law whereby such declarations can be made of themselves to speak into existence an indebtedness which before was not. See *Bennett v. Potter*, 180 Cal. 736, 745-746, 183 Pac. 156; *Stimson Mill Co. v. Hughes Mfg. Co.*, 8 Cal. App. 559, 561-562, 97 Pac. 322.

To fashion a contract out of Mrs. Vandever's testimony it would be necessary to reject arbitrarily and unreasonably all the other evidence, including the actions and testimony of Dr. McClenahan himself, despite

the fact that such other evidence affords clear, direct, and positive proof that Mrs. Howard never did obligate herself to pay the fees. The record does not justify, opposing conclusions, and under such circumstances it must be said that Mrs. Vandever's testimony does not, in legal intentment, conflict with the other testimony in the case. Seeley v. Osborne, 220 N. Y. 416, 422, 116 N. E. 97.

It is unfortunate and seemingly inequitable that Dr. McClenahan has had to go unpaid. He gave undoubtedly important and valuable aid much desired by Miss Howard's relatives. And the situation in which he is left is apparently due to the fact that, unmindful of his private interest, he trusted to be paid instead of exacting an express agreement from some one competent to act.

[3] In different trials the doctor has voiced different inferences or opinions as to who was his real debtor; but now, as on the former occasions, liability must be made to depend on the facts in evidence, uninfluenced by personal opinions. *Burns v. Jackson*, 59 Cal. App. 662, 666, 211 Pac. 821.

There has, however, at no time been variance in the testimony as to the governing facts; and since the record here presented is in all substantial particulars the same as that at the former trial, it follows that this appeal must be controlled by the law of the case heretofore promulgated. Inasmuch as the evidence, weighed by that standard, fails to support findings in favor of plaintiff, the judgment must be reversed. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 456

PRENDERGAST v. MITCHELL-SILLIMAN
CO. et al. (Civ. 4813.)

(District Court of Appeal, First District, Division 2, California. Jan. 26, 1924. Hearing Denied by Supreme Court March 24, 1924.)

Venue $\Leftrightarrow$ 52 1/2—Right to change defeated by dismissal as to individual defendants after motion filed.

Where plaintiff would have right to have an action tried where brought, had it been against the corporation defendants alone, and, after appearance and filing of motion for change of place of trial by the individual defendants, he directed the clerk of court to dismiss the action as to them, the right to change, existing in such individual defendants only, was thereby defeated; right of plaintiff to dismiss existing, under Code Civ. Proc. § 581, at any time before the trial, and sections 392-397, as to venue, not being inconsistent therewith.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by S. J. Prendergast against the Mitchell-Silliman Company and others. From an order denying motion to change place of trial, defendants appeal. Affirmed.

Walter H. Linforth, of San Francisco, and C. F. Lacey, of Salinas, for appellants.

Philip C. Boardman, of San Francisco, for respondent.

STURTEVANT, J. This is an appeal from an order denying the motion of the defendant to change the place of trial. On May 17, 1921, the plaintiff commenced an action against the defendants by filing in the office of the county clerk of San Francisco a complaint in which he alleged that he had been employed by the defendants, had rendered service for them, and that the reasonable value of his services was \$2,600, of which \$1,823 remained unpaid. Thereafter summons was served on each of the defendants except the fictitious defendants John Doe and Richard Roe. Thereafter C. F. Lacey, Esq., as attorney for all defendants except the fictitious defendants, gave notice:

"Said motion will be made upon the ground that at the time of the commencement of said action the defendants O. P. Silliman, W. G. Silliman, and Lee Post were and are now residents of Monterey county, California, and the Mitchell-Silliman Company, a corporation, and the Monterey County Bank, a corporation, at the time of the commencement of said action had and maintained, and still have and maintain, their respective principal places of business in Monterey county, California, and that said Monterey county, California, is the proper county for the trial of said action."

That notice was accompanied by a demand signed by each of the defendants. It was also accompanied by affidavits as follows: (1) The affidavit of O. P. Silliman as president of the Mitchell-Silliman Company, a corporation, from which affidavit it appears that the principal place of business of the corporation is Salinas City, Monterey county; (2) the joint affidavit of O. P. Silliman, W. G. Silliman, and Lee Post, from which it appears that each of them was a resident of Monterey county when the action was commenced; and (3) the affidavit of Luther Rodgers, president of the Monterey County Bank, from which it appears that said bank is a corporation and has its principal place of business at Salinas City, Monterey county; and said moving papers were accompanied by a demurrer. Each of said papers was filed on October 13, 1921. The return date of the motion, as alleged in the notice of motion, was October 28, 1921.

After the service and filing of said papers the plaintiff appeared in the county clerk's office and directed the county clerk to dismiss the action as to the defendants O. P. Silliman, W. G. Silliman, and Lee Post. A few days later he filed his own affidavit to the effect that—

"The obligation and liability of said defendants thereunder, and breach thereof, arose in the city and county of San Francisco. * * *"

Later the motion was presented to the trial court, supported by the papers designated, the motion was denied, and a notice of appeal was filed which purports to be the appeal of each and all of the defendants except John Doe and Richard Roe. It is not disputed that the fictitious defendants are to be disregarded in determining a motion for the change of a place of trial. *Ludington E. Co. v. La Fortuna Min. Co.*, 4 Cal. App. 369, 88 Pac. 290. Nor is there any contention that if the action had been brought against the corporations alone the plaintiff would have a right to have the action tried in San Francisco because the services are alleged to have been rendered there. *Cook v. Ray Manufacturing Co.*, 159 Cal. 694, 115 Pac. 318. However, the appellants claim that right to a change of place of trial must be determined by the conditions existing when the defendants first appeared in the action. *Donohoe v. Wooster*, 163 Cal. 114, 124 Pac. 730; *Remington S. M. Co. v. Cole*, 62 Cal. 311; *Hennessy v. Nicol*, 105 Cal. 138, 38 Pac. 649; *Ah Fong v. Sternes*, 79 Cal. 30, 33, 21 Pac. 381; *Buell v. Dodge*, 57 Cal. 645. As to that contention the respondent replies that the effect of the filing of the appearances and moving papers was to prevent the plaintiff from asking or taking any judicial relief until the motion of the defendants had first been heard and determined; or, in other words, that the filing of those papers operated to intercept action by the court, but not action by the clerk of the court. To this statement the appellants reply that such an interpretation results in vesting more power in the clerk than is vested in the court of which he is a mere officer. The same reply could have been made concerning the power to file of record a complaint, or to issue a summons. The answer is, however, that the statute is so written.

The appellants urge that their theory must be supported to the end that the provisions of sections 392-397 of the Code of Civil Procedure be reconciled with the provisions of section 581 of the Code of Civil Procedure. But the vice of that contention is that the sections mentioned contain no conflict, and there is nothing to be reconciled. On the other hand, if the courts should hold with the appellants, then the latter section would be construed as though it were written as follows:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant, or

no appearance and notice of motion to change the place of trial has been served or filed."

Appellants' contention would require us to read into the statute the whole of the expression as underlined. To do so would be to legislate instead of to interpret.

The individual defendants who had been joined with the corporations had the right, notwithstanding such joinder, to have the action tried in a county where they resided at the time the action was commenced. *Ah Fong v. Sternes*, supra. But that right on the part of the individual defendants was no concern of the codefendant corporations. *Strassburger v. Sante Fé L. I. Co.*, 54 Cal. App. 7, 9, 200 Pac. 1065.

Notwithstanding the dismissal of the individual defendants and that such dismissal was a step in favor of those defendants, nevertheless they took a purported appeal. Such action was consistent with their theory, but certainly conferred on them no additional rights, neither did it confer any additional rights on the defendant corporations.

We find no prejudicial error in the record. The order is affirmed.

We concur: LANGDON, P. J., NOURSE, J.

(65 Cal. App. 430)

PECK v. SIMON NEWMAN CO. et al.
(Civ. 2682.)

(District Court of Appeal, Third District, California. Jan. 24, 1924. Hearing Denied by Supreme Court March 24, 1924.)

I. Evidence §98—Failure of plaintiff to produce evidence on any issue justifying finding in favor of defendant on that issue.

Since plaintiff has the burden of proof, failure to produce evidence upon any issue justifies a finding in favor of defendant on such issue.

2. Landlord and tenant §332—Finding on issue of ownership of live stock sustained.

In an action by the lessor of a farm against an attachment creditor of the lessee for the conversion of live stock claimed by plaintiff by virtue of the lease, evidence held to sustain a finding that the property in controversy was purchased and paid for by lessee and was at all times in his actual possession, and that plaintiff at no time asserted any title to such property.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by J. F. Peck against the Simon Newman Company and Emil S. Wagenheim. Judgment for defendants. Plaintiff appeals. Affirmed.

C. M. Peck and H. C. McPike, both of Oakland, for appellant.

Goldman & Altman, of San Francisco, for respondents.

FINCH, P. J. Plaintiff appeals from a judgment in favor of defendants.

Plaintiff leased certain lands belonging to him to E. T. Wiggins, together with personal property thereon, including cows, bulls, heifers, calves, and hogs, for a term of seven years from January 1, 1916; the lessee to furnish the necessary labor in the operation and management of the property and the net proceeds to be divided equally between the parties. The lease provided:

"The lessee shall return to the lessor, at the end of the termination of the term, the same number of cows of the same ages of those leased, and at all times the cows upon the land which are purchased from the proceeds of the sales of the cows leased or acquired by exchange of said cows shall belong to the lessor and be a part of the property leased herewith and be held under the same terms as though the original cow had continued upon the place."

Like provisions were made as to the heifers, bulls, and hogs. It was further agreed:

"That, at all times, hogs, horses, mules and cattle, however acquired from funds derived, directly or indirectly, from said leased land or the produce thereof to the number of those leased shall belong to the lessor with the division herein provided for upon the termination of the lease. * * * At the termination of the term, the cows, hogs, calves, heifers and bulls shall be restored in kind and the remainder of the increase shall be divided as follows: If any of the remaining cows, calves, heifers, bulls or hogs have been purchased from the proceeds of the ranch, or the increase of those leased, these shall be equally divided between the lessor and the lessee as nearly as can be, according to their value, numbers and ages."

Further provision was made that one-half of the net proceeds "shall be paid to the lessor on the first day of each and every month."

[1] May 25, 1918, in an action brought by defendant Simon Newman Company against Wiggins, the live stock then on the land was attached; the company paying the mortgage liens thereon hereinafter mentioned. May 29, 1918, Wiggins gave the company a bill of sale of the live stock and the company took possession of the property. A part of the property included in the bill of sale was thereafter delivered by the company to the plaintiff, and this action involves only the hogs and the cattle described in the bill of sale. Plaintiff thereafter commenced this action of conversion and at the trial thereof sought to prove that he was the owner of the live stock by virtue of the terms of the lease, and further that, prior to the attachment, Wiggins had transferred the property to the plaintiff, pursuant to the provisions of the lease. The only ground urged for a reversal is that the evidence is insufficient to support the findings. The evidence bearing upon some of the issues is very meager, and, since plaintiff had the burden of proof, failure to

produce evidence upon any issue justifies a finding in favor of defendants upon such issue.

[2] To establish plaintiff's ownership of the live stock in controversy by virtue of the terms of the lease, it was necessary to show that the same were a part of the original stock or of the increase thereof, or had been "purchased from the proceeds of the sales" thereof, or "acquired by exchange," or acquired by the plaintiff himself by purchase or otherwise. The record is silent as to whether any of the hogs included in the bill of sale were a part of the original stock or had been acquired in such manner as to bring them within the terms of the lease. It is conceded in appellant's opening brief that "some time after entering into possession of the leased property, E. T. Wiggins disposed of all of the leased cows, heifers and calves." There is no claim that any of the cattle mentioned in the bill of sale are a part of the increase of the original stock. It remains to be ascertained whether they were purchased by plaintiff or "purchased from the proceeds of the sales" of live stock belonging to plaintiff. Relative to a part of the cattle in controversy, Wiggins testified:

"I * * * found this bunch of cattle and one of the boys was with me, and we decided that they were all right. I went up to Mr. J. F. Peck's office in Oakland and told him of the cattle, and he said to go ahead and buy them, and I asked him how about the money. He gave me a check out of his pocketbook and told me to give a personal check for the amount. * * * When I objected, he said that it was all right; that when the check came in he would take care of it. When the cattle came, I sent them to the ranch by the boys, myself going to Oakland. I asked Mr. Peck if he had taken care of said check. He said he had forgotten it."

A promissory note and a mortgage on the cattle purchased were then executed by Wiggins to the bank on which the check was drawn for the amount thereof. Plaintiff indorsed the note, but Wiggins seems not to have known of the indorsement. In answer to a question as to whether plaintiff said anything "as to why the chattel mortgage was to be placed in your name," Wiggins testified:

"Yes, sir; there was, but I don't know as I could recall the exact words. He did not care to have people down there think that he was buying cattle on time, or something to that effect."

He testified that plaintiff never made "any claim to any live stock on the ranch" prior to the execution of the bill of sale to the company. Another lot of cattle was purchased by Wiggins and a promissory note, secured by a mortgage on the cattle, was given to a partner of plaintiff for the amount necessary for payment of the purchase price. The plaintiff requested his partner to make the loan. Wiggins testified that he had no conversation

with plaintiff "with reference to what was to be done with the live stock when the chattel mortgage would be paid, * * * only in a general way, that they were to be there on the place. The mortgage was given with the note and would be renewed from time to time until paid off by me"; that witness paid the sum of \$600 out of his own funds for some of the cattle purchased; that nothing was said as to who was to be the owner of the mortgaged property "when the chattel mortgages were paid"; that after the company had paid the mortgages, the plaintiff said "that it was the money he wanted, not the stock." C. M. Peck, a son of the plaintiff, was plaintiff's agent during the term of the lease. He visited the ranch about twice a month and had general charge thereof. Included in the property delivered by Wiggins to the company pursuant to the bill of sale were some farming implements. Shortly after the property had been so delivered, C. M. Peck demanded the return of such farming implements but made no demand for the return of the live stock. He explained his failure to make such demand by saying that he had not at that time seen the lease and did not know whether the cattle belonged to plaintiff, and that plaintiff was then in Death Valley. A demand for the return of the live stock seems to have been made subsequently. The testimony of plaintiff throws no light upon the transactions between himself and Wiggins. If it be conceded that the foregoing evidence would support a finding to the effect that plaintiff was the owner of the property in question under the terms of the lease, it cannot be held that it requires such a finding.

C. M. Peck testified: That prior to the levy of the attachment Wiggins telephoned the witness, saying:

"I am going to give up this lease. * * * I am not going to fool with the live stock anymore."

That witness replied:

"You deliver the cattle at the place to Fred Hornback and I will get up there in the next day or so."

That witness went to the ranch two or three days later, before the attachment was levied, and that Wiggins there said:

"I will give up the cattle under the terms of the lease. * * * Hornback out there has already taken charge of them. * * * I delivered them to him in compliance with our telephone conversation the other day."

The testimony of the witness is corroborated by that of Glen Hornback and Fred Hornback. Wm. C. Wiggins testified that C. M. Peck was not at the ranch at the time stated by the latter. E. T. Wiggins testified that he was in the actual possession of the property up to the time of the attachment; that he did not have the telephone conversation with C. M. Peck as testified by the latter; and that

he did not tell Hornback that C. M. Peck had said to turn the cattle over to Hornback. In weighing the evidence, the court may have considered of some importance the failure of C. M. Peck to demand the return of the live stock at the time he demanded the return of the farming implements as heretofore stated. If in fact the live stock was transferred to plaintiff prior to the attachment and the execution of the bill of sale, C. M. Peck had knowledge thereof, according to his own testimony, and it would have been most natural for him to demand the return thereof with the farming implements.

From the conflicting evidence, the court found that the personal property in controversy "was actually purchased by said E. T. Wiggins and paid for by him and was at all times in his actual possession and at no time was said property ever delivered by said Wiggins to plaintiff, but plaintiff knew that said E. T. Wiggins claimed to be the owner thereof and was in the actual possession of said property, and at no time did said plaintiff assert any title to said property." There is sufficient evidence to support the findings, notwithstanding the contradictory evidence.

The judgment is affirmed.

We concur: PLUMMER, J.; YOUNG, Justice pro tem.

(65 Cal. App. 435)

MONTEVERDE v. BROOKE REALTY CO.
(CN. 2715.)

(District Court of Appeal, Third District, California. Jan. 24, 1924. Rehearing Denied Feb. 23, 1924. Hearing Denied by Supreme Court March 24, 1924.)

1. Vendor and purchaser ⇨49—Covenant by vendor of real estate to construct, grade, and improve highways held substantially complied with.

A covenant by a vendor of lots to construct, grade, and improve highways in the subdivision was substantially complied with when the streets were graded, in absence of a showing of the surrounding circumstances and mutual understanding of the parties as to the character of the street improvements.

2. Vendor and purchaser ⇨339—Purchaser justified in treating contract abandoned on refusal of vendor to comply with covenant therein.

In a contract for the sale of lots with a covenant by vendor to pipe water thereto, when vendor refused to comply with the covenant, purchaser was released from the duty of making further demand and was justified in treating the contract as abandoned and suing for recovery of the money paid without any demand other than the suit.

3. Vendor and purchaser ⇨341(1)—Purchase price recoverable on vendor's refusal to perform covenant before time for performance.

In a contract for the sale of lots with a covenant by vendor to pipe water thereto, upon

completion of dwelling, that purchaser had not constructed a dwelling house did not preclude action for the purchase money paid, when vendor informed purchaser that he would not comply with the covenant.

4. Vendor and purchaser ⇨58, 110 — Covenants held dependent; vendor's agreement to pipe water held a covenant, breach of which was ground for rescission.

In a contract for the sale of building lots, a covenant by vendor to pipe water thereto and covenant by purchaser to pay the purchase price were dependent, and vendor's covenant being material, a breach thereof justified a rescission by purchaser.

5. Vendor and purchaser ⇨49 — Vendor's agreement to pipe water not complied with by putting down a well.

The putting down of a well on building lots was not a performance of vendor's covenant to pipe water thereto.

6. Vendor and purchaser ⇨341(3)—Burden on vendor to excuse performance of agreement to pipe water to property sold.

Where vendor of lots covenanted to pipe water thereto, if there was anything to excuse performance thereof, the burden was on vendor to show it in purchaser's action to recover payments made.

7. Vendor and purchaser ⇨114—Vendor could not set up delay of purchaser in disaffirming contract.

A covenant by vendor to pipe water to lots sold being dependent, and vendor having it in his power to perform it, and not having suffered because of purchaser's delay in demanding performance of the covenant, he could not set up such delay in an action by purchaser for the purchase money.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John J. Monteverde against the Brooke Realty Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

V. L. Hatfield and W. H. Hatfield, both of Sacramento, for appellant.

Dunn & Brand, of Sacramento, for respondent.

FINCH, P. J. The complaint alleges that on or about the 24th day of January, 1921, the defendant became indebted to Mary Monteverde in the sum of \$1,239.22 "as and for money had and received by the defendant from the said Mary Monteverde in successive and continuous monthly payments * * * for the use and benefit of said Mary Monteverde"; that she assigned her claim for said money to plaintiff; and that no part thereof has been paid. The answer denies the allegations of the complaint. The court found that the claim of Mary Monteverde had been duly assigned to plaintiff as alleged, but that the other aforesaid allegations of the complaint are untrue and gave the de-

defendant judgment for costs. Plaintiff appeals from the judgment.

The case was submitted in the trial court upon an agreed statement of facts. From such statement it appears that by two written contracts, dated respectively July 5 and July 12, 1911, the defendant agreed to sell, and Mary Monteverde agreed to buy, two lots in North Sacramento Heights at the price of \$700 each, an initial payment of \$70 to be made on the first lot and \$10 on the other; the remainder to be paid at the rate of \$10 a month on each lot. The terms of the two contracts were the same except as to the descriptions of the lots and the amounts of the initial payments. The lots were unimproved and have remained unimproved and vacant at all times. Monthly payments were made from time to time, but not regularly as provided in the contracts. Defendant, however, took no steps to forfeit the purchaser's rights under the contracts, and in May, 1921, all installments of the purchase price had been paid except the total sum of \$205. May 4th, the defendant tendered a deed on condition of the payment of the sum of \$205, and the next day the purchaser offered to make the payment on condition of the performance by defendant of a covenant of the contracts reading as follows:

"The seller agrees to pipe or cause to be piped water in sufficient quantities for domestic use along the street or alley adjoining the herein described premises within two (2) years from this date, or furnish water immediately upon notification in writing of the completion of a dwelling house by said vendee. Also to construct, grade and improve the streets and highways in said subdivision."

During May, 1921, plaintiff, as agent of Mary Monteverde, "demanded of defendant that water be piped to said lots," but defendant refused, but "did offer to dig a well and place a pump thereon." During 1911 and 1912 the defendant "graded said streets by scraping the dirt from the sides of said streets or highways, leaving a crown in the center with a gradual slope to the gutters, the center being approximately 12 inches higher than the gutters; scraped, harrowed, and rolled the said streets and highways, making a smooth even surface. * * * No curbs, gutters or sidewalks were actually constructed or laid, except dirt curb and gutters." Water was at no time piped along the street or alley adjoining the lots.

In September, 1921, W. H. Hatfield, as agent and attorney for plaintiff and Mary Monteverde, made formal demand upon defendant that the street "be constructed, graded and improved" and was informed by defendant that no further work would be done thereon. Thereupon Hatfield wrote defendant that Mary Monteverde accepted defendant's refusal as an abandonment of the contracts and demanded the return of all moneys paid

thereon. The defendant replied in writing, saying:

"If you will take this matter up with Dunn & Brand, they have full authority to act in the matter."

Thereafter Hatfield took the matter up with Clyde Brand, of the firm of Dunn & Brand, and was informed that the defendant "would do no further street work than had already been done, * * * nor would defendant company pipe water to said lots, but that it would dig a well and provide a pump for the purpose of supplying water therefor." This action was then commenced for the recovery of the moneys paid on the contract.

[1] In so far as concerns the alleged failure of defendant to "construct, grade and improve the streets," the plaintiff failed to make a case. The streets were graded. The covenant to construct and improve the streets has no fixed and certain meaning. The surrounding circumstances and the mutual understanding of the parties as to the character of the street improvements contemplated are not shown. As said in *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 382, 184 Pac. 661, 662:

"The contract was altogether silent in regard to the character and kind of work that was to be done upon the roads. If there was any agreement on that subject, or any plan relating thereto adopted by defendant and acquiesced in by the plaintiffs, it was not set forth in the contract. So far as appears, it was in parol only. Such an agreement would be collateral and supplemental to the contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract and would not alter it in any respect, evidence thereof would be admissible if material to the issues."

[2] It appears from the stipulated facts, however, that the defendant refused to perform its covenant to pipe water to the lots and informed plaintiff's agent and attorney that it would not perform such covenant. It is true that when demand was made for the return of the moneys paid on the contract, such demand was based upon defendant's refusal to do further street work; but, when defendant thereafter declared that it would not pipe water to the lots, the plaintiff was thereby released from the duty of making further demand that the defendant so provide water and was justified in treating the contracts as abandoned by the defendant and suing for recovery of the money paid, without any demand other than the suit. *San Deigo Construction Co. v. Mannix*, 175 Cal. 548, 553, 166 Pac. 325; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773-778, 186 Pac. 356; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[3] Respondent states in its brief:

"Since there has been no completion of a dwelling house upon the lot covered by the contract, the time for the performance of the contract in this respect has not yet arrived."

Conceding, for the purposes of the argument only, that this contention is well founded, when the defendant informed the plaintiff's agent that it would not pipe water to the lots, "it was not necessary for the plaintiff to defer bringing his action until the full time had expired during which the defendant might have made the improvements." Walker v. Harbor Business Blocks Co., supra.

[4-6] It must be kept in mind that the contracts were executory and that the covenants of the parties were dependent. Mills v. Richmond Co., Inc., 56 Cal. App. 774, 776, 206 Pac. 486. Authorities relating to covenants contained in executed contracts have no necessary bearing upon the questions here involved.

"The consideration for which the plaintiff and his assignor agreed to pay the sums specified was the lots improved according to the terms of the contract. * * * It is thus apparent that there was a failure of the consideration of the obligation to pay to the extent that the lots were less valuable without the improvements than with them; also, that it was a failure of the consideration 'in a material respect' before it was rendered, that is to say, before the title was conveyed. The cost of these improvements would certainly amount to a considerable sum, and the value such improvements would add to the lots must be presumed to be a material part of the consideration to the vendees." Walker v. Harbor Business Blocks Co., supra.

It certainly requires no argument to show that the value of having water piped to a residence lot is material or that putting down a well and installing a pump is not the performance of a covenant to so pipe water. The covenant is clear and certain, and if there was anything to excuse performance thereof the burden was on defendant to show it.

[7] Respondent contends that the plaintiff and his assignor were guilty of laches, though this argument is directed largely to the question of failure to improve the streets. If directed to the failure of defendant to pipe water to the lots, it is inconsistent with respondent's contention that "the time for the performance of the contract in this respect has not yet arrived." In any event, a party to an executory contract, who still has it in his power to perform a dependent covenant, and who has in no wise suffered loss by reason of the other party's delay in demanding performance, is in no position to set up such delay as a defense in an action such as this. The defendant could have avoided loss or injury by doing what it had agreed to do. The plaintiff, under the agreed statement of facts, was entitled to judgment on the ground

of the defendant's refusal to perform its covenant to pipe water to the property.

The judgment is reversed.

We concur: PLUMMER, J.; YOUNG, Justice pro tem.

65 Cal. App. 299

GILMORE v. CASWELL. (Civ. 2661.)

(District Court of Appeal, Third District, California. Jan. 16, 1924. Rehearing Denied Feb. 14, 1924.)

1. Highways ⇨172(1)—Operating vehicle on public highway without proper brakes constitutes negligence.

It is negligence to operate a vehicle on the public highway, without brakes adequate to check the speed thereof, and to stop the vehicle as required by Motor Vehicle Law 1923, § 94.

2. Highways ⇨183—Liability of car driver with defective brakes to person riding in another's car not affected by negligence of other driver.

If the negligence of an automobile driver in operating a car without proper brakes contributed to the injuries of a person riding in another's car, his liability was fixed irrespective of any negligence of the driver of the car in which such person was riding.

3. Assignments ⇨137—Evidence held insufficient to show assignment of cause of action for damages to automobile.

In an action for damages to an automobile by an alleged assignee of the owner, evidence that a witness was a brother of the "assignor" was insufficient to show an assignment of the cause of action.

4. Assignments ⇨134—Assignment must be proved when denied to enable assignee to recover.

Where an assignment of the cause of action sued on is denied, proof of assignment must be made to enable assignee to recover.

On Petition for Rehearing.

5. Trial ⇨37—Attention to more important issues not a waiver of proof of minor issue.

That more attention was given by the respective parties to the more important issues involved was not a waiver of the necessary proof on a minor issue.

6. Appeal and error ⇨1178(6)—Proceedings of trial court on remand for new trial limited to issue on which there was a failure of proof.

Where, in an action for damages to an automobile, there was a failure of evidence only as to the assignment of the cause of action to plaintiff, in accordance with Code Civ. Proc. § 53, the case will be remanded on reversal for determination of that question only.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Clarence Gilmore against Thomas Caswell. Judgment for plaintiff, and de-

fendant appeals. Affirmed in part, and reversed in part.

L. J. Maddux, of Modesto, for appellant.

Gumpert & Mazzera, of Stockton, for respondent.

PLUMMER, J. Action by plaintiff for personal injuries alleged to have been sustained by him for and on account of a certain automobile collision due to the alleged negligence of the defendant and on an assignment for damages to the automobile in which the plaintiff was riding. It appears from the transcript that on or about the 7th day of October, 1922, the plaintiff was a passenger in a certain automobile, being driven in an easterly direction by one Clarence Buthenuth upon a certain main public highway in the county of San Joaquin, leading to the town of Modesto, at a point on said highway where it is intersected by a certain other highway known as and called the Atlanta-Ripon road. The complaint sets up two causes of action: First, for the injuries sustained by the plaintiff; secondly, for damages to the automobile in which the plaintiff was riding in the sum of \$423.50, alleged to have been assigned to the plaintiff by the owner of the automobile in which the plaintiff was a passenger at the time of the injury. On the part of the appellant it is insisted that the testimony shows that the injuries received by the plaintiff were due solely and exclusively to the negligence of the owner and driver of the automobile in which the plaintiff was a passenger. On the part of the respondent it is contended that the injuries received by the plaintiff were due exclusively to the negligence of the defendant and that in any event, if the plaintiff was also negligent, the plaintiff not having anything to do with the control of the automobile in which he was riding would nevertheless be entitled to recover. The action was tried before the court without a jury. On the conclusion of the trial the court made its findings of fact and conclusions of law, and awarded judgment to the plaintiff on the first cause of action in the sum of \$512.40 and upon the second cause of action, to wit, for damages to the automobile in which the plaintiff was riding, in the sum of \$423.50.

So far as this appeal is concerned upon the question of damages to the plaintiff for personal injuries sustained by him, and as to the liability by the defendant, we do not need to inquire as to whether or not the owner and driver of the automobile in which the plaintiff was riding was or was not also careless and negligent or whether his negligence concurred in causing the injuries to the plaintiff; for, as stated above, if the defendant's negligence concurred in causing the injuries and the injuries would not have been inflicted had the defendant's negligence not so concurred, then and in that case the judgment for the injuries sustained by the plaintiff must be affirmed.

Without reciting the testimony, it is suffi-

cient to state that the testimony of the defendant, as well as the testimony of Clarence Buthenuth, of Chester Mello, and George C. Buthenuth, all show that the defendant was driving a car unequipped with proper brakes—that is, that the brakes upon the car being driven by the defendant were so defective that they offered practically no resistance to its momentum—and that if the car had been equipped with proper brakes, in view of the speed at which the defendant claimed he was driving for a few moments preceding the collision, the application of the brakes would have sufficed to avoid the collision.

[1, 2] The Motor Vehicle Law (St. 1923, p. 545, § 94) requires that every automobile operated upon the public highway shall be provided at all times with brakes adequate to promptly check the speed thereof and to stop said vehicle. A failure in this respect is negligence, and if such negligence contributed to the injuries of the plaintiff in this action his liability is fixed irrespective of any negligence on the part of the automobile driver of the car in which the plaintiff was riding as a passenger. The testimony to which we have referred was sufficient to authorize the trial court in making its findings, as above set forth.

[3, 4] As to the second cause of action, to wit, upon the claim for damages to the automobile in which the plaintiff was a passenger and alleged to have been assigned to the plaintiff, the appellant urges there is no testimony in the case showing such assignment. The transcript of the testimony shows the following questions and answers upon this point:

"Q. What is your name? A. Albert L. Buthenuth. Q. What is your occupation? A. Letter carrier. Q. Do you reside in Stockton? A. Stockton. Q. You are a brother of the plaintiff—of the assignor herein in this case? A. Yes, sir. Q. Clarence Buthenuth? A. Yes, sir."

"We do not see in this testimony any proof of an assignment of any claim by Clarence Buthenuth to the plaintiff, Clarence Gilmore, in this action. This is the testimony of a brother of the alleged assignor and amounts at most only to proof of relationship. The answer filed by the defendant denies the assignment, and, in order for the plaintiff to prevail in this action upon the second cause of action set out in his complaint, it is necessary under such circumstances to make proof of such assignment. It cannot be assumed or taken for granted. The contention of the appellant, therefore, that there is no proof in support of plaintiff's second cause of action, must be sustained. As the plaintiff's right to succeed upon his second cause of action depends upon the determination of the fact of whether his assignor was or was not guilty of negligence, contributing to the collision, which must be determined by the trial court, we have purposely refrained from expressing any opinion upon the testimony con-

tained in the transcript touching this question. For the reasons hereinbefore given, the judgment of the trial court upon the plaintiff's first cause of action, to wit, that part asserting and fixing the amount of damages he is entitled to recover and have on account of personal injuries sustained by him, will be and the same is hereby affirmed. As to the second cause of action stated in plaintiff's complaint, to wit, for the amount of damages claimed for and on account of the injuries to the automobile in which he was riding, the judgment will be and the same is hereby reversed and remanded for a new trial upon said second cause of action only. It is also ordered that the appellant have and recover his costs incurred upon appeal herein.

We concur: FINCH, P. J.; YOUNG, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. This matter is before the court on a petition for rehearing. In our former opinion we held that there was no evidence justifying the finding of the trial court that the second cause of action set out in plaintiff's complaint had been assigned to him. The evidence on this point appearing in the transcript is set out in that opinion.

[5] It is now insisted by respondent that:

"An appellate court will assume the existence of facts which were assumed to exist in the court below, notwithstanding the fact that they were put in issue by the pleadings."

"To support this statement a number of cases have been cited. The respondent's statement of the law we readily concede to be correct, but the authorities cited fail to support the application of the principle contained in said statement to the cause at bar. An examination of the cases all show that something was said or done which justified the assumption of the existence of the facts necessary to appear and to be made to appear in order to support the judgment. We only need to cite one case in this state which illustrates this point, *National Union Fire Ins. Co. v. Nason*, 21 Cal. App. 297, where, on page 299, 131 Pac. 755, 756, of said report, the circumstances taking place in the case are all set forth preceding the statement of the law by the court in that cause as hereinabove quoted.

We have searched the record in vain to ascertain if anything occurred to dispense with the testimony showing an assignment of the cause of action to the plaintiff, and we find nothing therein except what is set forth in our first opinion in this case.

This case is very similar in principle upon this point to that of *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 193 Pac. 775. That was an action begun by a partnership in which the complaint alleged compliance with sections 2466 and 2468 of the Civil Code; that is, that the certificate of copart-

nership was filed as required by law and also published as required by law. This allegation was controverted in the answer. At the trial the plaintiff proved the filing of the partnership certificate, but introduced no evidence of its publication, and went to trial upon the other issues presented by the pleadings. The court found that such publication was made. This finding was held to be without support in the evidence. The point was made that the objection was waived, and the court answered as follows:

"As to the waiver, suffice it to say that we find nothing to justify the claim that it occurred."

The issue was in the case, and the burden of proof rested upon the party having the affirmative, and there being no evidence to support the affirmative allegation only one result could follow. The finding was without support unless waived, and there being nothing in the record showing the waiver a reversal of the case was necessary. As we read the record in this case it presents simply a question of failure of proof upon what might be considered a minor issue and we cannot hold such failure to be a waiver of the necessary proof simply because more attention was given by the respective parties to what might be called the more important issues involved in the controversy.

[6] However, in the reconsideration of this cause and in view of the two cases decided by the Supreme Court of this state which we will hereafter consider, we think the necessities of justice demand a modification of the former order made by this court. With this in mind, we have carefully read all the evidence in the transcript, and conclude that there was sufficient evidence presented to the trial court to sustain its findings on the question of damages both as to the first and also as to the second causes of action set forth in plaintiff's complaint and that there is a failure of evidence only as to the finding as to the right of this plaintiff to maintain the second cause of action by assignment thereof to him by the owner of the damaged automobile. Therefore, in remanding the cause for further hearing, pursuant to section 53 of the Code of Civil Procedure, we think the further proceedings in the trial court should be limited to the determination of the one issue; that is, the ascertainment if the second cause of action was actually assigned to the plaintiff prior to the commencement thereof. In the case of *Collins v. Ramish*, 182 Cal. 360, 188 Pac. 550, the Supreme Court, in considering what directions should be given where a judgment is reversed for insufficiency of evidence to sustain a finding, says:

"No good reason appears why the new trial that must be had should not be limited to the matters in regard to which error has been shown,"

—and ordered the new trial limited to the one issue. In the case of *Rudneck v. Southern California M. & R. Co.*, supra, the case to which we have above referred, where no proof was made as to the publication of certificate of copartnership, the cause was reversed and sent back for trial upon that one issue, the judgment of the court being as follows:

"Judgment reversed for a new trial, in accordance with this opinion, upon the single issue as to publication by the plaintiffs of their certificate of partnership, as required by law, with directions that if such issue be determined in favor of the plaintiffs, judgment be given for them in accordance with the findings upon the other issues of the cause, and that if such issue be found against the plaintiffs, the action be dismissed without prejudice."

All the other issues in this cause having been fully and fairly tried and no error in any of them having been called to the attention of this court, there appears to us no reason why a new trial ordered in this case as to the second cause of action should not be limited to the issue relating to the assignment thereof to the plaintiff herein.

It is therefore directed that the order heretofore entered in this cause should be and the same is hereby modified to read as follows: That the order heretofore made as to the plaintiff's second cause of action is hereby reversed and remanded to the lower court for a new trial in accordance with this opinion upon the single issue as to whether said second cause of action was assigned to the plaintiff by the owner of the damaged automobile prior to the commencement of the action, and, if the testimony introduced on this question satisfies the trial court that such assignment was made, then and in that case judgment should be entered in favor of the plaintiff upon the second cause of action set forth in plaintiff's complaint fixing the amount of damages as already sufficiently found by the trial court. If the testimony does not show such assignment of the second cause of action herein referred to, then and in that case judgment is hereby directed to be entered in favor of the defendant. In all other respects the judgment of the trial court is affirmed. It is further ordered that the appellant recover his costs incurred on this appeal.

Petition for rehearing denied.

(65 Cal. App. 345)

Ex parte BRADY. (Cr. 1041.)

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1924.)

1. Courts ⇨74, 75—Superior court holds sessions only at time and place provided by statute.

There is no constitutional provision fixing time or place where the superior courts shall

sit; but, the Legislature having spoken (Code Civ. Proc. §§ 73, 142) as to the place at which sessions of the superior court may be held, the rule that the statement of one thing is the exclusion of another is applicable, and permits no sessions of the court except as provided by the statute.

2. Statutes ⇨71—Arbitrary classification not compliance with constitutional requirement of uniform operation of general law.

An arbitrary classification or one based purely on whimsical or fanciful reasons is not a compliance with Const. art. 1, § 11, requiring laws of a general nature to have uniform operation; but if the distinction is one for which the Constitution provides, or is one which on its face appears to be perfectly obvious, or has substantial reason for existence, the provision is not violated.

3. Statutes ⇨74(2), 76(3), 79(1)—Act providing that superior court may hold sessions in city other than county seat held invalid.

Code Civ. Proc. §§ 73, 142, providing that, in counties of the first class, one session of the superior court may be held in each city of the county containing not less than 50,000 population where the city hall is not less than 15 miles from the county courthouse, are violative of Const. art. 1, § 11, requiring laws of general nature to have uniform operation; article 4, § 25, subd. 33, providing that no special laws shall be passed where a general law would be applicable, and article 1, § 21, as conferring special privileges on the citizens of a particular county.

4. Evidence ⇨25(1)—Judicial notice taken that Los Angeles is only county of first class in state.

Counties of the first class under Pol. Code, § 4006, containing 500,000 population, judicial notice may be taken of the fact that Los Angeles county is the only county of the first class in the state.

5. Statutes ⇨71—General law must have uniform operation.

A strictly general law, according to Const. art. 1, § 11, must have a uniform operation.

6. Statutes ⇨71—Legislature may enact law applicable to one class only.

Where an act is based on a difference for which a substantial reason may be supplied, the Legislature may enact a law which shall be applicable only to one class.

7. Constitutional law ⇨48—Legislative power presumed rightfully exercised.

The presumption is that the legislative power has been rightfully exercised, and, while great regard is due to the expressed will of the Legislature, greater deference must be accorded to constitutional mandates.

Original application by William G. Brady for writ of habeas corpus against the Sheriff of Los Angeles County to secure release of petitioner from detention on commitment for contempt. Writ granted.

Charles D. Wallace, of Long Beach, for petitioner.

Asa Keyes, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, and P. E. Keeler, Spicer, Meacham & Mason, Knight, Lane & Goddard, McWhinney & Clock, and Doyle, Clark & Thomas, all of Long Beach, for respondent.

Edward T. Bishop, County Counsel, and Roy W. Dowds, Deputy County Counsel, both of Los Angeles, *amici curiæ*.

HOUSER, J. This is an application for a writ of habeas corpus based upon the alleged illegal detention of petitioner by the sheriff of Los Angeles county, acting under an order of the superior court, in and for said county, committing petitioner for a contempt of said court.

It appears that in an action pending before one of the departments of the superior court sitting in the city of Long Beach, in accordance with an order made by the judge of said department, petitioner had been served with a subpoena duces tecum. Petitioner failed and refused to respond to the said subpoena, and was thereafter brought before the court upon an attachment. Thereupon the court adjudged petitioner guilty of a contempt in said matter, and sentenced him to pay a fine. In default of such payment he was remanded to the custody of the sheriff.

Petitioner attacks the jurisdiction of the superior court, basing his objection on the alleged unconstitutionality of amendments of section 73 and section 142 of the Code of Civil Procedure under and by virtue of which the said superior court was sitting in the city of Long Beach. Among other things, section 142, Code of Civil Procedure, as amended, provides:

"That in counties of the first class at least one session of the superior court shall be held in each city of said county containing a population of not less than fifty thousand * * * wherein the city hall of said city is not less than fifteen miles distant from the site of the county courthouse."

Section 73, Code of Civil Procedure, as amended, contains language to the same effect.

It is understood that the city of Long Beach has a population of more than 50,000 people, and that its city hall is located more than 15 miles from the site of the county courthouse of Los Angeles county, being the county in which the city of Long Beach is situated.

With reference to the limitation on the power of the Legislature to enact laws of the character of the act in question, the Constitution provides:

"All laws of a general nature shall have a uniform operation." Section 11, art. 1.

"The Legislature shall not pass local or special laws * * * where a general law can be made applicable." Subdivision 33, § 25, art. 4.

"* * * Nor shall any citizen, or class of citizens, be granted privileges or immunities

which, upon the same terms, shall not be granted to all citizens." Section 21, art. 1.

[1] There is no constitutional provision which fixes either the time when or the place where the several superior courts shall sit, but section 73 of the Code of Civil Procedure provides that "they shall hold their sessions at the county seats of the several counties, or cities and counties, except as otherwise provided by section one hundred forty-two of this Code," and which section, in addition to what has heretofore been set forth, authorizes the judge or judges of any county to change the location of the court when war, insurrection, pestilence, or other public calamity, etc., may render it necessary, or, in the discretion of the court, whenever necessary or advisable, at any place in the county not less than 120 miles distant from the county seat. It is not contended that the session of the superior court sitting within the city of Long Beach comes within the terms of either of said exceptions, and it is conceded by counsel representing the respective parties that if such act is unconstitutional the order of commitment of petitioner is void.

The Legislature having spoken as to the place at which sessions of the superior court may be held, the rule that the statement of one thing is the exclusion of another is applicable and permits no sessions of the superior court except as provided by the statute. *Whitener v. Belknap & Co.*, 89 Tex. 273, 34 S. W. 594; *Williams v. Reutzel*, 60 Ark. 155, 29 S. W. 374; *Coulter v. Routt County*, 9 Colo. 258, 11 Pac. 199; *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *Shepherd v. Superior Court*, 54 Cal. App. 673, 202 Pac. 466; *Patton v. State*, 160 Ala. 111, 49 South. 809; *People v. McWeeney*, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916B, 34; *Carter v. State*, 100 Miss. 342, 56 South. 454, Ann. Cas. 1914A, 369; *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465; *Shold v. Van Treeck*, 82 Neb. 99, 117 N. W. 113. Even in the absence of express statutory requirement that the sessions of the court be held at the county seat, it has been held that a universal practice to do so gave the practice the legality of positive law, and that an order of the court made while sitting at a place other than the county seat was void. *Board of Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

If it be determined that the law here under consideration is general in its nature and that it has a uniform operation, necessarily it is not a special law. At various times the Supreme Court of this state has announced the rule in substance that in order that a statute be a general law it is not necessary that it apply to all the people in the state, but if it affect all individuals falling within a proper classification of them the constitutional requirement is met. Pas-

adena v. Stimson, 91 Cal. 251, 27 Pac. 604; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Darcy v. Mayor of San Jose, 104 Cal. 642, 38 Pac. 500; Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Ex parte King, 157 Cal. 161, 106 Pac. 578.

[2] The statute here does not purport to affect all the people, nor all the counties of the state, but concerns counties of the first class only, and a proper inquiry in that regard is whether or not the Legislature was warranted in making such a classification. While a great deal of latitude is rightly accorded legislative acts and the presumption of legality should obtain, nevertheless an arbitrary classification, or one based purely upon whimsical or fanciful reasons, is not a compliance with the constitutional mandate; but it is well settled that wherever the distinction is one for which the Constitution expressly provides, or is one which on its face appears to be perfectly obvious, or is yet one for which there is some substantial reason for its existence, the constitutional provision is not violated. As has been frequently said by our Supreme Court, the distinction must rest on either a constitutional, or a natural, or an intrinsic difference.

[3] It is apparent at the most superficial investigation of the statute that it is not general in the sense that it directly affects all of the people of the state. If it all comes within a requirement that laws of a general nature shall have a uniform operation, it must be because of its applicability to a class. In this respect the act provides that it shall be effective "in counties of the first class," thereby segregating one class of counties from each and all of the other classes of counties of the state and making the proposed law operative in one class of counties only. The act provides an additional classification in that it applies, first, as to cities of not less than 50,000 population; and, secondly, to such cities of such population only whose city halls are over 15 miles distant from the site of the county courthouse.

[4] But it is contended that there is no authority vested in the Legislature to classify counties by population, excepting for the sole purpose of establishing the compensation and fees of county officers. Section 5, art. 11, Const. For such purpose the Legislature has by other statutes brought about such a classification. It has said (section 4006, Pol. Code) that counties containing a population of 500,000 persons and over shall belong to and be known as counties of the first class; that counties containing a certain lesser population shall be counties of the second class, and so on down through the list of counties of the state, giving to each group a designated classification. The court may take judicial notice of the fact that Los Angeles

county is the only county of the first class in the state. People v. Wong Wang, 92 Cal. 277, 28 Pac. 270; People v. Williams, 64 Cal. 87, 27 Pac. 939; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66. In the case of Pratt v. Browne, 135 Cal. 651, 67 Pac. 1082, an act fixing the salary of the official reporter in a county of the thirtieth class was under consideration. In the course of the opinion it is said:

"It is the same as if Ventura county had been mentioned by name. No change of words or phrases, or calling Ventura county by another name, can change the result. The portion of the act in dispute must therefore be considered as an act fixing the salary of the reporter (whoever he may be) of Ventura county at the sum of one hundred dollars per month."

So this court may say that the act here in question is the same as though, instead of using the designation "first class," the act had provided that in Los Angeles county a session of the superior court shall be held at cities in said county containing a population of not less than 50,000 people, etc. In the case to which reference has just been made, the court held that the act in question, being applicable to one county only and not founded upon any natural, intrinsic, or constitutional distinction, and no reason appearing as to why the act was not made to apply generally to all classes of counties, was special and local and therefore unconstitutional. The same conclusion was reached in the case of Marsh v. Hanly, 111 Cal. 368, 43 Pac. 975, where the court had under consideration an act relating to primary elections, to be confined in its operations to counties of the first and of the second class. The court said:

"There can be no question that the act is local and special, since, by its terms, it is to 'apply to, take effect in, and be in force only in counties of the first and second classes,' that is to say, in San Francisco and Los Angeles. Stats. 1895, § 26, p. 218.

"The Constitution allows the classification of counties according to population for the purpose of regulating the compensation of county officers in proportion to their duties (Const. art. XI, sec. 5), and for that purpose a classification has been established under which San Francisco falls into the first class and Los Angeles falls into the second class. But the fact that these and the other counties of the state have been classified for a purpose which the Constitution recognizes as a proper and necessary one does not relieve a law relating to other and distinct matters from the objection that it is local and special if, by its terms, it is limited in its application or operation to one or more classes of counties less than the whole. Dougherty v. Austin, 94 Cal. 620; Welsh v. Bramlet, 98 Cal. 219; Pasadena v. Stimson, 91 Cal. 238; Bloss v. Lewis, 109 Cal. 493; Turner v. Siskiyou County, 109 Cal. 332; Darcy v. Mayor of San Jose, 104 Cal. 642; Denman v. Broderick, ante, p. 96. This act, therefore, not being a regulation of the compensation of county officers, is local and special, notwithstanding

ing it embraces two counties, each of which constitutes one of the classes defined by the County Government Act; and the only question to be determined is whether or not the subject of the act is one of those as to which special and local legislation is inhibited by the Constitution."

In the case of *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66, the court was considering the constitutionality of certain sections of the County Government Act of 1891 (St. 1891, p. 295), which provided that the assistants of district attorneys of counties in the eighth class should be paid by the county, and the court said, in part:

"The Legislature has not the general authority to enact laws for the counties by classes, nor is it authorized to make a classification of counties for any purpose of legislation, except for the purpose of enabling it to regulate the compensation of the county officers for whose election or appointment it shall provide. *San Luis Obispo Co. v. Graves*, 84 Cal. 71. Whenever it attempts to enact a law for one or more of the counties of the state upon subjects that it is directed to provide for by general laws, or which are to form part of a uniform system for the whole state, whether such counties are designated directly by name, or by reference to a class into which they have been placed for other subjects of legislation, it infringes these provisions of the Constitution. We must take judicial knowledge that there is only one county in the state whose population places it in the eighth class, and if an act is passed by the Legislature that is applicable to only one county in the state, it does not cease to be a local act by reason of the fact that it purports to be applicable to a class of counties which the Legislature is not authorized to create for the purpose of such legislation, and of which that county constitutes the only member."

The legal propriety of legislation of the character here in question is commented upon in the case of *Turner v. County of Siskiyou*, 109 Cal. 332, 42 Pac. 434, where the court was considering the constitutionality of an act which provided that in counties of the twenty-eighth class alone every person subpoenaed as a witness in a criminal case should be entitled to the same per diem and mileage as jurors in a like case. The court said, in part:

"This provision is clearly unconstitutional and void. It does not apply to counties of any other class. * * * The difficulty is not removed by the fact that the counties are classified, and that the provision applies to all counties of a certain class; because, under section 5 of article 11, counties may be classified only for the purposes of regulating the compensation of certain public officers therein enumerated. * * * The provision in question in the case at bar is local and special, because it is not in force in all parts of the state, and does not affect equally either all the people or all individuals of a class."

And, to the same effect, see *Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081; *San Luis Obispo*

v. Graves, 84 Cal. 71, 23 Pac. 1032; *Payne v. Murphy*, 18 Cal. App. 446, 123 Pac. 350.

The act does not conform to the constitutional requirements of a general law, either as affecting the entire state or as applied to a class, for the reason that the class designated by the statute, although not expressly forbidden by the provision of the Constitution, is impliedly excluded for any purpose other than that of regulating the compensation and fees of county officers. Paraphrasing a part of the language used by Chief Justice Beatty in *Marsh v. Hanly*, supra, there can be no question that the act which we are here considering is local and special, since, by its terms, it applies to, takes effect in, and is expected to be in force only in a county of the first class; that is to say (as is pointed out in *Pratt v. Browne*, supra), in the county of Los Angeles.

[5, 6] A strictly general law, according to the constitutional provision, must have a uniform operation. It is permitted to depart from that requirement as to every individual or class in the state only when the subject-matter of the act is based upon some constitutional or natural or intrinsic difference as between it and the whole body of individuals or classes within the state. The statute, then, instead of being a general law of universal application, really becomes identical in effect with a special statute. The statute here under consideration is special, and it occupies the same position as any so-called general law which, instead of applying universally, applies only as to some class founded upon some constitutional or natural or intrinsic distinction. Where the act is based upon such a difference for which a substantial reason may be supplied, the Legislature has the undoubted right to enact a law which shall be applicable to only one class. Title, etc., *Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; *Darcy v. Mayor of San Jose*, 104 Cal. 642, 38 Pac. 500; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

It has been intimated that the reason for the enactment of the statute within the intent of the Legislature may have been, first, that of facilitating the dispatch of business of the courts to the end that justice might be speedily administered; and, secondly, that of conveniencing witnesses, litigants, and lawyers in the locality to be served. No other reasons for the passage of such a law as the one before the court are readily observable. True, there may be other reasons, but none other have been suggested by learned counsel, nor has this court been able to discover them; hence it may be fair to assume that they do not exist. It is feared, however, that the first reason is not altogether sound. The fact that litigants may have only a short distance to travel for the purpose of attending court does not enable the court to handle the business before it more expeditiously.

The court can transact exactly the same amount of business regardless of the inconvenience, if any, suffered by the litigants, witnesses, and lawyers in reaching the courthouse. But it is undoubtedly true that a proximity to the courthouse by those who may have litigation would be a great accommodation and a great saving of time, so far as they may be personally concerned. The evident purpose of the act was to provide for a city having a population of 50,000 or more people whose city hall was so far distant from the site of the county courthouse that, considering transportation facilities and congestion of traffic, the necessity of the inhabitants of such city attending to any business with the courts worked a considerable inconvenience if not absolute hardship upon them. Just why, in effect, such cities in Los Angeles county only should be singled out for such a favor is not apparent. Other counties in the state either now having, or likely in the near future to have, similar conditions presented, very probably would have just cause for complaint because of such partiality shown by the legislative act. Their needs might be just as great and their people just as much inconvenienced by a statute including them therein, with similar rights and privileges, as would the cities provided for by the statute in question. Naturally the inquiry arises why were they not included in the act. Is there any reason why every city in the state having a population of 50,000 or more people and whose city hall is located 15 miles distant from the site of the county courthouse should not receive identical treatment as by this statute would be accorded such cities within the county of Los Angeles? So far as this court is able to determine, no sufficient reason exists therefor.

The final question is whether or not a general law could have been made applicable. It is plain that the attempted classification is not one authorized by the Constitution. The fact that a large number of citizens of the state might be greatly accommodated by reason of having a superior court in their vicinity presents no satisfactory reason for classification denominated either natural or intrinsic. Certainly every other community in the state, whether composed of 50,000 people, or 500 people, would be proportionately inconvenienced by the same arrangement. The attempted classification is not real; it is purely arbitrary, and not based upon any substantial ground. In addition thereto, it would seem that the constitutional provision (section 21, art. 1), which forbids that any citizen or class of citizens shall be granted privileges which, upon the same terms, shall not be granted to all citizens, is violated. In the case of *Mordecai v. Board of Supervisors*, 183 Cal. 434, 192 Pac. 40, the court was considering the constitutionality of an act which provided for the formation of irriga-

tion districts in all counties of the state except in counties which had adopted a freeholders' charter prior to June 4, 1915. It appeared that there were but two counties in the state which had adopted such a charter. In ruling that the statute was not uniform in its operation, the court used the following language:

"The many times reiterated statement of our decisions is that, while the requirement that a general law must have a uniform application does not mean that it must have a universal operation, and it is valid if it applies alike to all persons or objects within a class—or, what is the same thing, there is excepted from its operation a class—founded upon some 'natural, intrinsic, or constitutional distinction,' yet if the statute operates only upon a class, or there is excepted from its operation a class, not founded upon a 'natural, intrinsic, or constitutional distinction,' its operation is not uniform, and it is discriminatory legislation of the sort which the Constitution purposed to prohibit and is invalid."

Touching upon the point that the act there in question granted to the citizens of some of the counties privileges which were withheld from citizens of other counties, the court said:

"It has been frequently and truly said that the purpose of a constitutional mandate was to prevent special privileges or immunities being granted to a class. * * * In fact, the provision of the Constitution for uniformity of operation is closely connected with its further provision (article I, § 21) expressly prohibiting the granting of special privileges or immunities. * * * Now, if the California Irrigation Act be considered as a privilege, what reason is there why the inhabitants and property owners of Los Angeles and San Bernardino should not enjoy that privilege when those within other counties may do so? On the other hand, if the act be considered a burden, why should those within those two counties be immune from it when the rest of the state is subject to it?"

Paraphrasing the language just quoted, the following question is also pertinent: If the establishment of a superior court in a city of 50,000, located 15 miles or more from the county seat of the county of Los Angeles, be considered as a privilege, what reason is there why cities of the same size and similarly located in other counties of the state should not enjoy that privilege when such cities in Los Angeles county may do so? And, as is said in the *Mordecai* Case, we can see no sufficient answer to these questions, or to the objection involved in them that the exception from the applicability of the act of other counties in the state destroys the uniform operation of the act. And again, as is said in the *Marsh* Case, *supra*, the question remaining is:

"Whether or not the subject of the act is one of those as to which special and local legislation is inhibited by the Constitution."

[7] The presumption is that legislative power has been rightfully exercised, and, while great regard is due to the expressed will of the Legislature, a still greater deference must be accorded by the courts to the constitutional mandate, which all public officers are sworn to support. *People v. Central Pacific R. R. Co.*, 43 Cal. 398. In the very nature of things, special laws could not have a uniform operation in the sense that they really would or could apply equally as to every individual in the state. So far as concerns the matter here, the Constitution only requires that special laws shall not be passed where a general law may be made applicable. Although the authorities throughout the several jurisdictions of the United States are not entirely harmonious with reference to the force and the effect to be given to the legislative determination of the question as to whether or not a general law could be enacted in a given situation, the weight of authority, including adjudicated cases in California, is to the effect that the decision rests largely in the discretion of the Legislature and that the courts are not warranted in interfering with the conclusion expressed in the legislative act unless there appears a positive disregard of the fundamental law.

The case of *People v. Mullender*, 132 Cal. 217, 64 Pac. 299, is illustrative of the point. Under the act of March 18, 1889 (Stats. 1889, p. 305), a board of state harbor commissioners was established for the Bay of San Diego and the question of the legality of that act was before the court for its determination. The court said:

"That the act here in question is both local and special is conceded. But that is not conclusive. The language of said paragraph [referring to the constitutional provision] plainly implies that there are or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation. The Constitution submits the question, whether a general law can be made applicable in any given case, to the judgment of the Legislature, to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable. * * *

In the case of *Bruch v. Colombet*, 104 Cal. 352, 38 Pac. 45, it is said:

"No absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible, and what will be fatal. The courts must determine each case as it arises, presuming in favor of the rightful exercise of the legislative power. Yet the inhibition should be enforced unless there is discoverable some reasonable ground for a distinction."

And see, also, to the same effect: *People v. Sacramento Drainage District*, 155 Cal.

373, 103 Pac. 207; *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353; *Title Restoration Co. v. Kerrigan*, 150 Cal. 298, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; *Ex parte King*, 157 Cal. 161, 106 Pac. 578; *Matter of Burke*, 160 Cal. 300, 116 Pac. 755; *People v. Casa Co.*, 35 Cal. App. 194, 169 Pac. 454.

It will, however, be noted that the courts have not abdicated the power of final determination. The right to investigate and to review the facts is still retained, and, where it is shown that no sufficient reason appears for the implied declaration by the Legislature that in the passage of a special law a general law could not have been made applicable, the courts unhesitatingly exercise their rightful prerogative of pronouncing the statute unconstitutional. The language of the statute affecting the point is "that in counties of the first class at least one session of the superior court shall be held in each city of said county containing a population of * * * fifty thousand," etc. It is obvious that the statute might have provided that "in each of the counties of this state" a session of the superior court shall be held, etc. The possibility of drawing a law which would be general in its nature, instead of a special and local law, as the statute now presents itself, is demonstrated by another clause of the same statute, which provides that "whenever such judge or judges (of the superior court) deem it necessary or advisable" they may "direct that the court be held or continued at any other place in the city and county, county, city, or town not less than one hundred twenty miles distant from the county seat." That particular part of the statute is general in its nature. It operates as to each county and as to the superior court located within each county of the state. There is no reason why the act in question should not have done likewise. As is said in the case of *Marsh v. Hanly*, 111 Cal. 372, 43 Pac. 975:

"It is not a matter for argument or speculation, therefore, whether this is a case in which a general law could be made applicable. This act, by its terms shows that such is the case. * * *

In the case of *Coulter v. Routt County*, 9 Colo. 258, 11 Pac. 199, a state of facts arising from circumstances similar to those here, with a constitutional provision identical with ours, was under consideration. The Colorado court held the act unconstitutional, and, in passing upon the question whether or not a general law could have been made applicable, among other things, said:

"That the permanent location for the holding of the district courts in the counties of the state can be fixed by general laws has been demonstrated by the acts of the Legislature itself, during a long term of years, which acts overcome all presumptions that a departure is necessary in the case of a single county."

The same thing is evident here. There was a clear and palpable disregard of the constitutional requirement. The conclusion is therefore reached by this court that that part of the act here under consideration is special and local; that it is not uniform in its operation; that it confers special privileges upon a class of citizens, which, upon the same terms, are not granted to all citizens, and that a general law could have been made applicable.

It follows that the petitioner is entitled to be discharged. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

65 Cal. App. 400

P. K. WEBSTER CO. v. ROAMER MOTOR CAR CO. (Civ. 4819.)

(District Court of Appeal, First District, Division 2, California. Jan. 28, 1924.)

1. Principal and agent §47—Contract as to commissions on sales of automobiles held inapplicable to sales to prospects secured before execution of contract.

Exclusive automobile agency contract, providing that each party should make up and keep "prospect" cards and that the respective salesmen of the parties who first filed with his employer a "prospect" should be permitted to complete the sale and should be entitled to receive his commission on the sale, held not applicable to sales made to prospects secured prior to execution of contract, where final execution of the contracts alone remained to complete the sale, especially in view of such construction of the contract by the parties themselves.

2. Account stated §8—Plaintiff could not question credit it allowed in account stated.

Where action is upon an open, mutual, and current account and is based upon an account which plaintiff stated to defendant, plaintiff cannot question the correctness of a credit which it allowed in the statement of account.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the P. K. Webster Company against the Roamer Motor Car Company. From a judgment giving it insufficient relief, plaintiff appeals. Affirmed.

F. B. Fernhoff, of Oakland, for appellant.

Edward R. Eliassen, of Oakland, for respondent.

NOURSE, J. Plaintiff sued upon four causes of action, issue being joined upon the first, which was based upon a mutual, open, and current account for services rendered and materials furnished in the sum of \$2,407.85. The account, dated January 1, 1921, contained nine separate items. The first two, in the sum of \$550 each, represented claims for com-

missions for the sale of two Roamer cars within the territory covered by a written contract between the parties dated July 31, 1919. The original account offered in evidence differs from that recited in the complaint in that it contained a statement of credit in the sum of \$1,177.59 in favor of the defendant and against the plaintiff. The cause was tried before the court without a jury. The trial court found that plaintiff was not entitled to the two items of commissions, but found that the account of January 1st offered in evidence was otherwise correct and that the defendant was entitled to a credit of \$1,177.59 as appeared in that account. This credit was then deducted from the sum allowed in the account and judgment was given in favor of plaintiff in the sum of \$130.26. The plaintiff appeals from the judgment.

The appellant urges as grounds for reversal that the evidence does not support the finding that the appellant was not entitled to the commissions claimed and that the trial court erred in allowing respondent a credit of \$1,177.59 because of insufficiency of proof.

[1] The contract in evidence gave to the appellant the exclusive right to sell, during the continuance of the contract, Roamer automobiles in Alameda and Contra Costa counties, and provided that the appellant should have a discount of 20 per cent. from the current list price of the automobiles sold to persons who resided in that territory. It was also provided that each party should make up and keep "prospect cards" and that the respective salesmen of the parties to the contract who first filed with his employer a "prospect" should be permitted to complete the sale and should be entitled to receive his commission on the sale. On August 4, 1919, a few days after the execution of the contract, a Roamer car was sold by a salesman in the employ of the respondent to a resident of Alameda county, and on the following day another car was sold to a buyer who was also a resident of Alameda county, by salesmen who were also in the employ of the respondent. No claim was made by the appellant for any commission or discount on these sales until some six months after the transactions, when difficulties arose between the parties to this action. In the meantime work and labor had been performed upon one of these cars by appellant, and, this being under the head of "free service" to the purchaser, it was charged to the respondent. The trial court interpreted the contract as applying only to sales originating after its execution and as not applying to cases where the "prospects" had already been secured and final execution of the contracts alone remained to complete the sale. In this conclusion the court was supported by the acts of the parties, from which it appeared that they placed the same construction on the contract. On the facts before it the trial court was therefore justifi-

fied in making the finding that these sales were not made upon the account or to the credit of the appellant, and therefore correctly rejected its claim for commissions or discounts upon these sales.

[2] Upon the second point appellant's argument finds support only in the fact that it has incorrectly presented a true statement of the account upon which the cause of action was based. This account, which is found in the transcript as "Defendant's Exhibit A," expressly allows the respondent a credit of \$1,177.59. The balance which the appellant then claimed to be due appears in the account as \$1,230.26. Inasmuch as the action is one upon an open, mutual, and current account and is based upon this account which the appellant stated to the respondent, the appellant cannot at this time question the correctness of the credit which it allowed nor criticize the character of evidence which was offered in proof.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

65 Cal. App. 480

THORNTON v. PHELAN et al. (Civ. 2674.)

(District Court of Appeal, Third District, California. Feb. 1, 1924.)

1. Abandonment ⚡3—**Mines and minerals** ⚡38(21)—**Abandonment question of intent, provable by act or conduct.**

Abandonment is a question of intent, and may be proved by acts or conduct of the party alleged to have abandoned the property in controversy.

2. Mines and minerals ⚡38(14)—**Burden of proving abandonment on party alleging.**

The burden of proving abandonment of a mining claim rests upon the party alleging it.

3. Mines and minerals ⚡38(21)—**Evidence held insufficient to establish abandonment.**

Evidence held insufficient to establish abandonment of a mining claim.

4. Mines and minerals ⚡38(21)—**Evidence held to show assessment work for particular year.**

Evidence held sufficient to sustain a finding that assessment work on a mining claim for a particular year had been done.

5. Mines and minerals ⚡26—**Relocation of claim before lapse or forfeiture of former location of no effect.**

Relocation of a mining claim before a former location has lapsed or become forfeited for nonperformance of annual assessment work is of no validity, and results in no title.

6. Mines and minerals ⚡23(1)—**Where assessment work done, payment therefor by claim owner immaterial.**

Where the doing of annual assessment work on a mining claim has been established, it is

immaterial whether or not the cost of such work was paid for by the claim owner.

7. Mines and minerals ⚡38(20)—**Exclusion of letters relating to doing of assessment work in action to quiet title to claim held not error.**

In an action to quiet title to a mining claim, the exclusion of two letters written by former owner of claim, and apparently offered to support theory of abandonment, stating that the writer did not see why the last two years' assessment work had been done, and that it was unauthorized, held not prejudicial error; the reason for the doing of such work being immaterial as affecting the fact that it was done.

8. New trial ⚡104(1)—**Denial of new trial for newly discovered evidence merely cumulative and contradictory, not error.**

Denial of a new trial sought on the ground of newly discovered evidence which is simply cumulative and contradictory of testimony already given is not error.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by W. D. Thornton against J. M. Phelan and others, wherein J. M. Phelan filed a cross-complaint. From the judgment rendered, plaintiff appeals. Affirmed.

J. C. Webster, of Sonora, for appellant.

J. T. B. Warne and Rowan Hardin, both of Sonora, for respondent.

PLUMMER, J. Plaintiff began an action to quiet title to certain quartz mining property situated in the county of Tuolumne, state of California. The title to these premises was formerly in the Santa Ana Mining Company, a corporation. The appellant bases his claim to the property in question by virtue of the locations made thereof on January 1, 1917. Respondent claims said property by virtue of a subsequent location made thereon by him on April 10, 1920. The plaintiff asserts that prior to January 1, 1917, the Santa Ana Mining Company had abandoned the claims involved in this action. The respondent maintains that the property was not open to location on January 1, 1917, for the reason that the assessment work had been done on the claims in 1916 for the benefit of said Santa Ana Mining Company, and that said mining company had not abandoned its properties. The court found that the assessment work had been done by the Santa Ana Mining Company or for its benefit up to and including the year 1916, and that up to the 1st day of January, 1917, said company had not abandoned any of the mining claims involved herein. The court further found that during the years of 1917, 1918, and 1919 the Santa Ana Mining Company caused no assessment work to be done upon any of said mining claims, and that the assessment work required by law to be done during the said years was not performed by

said company or by any one for its benefit, and also that said company did not, during any of said years, file a certificate showing that it claimed the benefit of the acts of Congress of the United States suspending the requirements of the performance of annual labor on mining claims during said years, and consequently that, commencing with the year 1918, the mining properties theretofore belonging to the Santa Ana Mining Company were open to relocation. The court also found that the Santa Ana Mining Company on or about February 27, 1915, forfeited its right to do business in the state of California, and that the directors of said company thereupon became the trustees of said corporation, all of whom were made defendants in this action, but failed to appear or make any defense therein. It is urged by appellant herein that prior to the year 1916 the Santa Ana Mining Company had abandoned its properties, and also that during the year 1916 it did no assessment work thereon, and that no assessment work was done on said properties for its use and benefit, and hence that the property was open for relocation on January 1, 1917. The court found against appellant on both of these contentions, and it is insisted that such findings are not sustained by the evidence.

[1-3] The decisions are uniform in holding that abandonment is a question of intention, and that abandonment may be proved by the acts and conduct of the party alleged to have abandoned the property in controversy. The burden also rests upon the party alleging abandonment to prove the same by satisfactory and competent evidence. Upon this question, our attention has only been called to the fact that in February, 1915, the Santa Ana Mining Company, as a corporation, forfeited its rights to do business in the state of California by reason of failure to pay corporation taxes required to be paid by the laws of this state, and the testimony of the witness J. T. Callahan. The testimony of this witness, as set out in the transcript, is as follows:

"I was a stockholder in the corporation, and had no other interest in the corporation, except as being a stockholder. The company abandoned the property in 1914 and I abandoned the claims in 1915. I went ahead and did the work in 1915 for my own protection, and after the work was completed I abandoned it entirely, and the Santa Ana Mining Company has made no claim to that property since that time."

A reading of this testimony is all that is necessary to show that it is entirely insufficient to establish the fact of abandonment. No act or transaction on the part of the company or of the persons who became trustees of the property belonging to the company showing an intent to abandon the property appears in such testimony. The intent to

abandon the property by this witness has no bearing upon the issue involved, and his statements as to abandonment by the company are simply the conclusions of the witness, and are not in any sense of the word evidentiary facts from which the court could draw the conclusion of abandonment by the company. The witness Callahan further testified, first, that he was the agent of the company, but upon cross-examination he testified as follows:

"I was not an authorized agent. I was a member of the company. I came with the understanding that I would be doubly compensated for my work, but I was not an authorized agent. I assumed that."

Upon such testimony the court could only conclude that the witness was acting for himself.

[4] It is next insisted by the appellant that the evidence is insufficient to sustain the finding of the court that the assessment work required by law was done upon the premises involved herein for the year 1916. Upon this question the evidence is in direct conflict, Joseph Thomas Callahan testifying that no work was done upon said premises during the year in question. On the other hand, the witnesses Timothy Henry Carlon, George Edward Watson, and Herman Meyertholen all testified to having been upon the premises in the year 1916 and the beginning of the year 1917, and that the assessment work done on all of the mines belonging theretofore and constituting the property belonging to the Santa Ana Mining Company was done and performed by one John James, and also one of these witnesses testified to the fact of having paid the said James for such services.

If believed by the trial court, this testimony was sufficient to show that the said James commenced doing the assessment work upon the mining claims involved in this action, and known as and called the Eureka and Mississippi Quartz Mining Claims, in the month of December, 1916, and continued in said work until it was finally completed, and hence as to these properties no valid location thereof could be made on January 1, 1917. As hereinbefore stated, there is no question raised as to the failure of the Santa Ana Mining Company to do the required assessment work for the years 1917, 1918, and 1919, and also of its failure to file the certificate required by the acts of Congress. It necessarily follows that the premises were open to relocation at any time on and after January 1, 1918.

[5] The law is well settled that a relocation of a mining claim before a former location has lapsed or has become forfeited for nonperformance of the annual assessment work is of no validity, and the person making such relocation acquires no title thereby. *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; 18 R. C. L. title Mines, § 47.

[6] The court having found that the annual assessment work for the year 1916 was done for the uses and purposes of the Santa Ana Mining Company, it is immaterial whether the cost of said work was or was not paid by the Santa Ana Mining Company. This court has held in the case of *Anderson v. Caughey*, 3 Cal. App. 22, 84 Pac. 223, that, if the work is done to the amount required by law, the effect thereof would be the same, even though the labor has been gratuitous.

[7] Appellant also insists that the trial court erred in striking from the testimony two letters written by Frank J. Callahan to one of his brothers, in one of which it is stated that Timothy Carlon was not authorized to act as agent of the mining company, and in the other, in speaking of certain work done in the mining premises, it is said:

"Why he did the last two years' work is beyond me. I did not authorize him to do it. You know that ditch man wired me to get me to acknowledge Tim as my agent, and I paid no attention to his request."

These letters were written in relation to other litigation then pending. They do not bear upon any of the issues tendered in this case, but were probably sought to be introduced to support the theory of abandonment. We do not see anything in them tending to support such theory; hence, if the letters had been allowed to remain in evidence, we cannot see that the result would have been any different from that arrived at by the trial court. The fact that two years' assessment work was done without being authorized by Frank Callahan would not alter the fact of the work having been done.

[8] Appellant also sought a new trial in the lower court on the ground that new evidence had been discovered. The affidavits set out in the transcript show simply that the evidence claimed to be new is simply cumulative, and contradictory only of testimony already having been given. Witnesses for the plaintiff testified that the required assessment work was not done upon the premises during the year 1916. The witnesses mentioned in the affidavits, according to their affidavits, would testify to the same effect.

Again, newly discovered evidence is also simply contradictory, and comes within the rule laid down in the case of *Estate of Walden*, 166 Cal. 446, where, on page 450 (137 Pac. 35, 37), the court says:

"We cannot say that the court below abused its discretion in denying the motion for a new trial so far as it was based on newly discovered evidence. All of the new evidence presented comes within the well-established rule that the trial court may, in its sound discretion, refuse a new trial upon this ground, where the new evidence is merely cumulative, or where it tends merely to impair the credibility of the evi-

dence of the prevailing party"—citing a number of California cases.

No other reasons being assigned for reversal, we conclude that the judgment of the trial court should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; YOUNG, Justice pro tem.

(65 Cal. App. 493)

KELLY et al. v. UNIVERSAL OIL SUPPLY CO. et al. (Civ. 2677.)

(District Court of Appeal, Third District, California. Feb. 2, 1924. Hearing Denied by Supreme Court March 31, 1924.)

1. Bills and notes $\S$ 167—Note secured by mortgage is nonnegotiable.

A note secured by mortgage is nonnegotiable.

2. Mines and minerals $\S$ 78(5)—Lessors held estopped to assert equities against note and mortgage.

Where oil lessors executed to lessee corporation, for purchase of its stock, notes secured by mortgage payable in three years, such purchase to be rescinded if drilling was not commenced within four months, also delivering a statement that they understood that the note and mortgage were to be assigned and that lessors had no offsets or defenses against the note, held that, under Code Civ. Proc. $\S$ 1962, subd. 3, and Civ. Code, $\S$ 1710, subd. 3, they were estopped to set up, as against assignees of the note and mortgage, lessees' failure to commence drilling within the four months, as warranting rescission.

3. Pledges $\S$ 30(1)—Assignee of chose in action, held as security, may recover whole amount due.

Ordinarily the assignee of a chose in action, held as security, may recover the whole amount due thereon.

4. Appeal and error $\S$ 880(3)—Cross-complainant could not complain of judgment covering full individual claim where excess would go to defendant not appealing.

In a suit to cancel note and mortgage, a cross-complainant, given judgment for the full amount to which it was individually entitled, could not complain of failure to secure judgment for the whole amount of note of which it was assignee, where the excess would go to its assignor, another defendant who did not appeal from a judgment declaring his claim invalid.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Suit by J. J. Kelly and another against the Universal Oil Supply Company and others, in which the Glendale National Bank filed cross-complaint. From a judgment for plaintiffs and cross-complainant, plaintiffs and cross-complainant appeal. Affirmed.

W. W. Middlecoff and Power & McFadzean, all of Visalia, for appellants Kelly.

Hocker & Austin, of Los Angeles, for appellant bank.

FINCH, P. J. Plaintiff brought this action for the cancellation of an agreement, a lease, and a promissory note and mortgage. The defendant Glendale National Bank filed a cross-complaint to recover the amount of the promissory note and to foreclose the mortgage. The action was dismissed as against defendant Hoggins. The bank held the note and mortgage as security for a loan made by it to defendant Hamil in the sum of \$3,500. The court gave the bank judgment against plaintiffs for the sum of \$3,500 and unpaid interest and counsel fees in the sum of \$350, and entered judgment in favor of plaintiffs against the other defendants for the cancellation of all the aforesaid instruments. The plaintiffs and the bank have appealed on a single record. The question raised by the appeals is whether the facts found by the court support the judgment. The findings of the court are substantially as follows:

October 28, 1920, plaintiff agreed to lease certain lands to Hoggins for a term of 20 years "for the purpose of mining and prospecting for oil and gas." The agreement provided that Hoggins should begin drilling operations within 4 months after the execution of the lease and "pay a royalty of one-sixth of all oil taken from the ground"; that within 30 days Kelly would purchase from Hoggins 5,000 shares of the capital stock of the defendant company for the sum of \$5,000, "to be paid by the execution of a note by said Kelly and his wife," payable 3 years after date, with interest at 7 per cent. per annum, payable quarterly, and secured by a mortgage on other lands belonging to Kelly; that "the five thousand dollars above mentioned is to be expended in the development of the lease"; that "if drilling is not commenced within the time mentioned, in the above, the lease herein mentioned shall be canceled and the sale of stock rescinded." The "plaintiffs expected and intended that said R. C. Hoggins should negotiate the sale of said promissory note and mortgage and use the proceeds thereof in developing the lease therein mentioned." November 6, 1920, the lease provided for by the agreement was executed. On the same day Kelly purchased 5,000 shares of the capital stock of the defendant company, and he and his wife, Ione Kelly, in payment therefor, gave Hoggins their promissory note, as provided in the agreement, in the usual form, secured by a mortgage, executed by them, on lands other than those leased. Neither the note nor the mortgage contains any reference to the purchase of the stock or to the aforesaid agreement or lease, but the execution of all of said instruments constituted one transaction as be-

tween the parties thereto. December 5, 1920, for the purpose of assisting Hoggins "to negotiate said note and mortgage," Kelly caused the National Bank of Bakersfield to telegraph Hoggins an appraisal of the property mortgaged, and the next day, for the same purpose, Kelly and his wife executed and delivered to Hoggins the following writing:

"Pacific Mortgage Company, Los Angeles, California—Gentlemen: Replying to your request of recent date will say, that I am the maker of the promissory note dated November 6, 1920, in favor of R. C. Hoggins, secured by mortgage recorded in Book 177, page 496, of Mortgages in Tulare county, California, and covering 215 acres of land described in said mortgage; that I am the owner of the premises covered by said mortgage; that the unpaid balance of the mortgage is \$5,000.00; that the interest on said note is at the net rate of seven per cent. (7%) per annum; that I have no off-sets, claims nor defenses against said note except as stated above. I understand that it is desired to assign said note and mortgage.

"Very truly yours,

"[Signed] J. J. Kelly.
"Ione Kelly."

"Said writing was not made in response to any inquiry from the Pacific Mortgage Company and was not delivered to said Pacific Mortgage Company, but was delivered to said R. C. Hoggins with the intention and expectation of having said R. C. Hoggins exhibit the same to whomsoever he might wish and to assist the said Hoggins in negotiating said note and mortgage." December 8, 1920, Hoggins exhibited the foregoing telegram and written statement to defendant Hamil, and sold and assigned the note and mortgage to him for the sum of \$4,600, which Hamil paid to Hoggins. December 14, 1920, Hamil exhibited the telegram and statement to the Glendale National Bank, and the bank, relying thereon, and, without knowledge or notice of any of the aforesaid terms and conditions upon which the note and mortgage were executed, "or that there was any condition attached to said note," loaned Hamil \$3,500 and took an assignment from him of the note and mortgage as security for the loan. Plaintiffs were not notified of the assignment to Hamil prior to May 3, 1921, nor of the assignment to the bank until the commencement of this action, July 29, 1921.

No drilling operations were ever commenced on the leased lands. June 7, 1921, plaintiffs gave notice of rescission of the foregoing agreement and lease to defendants Hoggins, Hamil, and Universal Oil Supply Company, offered to return the 5,000 shares of capital stock, and demanded the return of the note and the release of the mortgage. The note became due and payable before the action was commenced because of plaintiffs' default in payment of interest. Plaintiff was a director of the defendant company.

[1] Since the note was secured by a mort-

gage, it was nonnegotiable, under the law in force at the time of the assignments thereof. *Pitman v. Walker*, 187 Cal. 667, 203 Pac. 739. The bank, therefore, took it subject to all existing equities and defenses in favor of the plaintiffs unless they were estopped, by their written declarations, to assert such equities and defenses.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. § 1962, subd. 3.

[2] It is not contended that the declaration would not estop plaintiffs as to any defense existing at the time the declaration was made and acted upon but it is urged that the consideration for which the note was given failed after the declaration was made and that therefore the plaintiffs are not estopped thereby, since they could not have known of such failure of consideration at the time. The plaintiffs did know at that time, however, that the note and mortgage were to be canceled if Hoggins failed to commence drilling within 4 months from the date of the lease. Their declaration was intended to influence any person who might contemplate the purchase of the securities, and their deliberate failure to disclose any secret equities or conditions relative thereto, of which they had full knowledge, was such an omission of duty as to preclude them from asserting such equities or conditions against one who has been misled by their statement. One form of deceit is:

"The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." Civ. Code, § 1710, subd. 3.

It is urged that the bank made no inquiries relative to any equities or conditions attaching to the securities. The answer is that under the written representations made by the plaintiffs, and upon which the bank acted, there was no occasion for inquiry. *Porter v. Johnson*, 172 Cal. 456, 156 Pac. 1022.

[3, 4] The appellant bank contends that it should have been given judgment for the full amount of the note. Ordinarily the assignee of a chose in action, held as security, may recover the whole amount due thereon. *Ginocchio v. Amador*, 67 Cal. 493, 8 Pac. 29; *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 141 Pac. 375. In the latter case it is said, quoting from *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094, that the assignor's only interest "is in what remains of it after the advances, for the security of which it was assigned, have been satisfied." Had the bank been given judgment for the full

amount of the note, it would have been under obligation to pay Hamil, the assignor, whatever it recovered in excess of the amount due upon his note to it. But Hamil was a party to the action, and the court, in effect, found that he was not entitled to such excess by reason of the invalidity of the note as to him. He has not appealed from the judgment. The bank was given judgment for the full amount to which it was individually entitled and therefore has no just cause of complaint. Having all interested parties before it no reason appears why it was not proper for the court to enter judgment determining the rights of all of them. The judgment is affirmed on both appeals.

We concur: YOUNG, Justice pro tem.; PLUMMER, J.

(65 Cal. App. 463)

PEARDON et al. v. WHITE. (Civ. 2656.)

(District Court of Appeal, Third District, California. Jan. 29, 1924.)

1. Pleading ⇨216(1)—General demurrer calls for consideration of complaint as whole.

A general demurrer to a complaint calls for a consideration of the complaint as a whole only.

2. Partnership ⇨327(1) — Pleading held to show partnership at will dissolvable at any time.

A complaint alleging formation of a partnership, agreement to advance money, purposes for which it was to be organized, and concluding with a prayer for dissolution and accounting, held to show a partnership at will, which could be dissolved at any time, in view of Civ. Code, §§ 2449, 2450, subd. 2.

3. Joint adventures ⇨5(1) — Facts held to warrant accounting.

In an action for an accounting between joint adventurers, an accounting was properly granted, where it was necessary for the court to ascertain and determine the amount of money advanced by all the parties engaged in the adventure, and the dates of the advancement.

4. Joint adventures ⇨5(2)—Accounting granted, though partnership alleged.

The fact that the complaint alleged a partnership did not prevent the court from granting an accounting on the theory that a joint adventure existed and not a partnership.

5. Joint adventures ⇨5(1)—Finding of indebtedness held not defective.

In an action for dissolution and accounting between joint adventurers, a contention that the findings were defective, in that they did not show the amount of the indebtedness from the defendant to the plaintiffs, was without merit, where one paragraph of the findings, after setting forth various amounts due plaintiffs by defendant, found that a certain sum for which sum judgment was subsequently entered was due plaintiffs.

6. Joint adventures: ¶4(4)—Interest properly allowed on advancements by joint adventurers.

In an action for an accounting between joint adventurers, court properly allowed plaintiffs' interest on sums advanced, which should have been paid by the defendant, from the dates of such advancements.

7. Joint adventures: ¶5(1)—Objection that accounting not brought down to date held without merit.

In action between joint adventurers for an accounting, an objection that the accounting was not brought down to date of entry of judgment is without merit, where the transcript shows that accounting was brought down to latest possible date, and the taking of testimony ended September 20th, and judgment was entered in October thereafter.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Fred Peardon and others against Thomas W. White. Judgment for plaintiffs, and defendant appeals. Affirmed.

Crofton & Wetmore, of Marysville, for appellant.

W. P. Rich, of Marysville, for respondents.

PLUMMER, J. Action for an accounting. Plaintiffs had judgment. Defendant appeals. It appears from the pleadings and transcript in this action that in 1920 and up to the date of the entry of judgment herein the plaintiffs were the owners of a certain ranch situated in the county of Sutter upon which they were raising Thompson seedless grapes, the plaintiff Peardon owning a half interest in the ranch, and the other plaintiffs a one-fourth interest each. This ranch was operated by the plaintiffs as partners.

During the same period of time the defendant has been the owner of a ranch located in close proximity to the ranch belonging to the plaintiffs. The defendant was likewise engaged in the raising of Thompson seedless grapes. Prior to the transaction hereinafter referred to neither plaintiffs nor the defendant had a fruit-drying plant of their own. Early in 1920 the plaintiffs and the defendant agreed that they would construct a raisin and fruit-drying plant for the use of the plaintiffs and defendant respectively. The plaintiffs were to pay one-half of the cost thereof and the defendant to pay one-half of the cost of such plant, and that the plaintiffs and defendant should be equal owners in said plant, and when grapes were dried the expense of operating the plant should be prorated between the plaintiffs and defendant, that is, the total expense of operating the plant should be divided between them in proportion as the tons of grapes dried by each bore to the total number of tons dried. The drying plant itself was erected upon the property belonging to

the plaintiffs, and was operated during the years 1920 and 1921. The cost of the plant was several thousand dollars. A few bills were paid by the defendant, but the greater portion thereof was paid by the plaintiffs.

The complaint alleges that the plaintiffs and the defendant were copartners in this enterprise. The trial court found that there was no copartnership, but that the plaintiffs and the defendant were engaged in a joint adventure, and directed that an accounting be had. The first point made for reversal is that the plaintiffs have not complied with the provisions of sections 2466 and 2468 of the Civil Code, in that no certificate of partnership was ever filed or published.

[1, 2] As it does not appear, however, that the plaintiffs entered into any agreement or joint adventure with the defendant as partners, this contention is untenable, and needs no further consideration. It is next contended that the complaint is insufficient in its allegations concerning partnership, in that it sets out no time for its continuance and no cause for dissolution. Only a general demurrer was filed to the complaint and calls for a consideration of the complaint as a whole only. The complaint alleged the formation of the partnership, the agreement to advance the moneys, the purposes for which it is to be organized, and concludes with a prayer for dissolution and accounting. This shows a partnership at will, and under such circumstances a partnership that may be dissolved at any time. Section 2449, Civ. Code; subdivision 2, § 2450, Civ. Code; 30 Cyc. p. 712.

[3, 4] Upon the conclusion of the plaintiff's testimony a motion for nonsuit was made on the ground that the evidence failed to establish a partnership. The court denied the motion, holding that the testimony established a joint adventure, and made out a case entitling the plaintiff to an accounting. Several cases are cited by the appellant to the point that a court will not grant an accounting where an accounting is unnecessary. The principal case relied upon is that of *Kinley v. Thelen*, 158 Cal. 175, 110 Pac. 513. An examination of this case shows, however, that it has no application to the issues presented by the case at bar. In the case of *Kinley v. Thelen*, supra, it appears that a balance due upon an unsettled account had been fixed by an agreement and a note given therefor, and the court held that, under such circumstances, in the absence of a charge of fraud or mistake an accounting would not be permitted. In the case at bar the plaintiffs and the defendant made advances, and, in order to ascertain the rights of the respective parties, it was necessary for the court to ascertain and determine the amount of money advanced by all the persons engaged in the joint adventure and the date of the advancements. It could only be done by

taking an accounting of the various transactions. In the case of Coward v. Clanton, 122 Cal. 451, 55 Pac. 147, the precise questions here presented were considered and determined. It was there held that the fact that the relation was wrongly averred to be that of partners and not of persons engaged in joint adventure was immaterial.

"If a case is stated which entitles the plaintiff to relief, it matters not that the contract which is correctly set out is wrongly called a contract of partnership. * * * Whether the facts would have given jurisdiction to a court of equity is of no consequence. We have no such courts, but our courts afford the remedies to which the facts may show the parties are entitled, whether legal or equitable."

A reading of this case shows that further citation of authority upon this point is unnecessary. The fact that the plaintiffs were doing business as partners did not prevent them as individuals from entering into an agreement with the defendant herein, as before stated, and hence the defendant's motion in abatement was properly denied.

[5] It is next contended that the findings are defective, and that they do not show the amount of the indebtedness from the defendant to the plaintiffs. Paragraph 7 of the findings, however, is a complete answer to this contention. After setting forth various items, it is found that the amount due the plaintiffs by the defendant is the sum of \$3,779.05, for which sum the judgment was subsequently entered in favor of the plaintiffs and against the defendant.

[6] The court allowed the plaintiffs interest for the sums advanced by them which should have been paid by the defendant from the dates of such advancements at the rate of 7 per cent. per annum. This we hold to be proper.

"Interest in such cases should be allowed on advances from the time of payment." 23 Cyc. 457; Crenshaw v. Crenshaw (Ky.) 61 S. W. 366; Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474, 16 N. W. 862.

"Joint adventures and partnerships are governed by the same rules of law." 23 Cyc. 453.

[7] It is next objected that the accounting is not brought down to the date of entry of judgment. It appears, however, from an examination of the transcript that the accounting was brought down to the latest possible date, and the taking of testimony ended on the 20th day of September, 1922. Judgment was entered in October thereafter.

There appearing no valid reasons for disturbing the judgment entered by the court in this case, it is ordered that the same be and it is hereby affirmed.

We concur: FINCH, P. J.; YOUNG, Justice pro tem.

(65 Cal. App. 450)

HAYWARD et ux. v. DOWNER. (Civ. 4771.)

(District Court of Appeal, First District, Division 2, California, Jan. 26, 1924.)

1. Municipal corporations $\S$ 821(24)—Contributory negligence of pedestrian traveling at night with knowledge of excavations held for jury.

A pedestrian who, with knowledge that a sewer system was being constructed in a street, fell into a trench excavated in the course of the construction of such sewer system, while walking along such street during the nighttime, held not contributorily negligent as a matter of law.

2. Husband and wife $\S$ 235(2)—Contributory negligence of husband in not warning wife of danger of falling into trench held for jury.

Husband of one who fell into trench dug in the course of the construction of a sewer system, while walking in a street during the nighttime, held not contributorily negligent as a matter of law, so as to be precluded from recovering damages for wife's injuries because of his failure to warn her that a sewer was being constructed in such street, though he had knowledge thereof.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by L. P. Hayward and wife against R. H. Downer. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. H. Delap and Hiram E. Jacobs, both of Richmond, and J. E. Rodgers, of Martinez, for appellant.

Hall & Jacobs, for respondents.

NOURSE, J. Plaintiffs obtained a verdict of \$2,000 for damages suffered by Emilie Hayward, the wife of her coplaintiff, when she fell into a ditch or trench excavated by the defendant in a public street during the course of his construction of a sewer system under contract. Work under this contract covered a large area in the particular neighborhood in which the plaintiff lived, and had been in course of construction for a period of some two and a half months prior to the date of the injury. On the night on which the injury occurred, the plaintiffs had been visiting a neighbor, and on their return home over a path which they had frequently used the wife fell into the trench and suffered the injuries which are the basis of the accident. Plaintiffs had a general verdict in the sum of \$2,000, and from the judgment upon the verdict this appeal is taken.

The only grounds urged upon the appeal are: (1) That the respondent Emilie Hayward had knowledge or the means of knowledge of the existence of the danger, that she voluntarily assumed the risk, and was therefore guilty of contributory negligence as a matter of law. (2) That the respondent

Emilie Hayward's husband had actual knowledge of the danger, and that his negligence in failing to warn his wife of such danger bars recovery by both himself and his wife.

[1] There is much respectable authority in support of appellant's first point, and such, in fact, was the rule in this state until the Supreme Court, in *Meindersee v. Meyers*, 188 Cal. 498, 503, 205 Pac. 1078, held that, notwithstanding this knowledge and means of knowledge, it was for the jury to determine whether it was a want of ordinary care for the injured not to have the source of danger in mind.

Nothing was said by the Supreme Court regarding the standing of the husband in relation to the award of damages for his wife's injury, and no effort was made to distinguish the rule affirmed in *Basler v. Sacramento G. & E. Co.*, 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642, to the effect that the husband's failure to notify his wife of approaching danger while under his care bars recovery by him for injuries suffered by the wife.

[2] However, the *Meindersee* Case was decided upon a state of facts similar to those before us, and we must assume from the decision that all these questions were taken into consideration, and that, where either husband or wife having knowledge or previous notice of the unsafe condition of a street voluntarily puts himself in a place of danger from which injury results to the wife, it is a question for the jury to determine whether either is guilty of contributory negligence.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

193 Cal. 360

(224 P.)

ROULLARD et al. v. ROSENBERG BROS. & CO. (S. F. 10912.)(Supreme Court of California. March 12, 1924.
Rehearing Denied April 10, 1924.)**1. Election of remedies ⇐1—Doctrine stated.**

A party having two or more coexisting modes of procedure and relief, allowed by law, on the same state of facts, one inconsistent with the other, must choose between them, and having done so, with knowledge of the facts, is estopped from invoking the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

2. Election of remedies ⇐1, 7(1)—Neither suit to quiet title against purchaser nor for conversion against purchaser's assignee is election.

Where a landowner commenced suit for conversion of his peach crop against assignees of one contracting to buy and subsequently sued the purchaser, defaulting in payments, to quiet title, the first suit was not an "election of remedies" because the second did not exist, and neither having proceeded beyond the pleadings constituted such election against the other; there being no inconsistency.

3. Election of remedies ⇐1—Doctrine is specific application of estoppel.

The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel.

4. Election of remedies ⇐1—Commencement of suit to quiet title did not bar pending suit for conversion of peach crops against another defendant.

Commencement of a suit to quiet title against one defaulting in payments under his contract to buy did not bar a pending suit against the purchaser's assignee of a peach crop for conversion of the crop, the actions being distinct, since the title suit could not result in injury to the converters.

5. Vendor and purchaser ⇐214(3)—Assignment of peach crop not an assignment of assignor's contract to buy land.

An assignment of the peach crop, by one holding land under a contract to buy, did not operate as an assignment of his contract, or any interest therein, and the assignee was not in privity with the parties to the land contract.

6. Action ⇐27(1)—Action for conversion of peach crops against assignees of one contracting to buy sounds wholly in tort.

Landowner's action for conversion of his peach crop, against assignees of the crop from one contracting to buy, sounded wholly in tort, and was entirely independent of the contract relationships.

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Joel Roullard and another against Rosenberg Bros. & Co. Judgment

for defendant, and plaintiffs appeal. Reversed and remanded, with instructions.

C. K. Bonestell, of San Francisco, for appellants.

Harris, Johnson, Willey & Griffith, of Fresno, for respondent.

MYERS, J. Plaintiffs appeal herein on the judgment roll alone from a judgment in favor of defendant in an action to recover damages for the wrongful conversion of a certain crop of peaches. The only question involved upon the appeal is whether or not the doctrine of election of remedies was applicable to this case, and, if so, whether or not the defendant was entitled to rely upon it as a defense to the cause of action.

Briefly stated, the facts were these: In October, 1919, appellants, who were the owners of a certain vineyard and orchard in Fresno county, entered into an executory contract to sell the same to one Johnson. This was in the usual form, providing for the payment of the contract price in annual installments and that time should be the essence thereof. To secure these annual payments Johnson executed and delivered to the appellants a chattel mortgage upon all of the crops to be produced upon the premises during the years from 1920 to 1925. This mortgage was in due and legal form, duly executed, acknowledged, delivered, and recorded, and contained the affidavits of the parties as required by law. It gave to appellants the right to possession of the crops as soon as they should be in a condition to be harvested and the right to dispose of them and apply the proceeds upon the unpaid balance of the purchase price. In September, 1921, certain persons, who were in possession of the premises as assignees from Johnson, sold and delivered the 1921 crop of peaches from said premises to respondent herein, in disregard of the provisions of the chattel mortgage and of the rules of law applicable thereto. Thereupon appellants brought this action of conversion against the respondent to recover the value of the crop so converted, alleging in their complaint the facts briefly outlined above.

Subsequent to the commencement of this action, and before the trial, Johnson having defaulted in his payment due October 10, 1921, upon the contract of purchase, appellants brought an action against him to quiet title to and recover possession of the land. Thereupon the respondent filed a supplemental answer in the action of conversion, which is the case here upon appeal, alleging the commencement of the other action by plaintiffs against Johnson, and alleging that plaintiffs have elected by said last-mentioned action to recover said land and not the purchase price thereof, and that by reason of such election plaintiffs are barred from re-

covering any judgment against the respondent herein. The trial court found all of the facts alleged in the complaint to be true and also found the facts alleged in the supplemental answer to be true, and as a conclusion of law therefrom it concluded that the latter facts presented a complete bar to plaintiffs' cause of action herein, and rendered judgment accordingly in favor of defendant.

[1] Respondent's contention is that when appellants commenced the second action above referred to for the recovery of the possession of the premises they thereby made an election of remedies, as a result of which they are estopped and precluded from further pursuing their remedy in the case at bar. To this appellants reply that if they at any time made an election of remedies it was made when the case at bar was commenced, and not by the later suit to quiet title. We are of the opinion that neither of these contentions is precisely correct. An excellent statement of the doctrine of election of remedies is to be found in the following passage in 10 California Jurisprudence, at page 1:

"It is a general rule that a party having two or more coexisting modes of procedure and relief allowed by law on the same state of facts, one of which is inconsistent with the other, may not pursue both but must choose between them, and when, with knowledge of the facts, he has clearly elected to proceed upon one, he is thereby bound and will be estopped from invoking the other. * * *"

[2] It cannot be said that plaintiffs made an election of remedies by the mere commencement of the action in the case at bar, because at that time they had no choice of remedies. No default had then been made in the contract of purchase, and the only remedy then available to plaintiffs was the action of conversion, which they are here prosecuting. Neither do we think they can be said to have made an election by the mere commencement of the action in the suit to quiet title. When that had been done, the situation was that plaintiffs had then commenced two actions, one an action for damages for conversion, being the case at bar, the other a suit to quiet title. Neither of said actions had then proceeded beyond the point of filing complaint and issuance of summons, and it could not be said that plaintiffs had "clearly elected to proceed" upon either of them as distinguished from the other. The conclusion to be deduced from plaintiffs' conduct up to that point would be that they had not elected to pursue either remedy, but had elected rather to pursue both. If plaintiffs had then proceeded to pursue the quiet title action to trial and judgment, leaving the conversion action in statu quo, it might then have been argued with some force that they had thereby elected to pursue that action to the exclusion of this. But they did not do that. Instead thereof, they pressed the con-

version action to trial and judgment, leaving the quiet title suit to remain in abeyance, so that if it can be said that plaintiffs have elected to pursue either of these remedies to the exclusion of the other, it would have to be concluded that they have chosen to pursue the remedy of the case at bar.

Appellants further contend that the defense of estoppel by election of remedies is never available to a stranger to the transaction such as is the respondent herein. The rule relied upon is thus stated:

"The doctrine of election cannot be applied between one of the parties to a contract and a third person, a stranger thereto; since it is applicable only to the parties to the contract." 20 Corpus Juris, 18, citing *Kuehle v. Springer*, 145 Ill. App. 127; *Tanner v. Johnson*, 119 Ark. 506, 178 S. W. 376.

We shall not undertake to determine whether or not the rule contended for is as broad in its application as this statement of it would imply, or whether it is properly applicable to the present case, because, for the reason above indicated, as well as for other reasons which will be briefly stated, we do not think that the doctrine of election of remedies is available to the defendant herein. It is to be noted: First, that as against this defendant the plaintiffs have never had a choice of remedies; second, that the remedies involved in the two actions here under consideration depend upon totally different states of fact; and, third, that at least up to the present point there is no inconsistency between them. The case at bar is a tort action and rests upon the conversion by defendant of the crop of peaches, of which the plaintiffs were entitled under their mortgage to hold possession as security for the performance by Johnson of his contract of purchase. The quiet title action rests upon the default by Johnson in the performance of said contract, and has nothing whatever to do with the conversion of the peaches. We see no inconsistency in the prosecution of the two actions at the same time, at least up to the point to which each of them has now progressed. It is, of course, true that the plaintiffs are not entitled to recover both the land and the unpaid purchase price, but if there had been no conversion of the property secured by the mortgage, it would scarcely be contended that the mere commencement of the action to quiet title after default in the payment of purchase money would have had the effect of discharging or releasing the lien of the mortgage prior to the recovery of judgment in that action.

The instant case is analogous in some respects to the case of *Crittenden v. St. Hill*, 34 Cal. App. 107, 166 Pac. 1016. In that case a landlord had brought an action at law against his tenant to recover rent due under the lease. While that action was still pending, he commenced a second action of unlaw-

ful detainer to recover the possession of the premises, together with the rent due. The defendant contended that the commencement of the first action was an election of remedies by virtue of which the plaintiff should be precluded from pursuing the remedy in unlawful detainer. The following language from the opinion in that case is fairly pertinent to the action at bar:

"By the original action plaintiff was seeking to recover the rent due him, and being resisted in that action, he has resorted to a more expeditious proceeding to accomplish this result. The basis of the doctrine of election of remedies is founded in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. This doctrine is, therefore, generally regarded as being an application of the law of estoppel. (9 R. C. L. p. 956 et seq.) Here no such element exists. There was no payment or acceptance of the rent or any offer to pay, except the offers made upon the condition that defendant had no right to exact, nor does the record disclose any element of estoppel which makes it inequitable or unjust to allow the plaintiff the fruits of the judgment appealed from; nor are the two actions, in our opinion, inconsistent. One is for the income of the property, the other for the possession of the property itself, which is in part based upon the latter default. In *Arnold v. Krigbaum*, 169 Cal. 143, 146 (Ann. Cas. 1916D, 370, 146 Pac. 423), it is held that the action for unlawful detainer is one for the recovery of the possession of property primarily, and that the rent found due is a mere incident to the main object. The rights litigated in the two actions are therefore entirely different; and where the law affords distinct but not inconsistent remedies, the election to follow one does not operate as a waiver of the other. (*American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116 [16 Ann. Cas. p. 1056, 47 South. 942].) All inconsistent remedies may in general proceed concurrently, but, of course, the satisfaction of the claim by one remedy puts an end to the enforcement of the other. (Id.) Here there was no satisfaction of the action instituted for the recovery of the rent, because it never went to judgment. * * *

[3, 4] As above noted, the doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel. See, also, *Hines v. Ward*, 121 Cal. 115, 120, 53 Pac. 427; *McGibbon v. Schmidt*, 172 Cal. 70, 75, 155 Pac. 460; *Herdan v. Hanson*, 182 Cal. 538, 543, 189 Pac. 440; *Buckmaster v. Bertam*, 186 Cal. 673, 678, 200 Pac. 610; *Mansfield v. Pickwick Stages* (Cal. Sup.) 215 Pac. 389. When this is kept in mind, it is readily apparent that this defendant is in no position to invoke the doctrine. At the time this action was commenced, the plaintiffs had a complete and perfect cause of action against this defendant for the recovery of the value of the property which had been wrongfully taken by the defendant and converted to its own

use. The commencement and pendency of the later action to quiet title, against a different defendant and upon a different cause of action, did not operate to any extent to injure or defraud or mislead or in any way prejudice this defendant, and therefore affords no ground upon which the latter can predicate a claim of estoppel. To be sure, this defendant will be "injured," in the layman's sense of the word, if it is compelled to pay the judgment which is here sought. But this does not constitute an "injury," as that term is understood in law or in equity as affording a ground for relief. The defendant rests under a legal obligation to make just compensation to the plaintiffs for the wrong done to them by the conversion committed by it.

[5, 6] This defendant is not in privity with any of the parties to the contract for the sale of the land. The transfer to it of the crop of peaches did not operate as an assignment or conveyance of the land contract or of any interest therein, if, indeed, that transaction may be regarded as having any validity, which may be questioned. See *Pen. Code*, § 538. The case of *Glassell v. Coleman*, 94 Cal. 260, 29 Pac. 508, is readily distinguishable from the case at bar. The cause of action in that case rested wholly in contract. The defendants therein had guaranteed the payment by the vendee of a certain portion of the purchase price under a contract for the sale of land. Default having occurred, the vendor elected to and did rescind the contract. Thereafter he brought suit against the guarantors to recover from them the portion of the unpaid purchase price which had been guaranteed by them. The defendants therein, by their contract of guaranty, had become parties to the contract of sale, or at least in privity with the vendor thereunder. It was there held that the vendor could not enforce obligations resting solely upon a contract, after that contract had been effectively rescinded. The cause of action in the instant case sounds wholly in tort. It is not at all dependent upon any contract obligation of the defendant. It depends upon the right of the plaintiffs to the possession of the fruit and the wrongful interference therewith by the defendant; and the cause of action therefor was complete at the time this action was commenced.

The finding herein that plaintiffs have declared at an end the said contract for the sale of the land, and that the same has been terminated, is in no sense binding upon or effective against the vendee under said contract, or his assigns, because they were not parties or privies to parties herein. If that action ever proceeds to trial, it may be decided therein that the contract has not been terminated. It may be that the recovery of judgment herein, if such judgment is satisfied and the proceeds thereof applied upon the amounts due under the land contract,

will operate to estop these plaintiffs from the further prosecution of the quiet title action; but we are not here called upon to determine that question. We are of the opinion that the trial court erred herein in concluding that the facts found in response to the allegations of the supplemental answer operate as a bar to the cause of action which is fully supported by the facts found in response to the allegations of the complaint.

The judgment is reversed, and the cause remanded to the trial court, with instructions to render judgment for the plaintiffs upon the facts found by it, in accordance with the conclusions hereof.

We concur: WILBUR, C. J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; WASTE, J., SEAWELL, J.

(193 Cal. 387)

Ex parte WIGNALL. (Cr. 2653.)

(Supreme Court of California. March 13, 1924.)

1. Habeas corpus $\S$ 17—Sentence of petitioner to from one to ten years in penitentiary held sufficient to require remand to custody before expiration of maximum term.

A judgment, sentencing one convicted of a conspiracy to obtain personalty worth more than \$100 by false pretenses to a term of from one to ten years in the state penitentiary, held a sufficient sentence for the maximum term of ten years provided by Pen. Code, $\S$ 182 (St. 1919, p. 170), so as to require that he be remanded to custody on petition for habeas corpus prior to the expiration of such term. Pen. Code, $\S\S$ 532, 669.

2. Criminal law $\S$ 1216(1)—Term of imprisonment of one twice sentenced held to begin from date of first sentence.

Where an amended judgment and commitment thereon was made after notice of appeal from a judgment imposing a sufficient sentence for the offense of which appellant was convicted, his term of imprisonment began from the date of the first sentence.

In Bank.

Application by W. Wignall for writ of habeas corpus directed to the warden of Folsom State Prison. Prisoner remanded.

See, also, 205 Pac. 881.

Clarence E. Todd, of San Francisco, and Charles P. Huey, of Los Angeles, for petitioner.

At the conclusion of the oral argument, the Chief Justice made the following statement:

THE CHIEF JUSTICE. [1] The members of the court are satisfied that the first judgment pronounced by the trial court, which recited the verdict of the jury finding the petitioner guilty of the offense stated in the information, to wit, a conspiracy to obtain personal

property to a value of more than \$100 by false pretenses, was a sufficient sentence of the defendant for the term provided by law for conspiracy to commit a felony, that is, a sentence for the maximum term of ten years, as we construe section 182 of the Penal Code, and that term not having as yet expired, the prisoner should be remanded. Section 182, Stats. 1919, p. 170; sections 532, 669, Pen. Code. See *Ex parte Kirby*, 76 Cal. 514, 18 Pac. 655; *In re Frank Mann* (Cal. Sup.) 220 Pac. 305.

[2] Mr. Todd: Do your honors rule as to when the first term begins?

The Chief Justice: From the date of the first sentence.

Prisoner remanded.

(193 Cal. 386)

Ex parte YAHNE. (Cr. 2655.)

(Supreme Court of California. March 13, 1924.)

Habeas corpus $\S$ 92(1)—Guilt of offense charged held not presented.

Whether one in custody on a charge of violating the Auto Bus Transportation Act (St. 1917, p. 330) was guilty or innocent, held not presented on his application for writ of habeas corpus to secure his release on the ground that he was engaged in interstate commerce, prohibition of which violates the interstate commerce clause of the federal Constitution (article 1, $\S$ 8, cl. 3); his remedy being to defend the case before the trial court.

In Bank.

Application by Melville C. Yahne for writ of habeas corpus to the sheriff of the City and County of San Francisco, to secure petitioner's release from custody. Petition denied, and petitioner remanded.

H. L. McAllister, of San Francisco, for petitioner.

Carl I. Wheat and R. M. J. Armstrong, both of San Francisco, for respondent.

At the conclusion of the oral argument in the above-entitled matter the Chief Justice made the following statement:

THE CHIEF JUSTICE. The Justices are all satisfied that the complaint upon which the petitioner is held, as shown by the return, states a public offense, and that the question of whether or not the petitioner was guilty or innocent of that offense is the question counsel is now presenting to the court in his effort to show that the petitioner was engaged in interstate commerce, and that an attempted prohibition of that interstate commerce was a violation of the interstate commerce clause of the federal Constitution (article 1, $\S$ 8, cl. 3). We do not believe the record before us presents that question, and hold that the remedy of the petitioner is to defend the case before the trial court.

The petition will be denied, and the prison-

er remanded, for the reasons stated, and the remarks of the court will be transcribed and made the written opinion of the court.

Petitioner remanded.

193 Cal. 354

In re PARKINSON'S ESTATE. (L. A. 7815.)

(Supreme Court of California. March 12, 1924.
Rehearing Denied April 10, 1924.)

1. Executors and administrators — 188—Widow held entitled to statutory allowance, although nonresident of state at time of decedent's death.

Under Code Civ. Proc. § 1466, providing that, if the property set apart from decedent's estate is insufficient for the support of the widow and children, the court must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the settlement of the estate, the widow of a decedent for whom no provision has been made in the will, is entitled to such an allowance, where she was through no fault of her own, but wholly through fault of decedent, separated from him and a nonresident of the state of his domicile at the time of his death; there being nothing in sections 1464, 1465, relating to setting apart the homestead for the use of the widow inconsistent with this conclusion.

2. Executors and administrators — 188—Statutory allowance to widow held not dependent on existence of family status at death of decedent.

Code Civ. Proc. § 1466, relating to the support of a widow during the settlement of decedent's estate, does not limit the allowance for support to cases where the actual family status existed at decedent's death, in absence of showing that the wife had either by her own conduct lost, or by her agreements waived, her statutory rights as widow.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

In the matter of the estate of Charles A. Parkinson, deceased. From an order granting Mary E. Parkinson, the widow of Charles A. Parkinson, an allowance for her support out of his estate, Ida J. Parkinson, a residuary legatee, appeals. Affirmed.

See, also, 213 Pac. 259.

Stewart & Stewart, of Los Angeles, for appellant.

Ernest K. Maine, Albert Sidney Brown, and Robert J. Adcock, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order of the probate court granting the petition of Mary E. Parkinson, the widow of Charles A. Parkinson, deceased, for an allowance for her support out of his estate. The appellant, Ida J. Parkinson, is a sister of the decedent and the residuary legatee

under his will, and upon the hearing upon said petition she contended, and she also contends upon this appeal, that said order was improper and erroneous for the reason that the petitioner, though admittedly the widow of the decedent, was not and had never been, at the time of his death, a resident of the state of California; and for the further reason that she was not at the time of the decedent's death a member of the family of decedent, and for each and both of these reasons was not a person entitled to such allowance within the terms of the statutes providing for the same. The facts of the case are undisputed. Prior to the year 1912 the decedent, Charles A. Parkinson, and his wife, Mary E. Parkinson, resided in the state of Michigan, but had not lived together there for several years previous to that date. He had, in fact, in the year 1900 brought an action against her for divorce in the courts of that state, which suit he lost. They did not live together after that time, but the decedent associated with other women and otherwise so conducted himself as to render it impossible for his wife to live with him. This state of things continued until about the year 1912, when he left the state of Michigan and came to reside in California. During all these years his wife was and has ever since been in poor health and dependent upon her friends and relatives for support. In the year 1915 she brought an action against her husband in the courts of Michigan for separate maintenance and obtained a decree therein requiring him to pay the sum of \$100 a month toward her support. This sum he never fully paid, although there is evidence that he thereafter sent her the sum of \$3 a week. He died in California on April 7, 1921, leaving a will wherein he disposed of his estate to the exclusion of his wife, which will was duly admitted to probate and an inventory and appraisal filed showing the assets of his estate to consist of personal property of the appraised value of \$5,175.07. Shortly after his death his widow came to California and has since resided in this state. Not long after her arrival she presented a claim against his said estate for the sum of \$7,200 alleged to be the balance due her on account of her said judgment for separate maintenance, which claim being disallowed by the executor, she brought suit to establish the same, which action is still pending. Thereafter and on April 9, 1923, she filed her petition for an allowance as his widow out of said estate, which application the court granted in the sum of \$75 per month from the date of the filing of the inventory; and it is the order granting the same which forms the subject of this appeal.

The sections of the Code of Civil Procedure relating to the making of provision for the

comfort and support of the surviving spouse and minor children of a decedent are sections 1464, 1465, and 1466 of that Code. The first of these sections provides that when a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, etc., and are entitled to a reasonable provision for their support, to be allowed by the court or a judge thereof. The next section provides that upon the return of the inventory, or at any subsequent time during the administration, the court may, upon petition therefor, set apart, to the use of the surviving husband or wife, or in the case of his or her death, to the minor children of the decedent, all property exempt from execution, including the homestead; and makes provision for the selection of a homestead for the use of the surviving husband and wife and minor children, in case none had been selected and set apart by the survivor in his or her lifetime. Section 1466 provides that if the property thus set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances during the progress of the settlement of the estate. The application of the respondent herein for an allowance out of said estate was made under section 1466 of the Code of Civil Procedure; there having been no real property in said estate, and no provision therefor having been made or possible for the setting apart of a homestead.

[1] The first contention of the appellant is that section 1466 of the Code of Civil Procedure must be read in connection with the sections of said Code which immediately precede it, and that so read it must be construed as permitting an allowance to such person or persons only as would have been entitled to have a homestead set apart; and that, since the respondent herein was not, at the date of the death of the decedent, a resident of the state of California, and had never prior thereto been such resident of the state, she could not have been entitled to have a homestead set apart to her, and hence was not, by virtue of her status as a nonresident, entitled to an allowance for her support out of said estate during the period of administration. In making this contention the appellant in the first instance relies upon certain language used by this court in the Matter of Estate of Whitney, 171 Cal. 754, 154 Pac. 855, wherein the court stated that the right of a widow to an allowance "stands upon the same footing as her right to a homestead." A reading of the entire opinion in that case, however, shows that the court had no such question before it as is presented in this case, and that it had no

intention, in the use of the language above quoted, to limit the right of widows to an allowance to those persons only who would have been entitled to have homesteads set apart to them; or, in other words, that the widow's right to an allowance was dependent upon whether she was a resident of California at the date of the decedent's death. The language of section 1466, Code of Civil Procedure, does not itself make or import any such limitation unless the same is to be implied from the use of the word "family" in said section, which will be considered later in connection with the appellant's second point upon this appeal. The cases from other states upon which the appellant further relies in support of her first point upon this appeal do not support her claim that the widow, in order to be entitled to this allowance, must have been a resident of California at the date of the decedent's death. These cases (Spiers' Appeal, 26 Pa. 233; Barber, Adm'r, v. Ellis, 68 Miss. 172, 8 South. 390; Platt's Appeal, 80 Pa. 504; Krumenacker v. Andis Executor, 38 N. D. 500, 165 N. W. 524) turn upon the particular facts in each case, which are either that the widow seeking an allowance had voluntarily chosen, without fault on the part of her husband, to reside permanently in another state or country, or was living separate and apart from the husband and in another state voluntarily and under an agreement of separation which destroyed the family relation. Some of these very cases which the appellant cites point out the distinction which should be given emphasis in this case; as, in the case of Grieves' Estate, 165 Pa. 126, 30 Atl. 727, cited in Krumenacker v. Andis, supra, it was said respecting the widow seeking the allowance:

"It was no fault of hers that she was not a member of his household at his death. It was his illegal acts and bad faith that excluded her from it. In contemplation of law the family relation still existed and his domicile was hers. Why, then, should she be denied the exemption which the law allows to his widow?"

In the case of Platt's Appeal, supra, the decision of the court was put upon the ground that the separation of the wife from her husband and her residence in another state was voluntary, and that there was no evidence that she had ever done anything to maintain the family relation. The distinction between the cases relied upon by the appellant and the case at bar is clear. In this case the original separation between this husband and wife in the state of Michigan was brought about by his institution of an action for divorce against her, which he lost, and, we must assume, rightly lost. His conduct thereafter in consorting with other women and in other ways made it impossible for his wife to live with him. Finally he left her, ill and unsupported, in the state of Michigan, and came to California, and after

awhile she was obliged to bring suit against him there for separate maintenance without divorce, which the court awarded her, but with the judgment in which he in the main failed to comply, and finally died in California, leaving that judgment almost wholly unsatisfied. Then it was that his wife, herself in no fault for the severance of the family relations, came to California in an effort to enforce her rights as his widow in and to such portions of his estate as the law would accord her. In the case of *Estate of Whitney*, supra, this court said: "The widow's claim to a family allowance is strongly favored in our law," citing *In re Lux*, 100 Cal. 593, 35 Pac. 341; *Estate of Welch*, 106 Cal. 427, 39 Pac. 805; and *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209. We see no reason in either the language of the statute or in the policy of the law for holding that this widow is not entitled to the allowance permitted under the terms of section 1466 Code of Civil Procedure, merely because she was, through no fault on her part, but wholly through fault on his part, separated from her husband and a nonresident of California at the time of his death.

[2] The appellant's second contention is that the use of the word "family" in section 1466, Code of Civil Procedure, gives rise to the implication that the allowances under that section are to be confined to cases where an actual family status existed at the date of the decedent's death. We can see no reason for giving any such restricted significance to the use of that phrase in that section, nor, in fact, in making any distinction between the application of section 1464 and section 1466 of said Code in that regard. Both of these sections are dealing with the support of the widow and minor children, if any, of the decedent, the one before and the other after the return of the inventory. In the case of an application made under section 1464, Code of Civil Procedure, this court held, in the *Matter of Estate of Gould*, 181 Cal. 11, 183 Pac. 146, that the right of a widow to a reasonable provision for her support under section 1464 of the Code of Civil Procedure, was not conditioned upon her having lived in a family relation with the deceased at the time of his death. In so holding this court reviewed the earlier cases in this state involving this very question, and wherein it was held that, in the absence of a showing that the wife, had either by her conduct lost, or by her agreements waived, her statutory rights as a widow, she was entitled to a family allowance upon her husband's death, even though she was not living in the family relation with him at the time of his death. We can perceive no reason why this principle should not be given a like application to the provisions of section 1466 of the Code of Civil

Procedure and to applications for family allowances made thereunder. It follows that the trial court was not in error in making its order for a widow's allowance from which this appeal has been taken.

Order affirmed.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; WASTE, J.

193 Cal. 368

HOTALING et al. v. HOTALING et al.
(S. F. 10217.)

(Supreme Court of California. March 13, 1924.
Rehearing Denied April 10, 1924.)

1. Appeal and error §930(1)—All intentions from evidence are in support of judgment.

In reviewing evidence on appeal, all intentions therefrom are in support of the judgment.

2. Corporations §298(5)—Deed to director authorized by board of directors in absence of quorum invalid.

Where board of directors consisted of five members, and under the by-laws and Civ. Code, § 308, a majority of the board was necessary to form a quorum, a deed authorized by the board at a meeting of three directors was invalid in view of section 305 where one of the directors present was the grantee, since he could not be counted to make a quorum for that purpose.

3. Appeal and error §1010(1)—Finding supported by evidence conclusive.

Finding of the trial court that there was no fourth director present at a meeting of the board, which was alleged to have authorized a deed by the corporation, is binding on appeal, being supported by evidence.

4. Corporations §426(1)—Deed not properly authorized not ratified by stockholders.

Alleged deed of a corporation, authorized by less than a quorum at joint meeting of directors and stockholders, was not ratified by an annual meeting of stockholders whose minutes recited that the minutes of the last stockholders' meeting were read and adopted, such recital not purporting to approve anything which had been done by the directors.

5. Corporations §426(2)—Stockholders could not ratify execution of deed by corporation.

Stockholders as such had no authority to authorize execution of a deed by the corporation, in view of Civ. Code, § 306, and were incompetent to ratify it.

6. Corporations §316(4)—Omnibus resolution held not ratification of deed to director on condition.

Where directors of a corporation executed deed of corporate property to a director, which was to be recorded only on a named condition, and thereafter another corporation with the same stockholders was organized and deed made for the same and other property to the second corporation, and a resolution adopted by the

directors specifically ratifying such deed, an omnibus resolution ratifying all acts and transactions of the officers since the first directors' meeting held not intended to ratify the deed to the director, since, under Civ. Code, § 1113, the second deed carried with it the covenant that grantor had not previously conveyed the estate therein.

7. Appeal and error ⚭996—Inference from evidence supporting judgment accepted on appeal.

Where two conflicting inferences are fairly deducible from evidence, the one which supports the judgment must be accepted on appeal.

8. Corporations ⚭298(5)—Rule that legal quorum of directors is such as is approved by stockholders' meeting inapplicable.

Where two stockholders owning more than one-fourth of the capital stock were absent from a joint meeting of directors and stockholders at which there was no quorum of directors, the rule that a legal quorum of directors is such as is approved at a stockholders' meeting by stockholders holding all or substantially all of the capital stock was inapplicable, and did not empower the directors at such meeting to authorize a deed of corporate property.

9. Deeds ⚭60—Escrows ⚭3—Grant not held in escrow by grantee, no conditional delivery to grantee.

In view of Civ. Code, § 1056, a grant cannot be held in escrow by the grantee, and there can be no delivery to grantee conditionally.

10. Deeds ⚭56(2)—Delivery question of intention.

The question whether a delivery has taken place is a question of fact involving intent of the parties.

11. Deeds ⚭56(2)—Handing deed to grantee without intention to transfer title held not a delivery.

Where grantors handing deed to grantee and permitting him to retain possession did not intend to transfer title thereby, they believing the deed would be of no effect until recorded, and understanding that it was not to be recorded except on a contingency, there was no delivery.

12. Deeds ⚭69—Deed to trustee voidable where he knew grantors did not understand it would be effective.

Where grantors were of the belief that deed, though delivered, would not be effective until recordation, if grantee, who occupied a position of great trust and confidence, though knowing of their belief, did not share such belief and understanding, the deed was voidable, as he would not be permitted to procure a benefit for himself.

13. Corporations ⚭316(4)—Deed to director held not ratified, and stockholders not estopped.

Where corporate director to whom a deed was authorized at joint meeting of stockholders and directors, without sufficient quorum of directors, agreed to record it only on a contingency, and knew the other directors present un-

derstood that without recording it would not be effective, they were not estopped by reason of their presence at such meeting from suing as stockholders to set aside the deed, and execution of the deed by officers was not ratified by resolution thereafter adopted by the directors ratifying all acts and transactions of the officers.

14. Appeal and error ⚭931(8)—Findings liberally construed to uphold judgment.

It is the appellate court's duty in reviewing findings to give them a liberal construction to uphold rather than defeat the judgment, and all findings are to be read together and reconciled to prevent conflict on material points if such reconciliation is possible.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Lavinia J. Hotaling and others, as directors of the Hotaling Estate Company, against Richard M. Hotaling and another, individually and as directors of the Hotaling Estate Company, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

John W. Preston, Robert Duncan, Peter F. Dunne, E. J. McCutchen, and W. H. Metson, all of San Francisco, and Thos. P. Boyd, of San Rafael, for appellants.

Gavin McNab, Nat Schmulowitz, and R. P. Henshall, all of San Francisco, for respondents.

MYERS, J. [1] Plaintiffs, as stockholders and as directors, respectively, of the defendant corporation, the Hotaling Estate Company, brought this action in behalf of said corporation to establish the title of said corporation to certain premises in Marin county, known as the Sleepy Hollow Ranch. Findings and judgment in the court below were in favor of the plaintiffs and the defendants have appealed. An adequate discussion of the respective contentions of the parties requires a somewhat extended statement of facts. In the preparation of the following statement and in reviewing the evidence for that purpose we have followed the rule which governs reviewing courts in considering the evidence on appeal, that all intendments are in support of the judgment. In cases of conflicting evidence we have accepted as true that which tends to support the judgment in so far as it is not inconsistent with the findings, and where conflicting inferences are fairly deducible from facts proved we have adopted those which tend to support and harmonize with the judgment herein.

In 1897 A. P. Hotaling, a man of large means, who was engaged in the wholesale liquor business in San Francisco, caused to be organized a corporation, A. P. Hotaling & Co., to which he transferred all of his prop-

erty and assets. Of its capital stock one share was issued to Julius Friedland as a qualifying director's share, and the remainder was divided in four equal parts, which were issued, respectively, to Lavinia J. Hotaling, his wife, plaintiff herein, and to their three sons, A. P. Hotaling, Jr., now deceased. Richard M. Hotaling, defendant herein, and Frederick C. Hotaling, plaintiff herein. In the interest of brevity the parties hereto will be hereinafter referred to by their respective first names. In 1898, by reason of the failing condition of health of both A. P., Sr., and A. P., Jr., Richard became the general manager of the corporation. A. P., Junior, died in 1899, and his widow, Ella K. Hotaling, defendant herein, succeeded to his stock ownership and interest in the corporation. A. P., Sr., died in 1900. The relation between Richard and his mother and younger brother Frederick in the year 1898 and for many years subsequent thereto was one of great trust and confidence, resting not alone upon the filial and fraternal relationship, but, also upon the circumstance that he was in fact and in effect the manager of the corporation in which was vested substantially all of the property and assets of the several members of the family.

The minute book of the corporation discloses that on July 10, 1899—

"at the regular annual meeting of the stockholders and directors of A. P. Hotaling & Co. (all having been previously notified), * * * the meeting being a joint one of directors and stockholders by reason of all of the stock in the company being represented or controlled by the directors, there were present R. M. Hotaling, vice president and treasurer, F. C. Hotaling, secretary, and Mrs. L. J. Hotaling. After the reading and adoption of the minutes of the previous meeting, the vice president and treasurer read his report for the past year's business, which report was adopted as read and ordered filed for reference. The election of directors and officers to serve for the coming year, 1899 to 1900, resulted as follows: Directors, L. J. Hotaling, R. M. Hotaling, F. C. Hotaling, Julius Friedland and A. P. Hotaling. Officers, L. J. Hotaling, president, R. M. Hotaling, vice president, treasurer and general manager, F. C. Hotaling, secretary. By resolution, duly seconded, the president and secretary were authorized to execute a deed conveying to R. M. Hotaling all that land hitherto known as the Austin-Dutton Ranch in Marin county, Calif., [the Sleepy Hollow Ranch] for \$10—ten dollars—and other good and valuable consideration in recognition of his services to the company, and furthermore to equalize his patrimony in comparison with certain gifts made to his brother, the late A. P. Hotaling, Jr., by their father, A. P. Hotaling, Sr. * * *

Thereafter, on September 7 following, Lavinia and Frederick, as president and secretary, respectively, signed and acknowledged a deed purporting to convey said Sleepy Hollow Ranch to Richard. There was a manual tradition of the deed to Rich-

ard at that time, and it has ever since remained in his possession, but was not recorded until October 18, 1916. The questions of the validity and effect of this deed form the subject-matter of this controversy.

The evidence indicates, and the court so found, that at all the times here in question Lavinia and Frederick believed and understood that a deed to real property had no validity or effect unless and until it was recorded. It is equally indicated by the evidence, though not expressly so found, that Richard and Ella entertained the same belief and understanding. It is expressly found that Richard was at all times aware of this belief and understanding in the minds of Lavinia and Frederick. The motive and purpose of this transaction are not entirely clear, but the evidence indicates that the members of the Hotaling family were apprehensive that Ella would remarry and thus bring into the family a stranger who might not be acceptable to the Hotalings, and with this possibility in view it was proposed by Richard to provide a means by which, in the event of such remarriage, the Sleepy Hollow Ranch could be taken out from the assets of the corporation and reserved for the exclusive use and enjoyment of the Hotalings. Richard promised and agreed to hold said deed for the use and benefit of Lavinia, Frederick, Ella, and himself, and not to record same except in the event of Ella's remarriage.

Thereafter all of the parties continued to treat the Sleepy Hollow Ranch in all respects as if it still belonged to the corporation. It continued to be carried upon the corporate books as a portion of the corporate assets. It appeared upon each of the annual financial statements of the corporation as one of its assets. It continued to be assessed in the name of the corporation for purposes of taxation, and the fire insurance thereon was carried in the name of the corporation. During the ensuing five years the corporation expended in taxes, insurance, maintenance, and improvements upon this property about \$98,000. These expenditures were not charged to Richard, but were entered upon the corporate books as corporate expenditures upon its own property. During all of this time the corporation continued in possession and control of this property, and Richard continued in the actual management and active control of the affairs of the corporation. Lavinia was nominally president and Frederick nominally the secretary thereof, but they were such in name only, and exercised the functions of their offices only when called upon to do so by Richard, and then in accordance with his suggestions and advice. They were inexperienced in business affairs, and at all times trusted and confided implicitly in him, and continued to so trust and confide until shortly before the commencement of this suit.

In December, 1904, it was decided to separate the liquor business from the other properties and business of the family, and to that end the Hotaling Estate Company, defendant herein, was incorporated. To the latter corporation were transferred all of the properties and assets of A. P. Hotaling & Co. other than those which pertained directly to the liquor business. In return therefor the estate company assumed certain indebtedness and issued its capital stock in the same proportions and to the same persons who held the shares of A. P. Hotaling & Co. Instruments of conveyance were prepared, executed, acknowledged, delivered, and recorded under the direction and supervision of Richard, conveying the various properties from A. P. Hotaling & Co. to the Hotaling Estate Company. Among these was a grant, bargain, and sale deed purporting to convey the Sleepy Hollow Ranch—the property here in question. That deed was executed, acknowledged, and delivered by Richard as vice president of A. P. Hotaling & Co., and was promptly recorded. Richard alleged in his answer and contended at the trial that it was not the intention of any of the parties that a conveyance should be made of the Sleepy Hollow Ranch from A. P. Hotaling & Co. to the Hotaling Estate Company. He claimed that the preparation and execution of that deed was wholly due to mistake and inadvertence. The trial court found against him upon this contention, however, and found that the preparation and execution of this deed was not inadvertent, but was in accordance with the intention of all of the parties. The officers and directors of the Hotaling Estate Company were the same individuals, occupying the same relationships, as in A. P. Hotaling & Co. Thereafter, and until 1916, all of the parties continued to treat the Sleepy Hollow Ranch as the property of the estate company. It was entered upon the corporate books of the latter as one of its assets, shown as such in each annual financial statement, was so listed for purposes of taxation and for purposes of insurance, and the estate company continued in possession of said property and expended thereon in taxes, insurance, maintenance, and improvements about \$8,000. These expenditures were not charged to Richard, but were entered upon the corporate books as corporate expenditures as upon property of the corporation. With respect to the expenditures of these large sums of money by the two corporations upon this property after the purported conveyance thereof to Richard, he presented two inconsistent explanations at the trial. He contended, first, that the corporation A. P. Hotaling & Co. had agreed to expend this money upon the property for his benefit in consideration of past services by him rendered. He contended, second, that the expenditures were made for his personal account, and that the omission to charge the

same against him upon the corporate books was an oversight. Both of these contentions were resolved against him by the trial court, and the evidence amply supports its conclusions thereon.

In 1916 Richard recorded his deed, but plaintiffs had no knowledge of that fact until their attention was directed thereto by the omission of the Sleepy Hollow Ranch from the list of corporate assets in the financial statement of 1917. They then made an investigation which resulted, after some unsuccessful negotiations with Richard directed to the relinquishment of the property, in the commencement of this action. The action was brought by plaintiffs in behalf of and for the benefit of the corporation by reason of the fact that there are but four directors, who are divided two and two upon this question, and therefore no corporate action could be taken in the premises. The complaint is in three counts. The first contains the conventional allegations of the ordinary suit to quiet title. The second alleges at length and in considerable detail the facts above outlined, and aims at the cancellation of the deed. The third realleges the same facts, together with additional facts whereby it is claimed that, as against the defendant corporation, Richard is estopped to assert any claim to this property. The defendants Richard, Ella, and the Hotaling Estate Company filed separate answers, and are prosecuting separate appeals from the judgment.

[2, 3] Regarding the corporation as a separate legal entity and the deed under which Richard claims as an attempted corporate act, it must, we think, be conceded to have been invalid, at least in its inception, for the reason that its execution was never effectively authorized by the board of directors of the corporation, in whom was vested the sole power to give such authorization. Civ. Code, § 305; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607. The board of directors, as provided for in the by-laws, consisted of five members. Under the by-laws and under the state law a majority of the board of directors, or three or more, was necessary to form a quorum or to perform a valid corporate act (Civ. Code, § 308), even though there was a vacancy in the board (*Porter v. Lassen County, etc., Co.*, 127 Cal. 261, 269, 59 Pac. 563; *Pennington v. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947; 3 Cook on Corp. [7th Ed.] § 713a, p. 2462). At the meeting at which the resolution was adopted which purported to authorize the execution of this deed there were but three directors present, including Richard, who was named therein as grantee. Being personally interested in this transaction adversely to the corporation he was disqualified thereby to vote the authorization, and his presence could not be counted to make a quorum for that purpose. *Smith v. Immigration Assn.*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; *Wickersham v. Crittenden*, 93

Cal. 17, 32, 28 Pac. 788; Curtin v. Salmon, etc., Co., 130 Cal. 345, 349, 62 Pac. 552, 80 Am. St. Rep. 132; Bassett v. Fairchild, 132 Cal. 637, 647, 64 Pac. 1082, 52 L. R. A. 611; Goodell v. Verdugo, etc., Co., 138 Cal. 308, 71 Pac. 354; De Moulin v. Magnesite, etc., Co., 186 Cal. 128, 132, 199 Pac. 42; Lowe v. Los Angeles, etc., Co., 24 Cal. App. 367, 374, 141 Pac. 399. Appellants contend that it should be presumed that there was a fourth director present at this meeting. The trial court found to the contrary, and there was evidence to support this finding, both in the minute book of the corporation (Lowe v. Los Angeles, etc., Co., supra) and in the testimony of witnesses. The finding is therefore conclusive upon this point. We conclude that if the meeting of July 10, 1899, be regarded as a meeting of the board of directors there was not present a quorum of said board capable of authorizing the execution of this deed. If, upon the other hand, it be regarded as a meeting of stockholders, it was wholly incompetent to authorize a corporate act of this character. Gashwiler v. Willis, supra; Blood v. La Serena L. & W. Co., 113 Cal. 221, 226, 41 Pac. 1017, 45 Pac. 252; Salfeld v. Sutter County L. I. & R. Co., 94 Cal. 546, 29 Pac. 1105; In re Solidarite M. B. Assn., 68 Cal. 392, 9 Pac. 453.

[4, 5] It is suggested that the transaction, though invalid in its inception, was validated by a ratification thereof at the annual meeting of the stockholders of the corporation on July 9, 1900, at which time the minutes recited that—

“The minutes of the last *stockholders’* meeting were read, and on motion, duly seconded, adopted.” (Italics added.)

The answer to this is twofold: First, the recital does not purport to approve anything which had been done by the *directors*, the only body competent to act in the premises; and, second, the *stockholders* as such were incompetent to ratify that which they could not authorize. Curtin v. Salmon, etc., Co., supra, at page 351; Bassett v. Fairchild, supra.

[6, 7] It is next suggested on the part of appellants that the execution of the deed in question was ratified by a resolution adopted at a meeting of the directors on January 6, 1905, at which all of the directors were present. On December 6, 1904, at a meeting of the board of directors, a resolution had been adopted authorizing the transfer and conveyance to the Hotaling Estate Company of “all the real estate now held or owned by this A. P. Hotaling & Company, * * *” and authorizing the president and secretary thereof to execute the necessary instruments of conveyance of said real estate. Subsequently, and on January 6, 1905, another meeting of the board of directors of A. P. Hotaling & Co. was held and a detailed report was made to the meeting, describing the

various conveyances which had been executed by the vice president and secretary of A. P. Hotaling & Co. under and pursuant to the resolution last referred to. In this report was a specific reference to the deed purporting to convey the Sleepy Hollow Ranch from A. P. Hotaling & Co. to the Hotaling Estate Company. Based upon this report a resolution was adopted reciting in its preamble the execution of the various deeds, specifically mentioning the deed of the Sleepy Hollow Ranch, and resolving:

“That this corporation do and it does hereby ratify, confirm and approve all and singular the acts of its vice president and secretary in executing the deeds, written assignments and bill of sale which they have executed as herein recited.”

At the same meeting, and immediately following the adoption of the resolution last referred to, the board of directors adopted a resolution in the following terms:

“Resolved, that all and singular the acts and transactions of the president, vice president, and secretary of this corporation since the first directors’ meeting of this corporation, which was held on the 13th day of August, 1897, to the date hereof, all of which transactions are known to us, be, and they are hereby ratified, approved, and confirmed as the acts of this corporation.”

It is appellants’ contention that this “omnibus resolution” must be construed as ratifying and therefore validating the purported deed to Richard which had been made in 1899. There are various reasons why we cannot adopt this view. There is nothing, either in the minutes or in the evidence, to indicate that the directors present at this meeting had in mind the purported deed to Richard or the resolution purporting to authorize it. It must be conceded that the “omnibus resolution” is sufficiently broad in its terms to be construed as referring thereto. But so construed it would apply equally to the deed which had just been executed from A. P. Hotaling & Co., to the Hotaling Estate Company. The two deeds are, of course, inconsistent. The latter was a grant, bargain, and sale deed, executed upon a valuable consideration, and therefore carried with it a covenant that the grantor had not previously conveyed the same estate or any interest therein to any person other than the grantee. Civ. Code, § 1113. If it be assumed that by the “omnibus resolution” it was intended to ratify the deed to Richard, the result would be that the covenants of the deed to the estate company were breached as soon as it was executed. The grantor would then be liable in damages amounting to the full value of the property. It is true that the stock ownership was at that time the same in both corporations, but that situation might change at any time thereafter. It seems unthinkable that the directors present at that

meeting had the intention of ratifying at the same time two different conveyances of the same land to different grantees. It is clear that they did intend to ratify the later deed because they had just done so by a specific resolution which referred thereto in express terms. The ultimate question in this connection is the question of the intent of the directors in adopting these two resolutions. Giving the construction contended for by appellants to the "omnibus resolution" and reading that together with the specific resolution, the most that can be said is that an ambiguity resulted as to which of the two deeds they intended to ratify, which was resolved by the trial court against the appellants. Where two conflicting inferences are fairly deducible from the evidence, we must accept upon appeal that one which supports the judgment. *Mah See v. North American Acc. Ins. Co.* (Cal. Sup.) 213 Pac. 42, 26 A. L. R. 123. We conclude, therefore, that the purported deed to Richard was never ratified by the directors of A. P. Hotaling & Co. acting as such.

[8] It is suggested that the doctrine of *ultra vires*, as applied to a private corporation, and particularly as applied to a close corporation, as in the present case, should be confined within narrow bounds. This is not a question of *ultra vires*, but of agents assuming to act in behalf of a corporate principal in a matter in which they lacked authority to bind the principal. It is also suggested that a legal quorum of directors is such as is approved at a stockholders' meeting by stockholders holding all or substantially all of the capital stock, and that therefore the minutes of the joint meeting of July 10, 1899, must be taken as showing the unanimous consent of the stockholders to a modification of the by-laws, so as to make a majority of the directors present a legal quorum for the purposes of that meeting. Assuming the soundness of the rule thus invoked, it is not applicable herein, for the reason that stockholders holding all or substantially all of the capital stock were not present at this meeting. Julius Friedland, holding one share, and Ella Hotaling, holding one-fourth of the capital stock, were both absent therefrom. Appellants also contend that the plaintiffs cannot be heard to complain as stockholders of their own action as directors, and that they, having approved, both as directors and as stockholders, the execution of the deed to Richard, will not be permitted to maintain this action to cancel the same, even though they assume to do so in behalf of the corporation. This contention invokes the doctrine of estoppel, and will be considered in a later portion of this opinion.

Appellants urge that the fiction of separate corporate entity should be disregarded where, as in the instant case, the Hotaling Corporation is the mere double of the Hotaling family. They assert that the members of

the Hotaling family constituted virtually a partnership, owning the entire property and assets, using the corporation merely as a convenient instrument for the administration thereof. They argue that in such case, whether the members of the family assumed to act in behalf of the corporation either as directors or as stockholders, they were in fact acting as principals in their own behalf, and that in such case irregularities or defects in the pursuit of the corporate authority should be disregarded, citing *Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Rutz v. Obeare*, 15 Cal. App. 435, 115 Pac. 67; *Du Bois v. Padgham*, 18 Cal. App. 298, 123 Pac. 207; *Shorb v. Beaudry*, 56 Cal. 446; *Commercial, etc., Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 Pac. 964; *Hyman v. Karl Stern Co.*, 47 Cal. App. 605, 191 Pac. 47. Respondents reply that the rule contended for is applicable only to "one-man corporations," where one individual owns all of the stock. No good reason is apparent why the rule should not apply with equal force to a case wherein the corporate officers participating in the transaction own all of the stock between them. The rule is but a particular application of the general rule that a court of equity will in a proper case, in order to prevent fraud and do justice, disregard the fiction of separate corporate entity, and have regard for the real substance of the transaction. It is unnecessary to here decide this point. We shall assume that this is a proper case for the application of the rule and regard the plaintiffs Lavinia and Frederick as having acted in the transaction relating to the deed here in question, not as corporate agents, but as principals, acting in their own behalf.

[9] The trial court found that there was no delivery of the deed to Richard. Appellants challenge this finding as inconsistent with the admitted fact, also found by the court, that there was a "manual tradition" of the deed, and that the same has ever since remained in Richard's possession. They invoke the rule that a grant cannot be held in escrow by the grantee, and that there can be no such thing as a delivery of a grant to the grantee conditionally.

"Delivery to him * * * is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Section 1056, Civ. Code; *Mowry v. Heney*, 86 Cal. 471, 475, 25 Pac. 17; *Bias v. Reed*, 169 Cal. 33, 145 Pac. 516; *Treat v. Treat*, 170 Cal. 329, 150 Pac. 53, 57; *Avery v. Avery*, 183 Pac. 453; *McCarthy v. Security Bank*, 188 Cal. 229, 204 Pac. 818; *Stewart v. Silvia*, 221 Pac. 191; *Lewis v. Brown*, 22 Cal. App. 38, 133 Pac. 331; *Burkett v. Doty*, 32 Cal. App. 337, 345, 162 Pac. 1042.

[10] The validity of this rule is not open to question, but it comes into application only

when there has been a delivery. The question whether or not such delivery has taken place is a question of fact involving the intent of the parties.

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended * * * to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." *Williams v. Kidd*, 170 Cal. 631, 638, 151 Pac. 1, 3 (Ann. Cas. 1916E, 703); citing *Bury v. Young*, 98 Cal. 451, 33 Pac. 338, 35 Am. St. Rep. 186; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Estate of Cornelius*, 151 Cal. 552, 91 Pac. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 Pac. 544.

See, also, *Hefner v. Sealey*, 175 Cal. 18, 164 Pac. 898; *McCully v. McArthur*, 187 Cal. 194, 198, 201 Pac. 323; *Cox v. Schnerr*, 172 Cal. 371, 381, 156 Pac. 509.

[11] The evidence in the case at bar supports the conclusion that Lavinia and Frederick in handing the deed to Richard, or in permitting him to retain possession thereof after its signature and acknowledgment by them, did not do so with any intent to transfer the title thereby. They both believed that the deed would be of no effect whatever until recorded. Under that belief the manual tradition of the deed would be but one step, and not the final step, in the process of the execution thereof. Under that belief tradition without recordation would be no more effective than would signature without delivery. The case is substantially on all fours with *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556. In that case Mrs. Kenney, being the owner of certain real properties, signed without consideration two deeds purporting to convey them to her husband, and at his request and upon his representation that under the law the deed would be of no validity until recorded (which both parties believed to be true), and on his promise that he would not have them recorded unless he should survive her, the deeds were placed by her in his possession. It was at the same time understood that the instruments should never have any effect as a conveyance unless Kenney should survive his wife. This court held that under the facts stated there had never been a delivery of the deeds, saying:

"To constitute delivery of a deed, it is not sufficient that there be a mere delivery of its possession, but this act must be accompanied with the intent that the deed shall become operative as such. 2 *Boone on Real Property*, § 295a; *Black v. Sharkey*, 104 Cal. 281; *Denis v. Velati*, 96 Cal. 227; *Harris v. Harris*, 59 Cal.

622. Here both parties understood that the deed could have no effect until recorded; and there was therefore no intent that it should become immediately operative, or that it should ever become operative during the life of the grantor, or afterwards, unless the grantee should survive her. * * *

"We do not deem it necessary to discuss here the decisions in which it has been held that the delivery of a deed to the grantee, to take effect upon the death of the grantor, is an effective delivery, or the construction of the much-misunderstood rule laid down in section 1056 of the Civil Code. To justify the application of the rule there must at least be a delivery of the deed, which implies the intent that it shall become at once operative, either absolutely or conditionally. *Wheelwright v. Wheelwright*, 2 Mass. 447; *Black v. Sharkey*, 104 Cal. 279; *Denis v. Velati*, 96 Cal. 223. But such is not the case here, where the understanding, and therefore the intent, that it should or could take effect presently, was lacking. Nor do we deem it necessary to refer to the doctrine of escrow and to the ancient rule that delivery of a deed to the grantee as an escrow is to be taken as an absolute delivery, further than to say that these doctrines, and especially the latter, have often been misunderstood and misapplied. 2 *Blackstone's Commentaries*, 307; *Shepherd's Touchstone*, 58; *Coke on Littleton*, 36a, 9 *Coke Rep.* 137a. All that need be said is they can have no application here. *Kenney v. Parks*, 125 Cal. 149."

We find no difference between the essential facts of that case and those of the case at bar, and know of no reason why the rule of that case should not be applied herein. Appellants suggest that that case is to be distinguished from the instant case by the fact that actual fraud was present in that case and not in this. It is true that fraud was present in that case, but the decision was not placed upon that ground. The court in that case expressly repudiated the suggestion that its decision was in any respect predicated upon the element of fraud therein, saying:

"Mistake and fraud are indeed alleged and found, but the plaintiff's cause of action is complete without regard to either of these facts. For, eliminating these elements from the case entirely, there still remains the fact that the deeds were placed in the possession of her husband upon the understanding that they were to have effect only upon the contingency of her death before that of her husband. It follows that there was no delivery, or that the deed took effect subject to a trust in favor of the plaintiff for a reconveyance on the failure of the condition."

Kenney v. Parks was cited with approval in the recent case of *Stone v. Daily*, 181 Cal. at page 577, 185 Pac. 665; and we think it affords ample justification for the conclusion of the trial court herein that there had been no delivery to Richard.

[12] We have thus far discussed the case upon the assumption that Richards shared in the belief and understanding of his mother and brother that a deed was ineffective for

any purpose until recorded. The trial court did not so find, although the evidence would lead to this conclusion. The trial court did find, however, that at all the times here in question Lavinia and Frederick believed and understood that a deed to real property had no validity or effect unless and until it was recorded, and that Richard was at all times aware of this belief and understanding in the minds of Lavinia and Frederick. Therefore, if we should assume that he did not share this belief and understanding, we would be forced to regard him as a trustee dealing with his cestuis que trust, who would not be permitted to take advantage of their ignorance and mistake to procure a benefit for himself. If such an advantage were taken under such circumstances the conveyance would be voidable at their option.

[13] When we consider the fact of this mistaken belief in the minds of Lavinia and Frederick it becomes apparent that Richard is in no position to invoke the rule of estoppel as against them whether we assume that he was aware of their mistake or that he shared in it. This fact also furnishes another answer, complete in itself, to appellants' contentions to the effect that the deed to Richard, regarded as a corporate act, was ratified by the resolutions above referred to. If we assume that by the adoption of those resolutions, or either of them, the directors intended to ratify what had been done by Lavinia and Frederick in signing, acknowledging, and making tradition of the deed, still it is plain that they did not intend thereby to ratify a conveyance of the property from the corporation to Richard. They did not regard those acts as effecting a conveyance, but rather as mere preliminaries to a possible conveyance which might be effected at some future time by the recordation of the deed. As to that, they had Richard's promise that he would not record the deed except in the contingency of Ella's remarriage. Our conclusion that the deed in question was never effectively delivered renders it unnecessary to consider the various arguments of respondents in support of their contention that by reason of various facts alleged and proved, some of which have not been mentioned herein, Richard is estopped to assert any claim to this property as against the defendant corporation.

[14] Appellants contend that the findings of fact are inconsistent and conflicting, and they specify a large number of instances of alleged inconsistencies therein. The great majority of the claimed inconsistencies inhere solely in appellants' theory as to the legal effect which should be given to particular facts found. The findings are detailed and voluminous and in many respects are susceptible to a construction which would give rise to inconsistencies therein. It is the duty of an appellate court in reviewing the

findings to give them a liberal construction so as to uphold rather than defeat the judgment. All the findings are to be read together and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible. 2 Cal. Juris. pp. 871, 872, and cases cited. Reviewing the findings in the light of this rule we find no material conflicts or inconsistencies therein, except possibly as to the findings in response to plaintiffs' third cause of action, which pleaded an estoppel as against the defendant Richard, and which we have not discussed herein. The findings in response to the first and second causes of action afford ample support to the judgment.

Judgment affirmed.

We concur: WASTE, J.; LENNON, J.;
LAWLOR, J.; SEAWELL, J.; RICHARDS, J.

193 Cal. 345

BALDWIN v. BROWN et al. (L. A. 7123.)

(Supreme Court of California. March 12, 1924.
Rehearing Denied April 10, 1924.)

1. Divorce $\S$ 321½—Wife's status as to debt not changed by divorce.

Where, in action to set aside sale of land under deed of trust, plaintiff alleged that she signed the note as an accommodation maker for her husband, but the evidence showed that she and her husband signed the note as joint and several makers thereof and not otherwise, and thereafter a divorce against the husband was granted and the community property assigned in severalty, her contention that when the property involved in the deed of trust was subsequently assigned to her husband she became a surety cannot avail, since her relation to the creditor could not be changed, without his consent, by the divorce proceeding.

2. Newspapers $\S$ 3(2)—Effect of adjudication as newspaper of general circulation stated.

That the newspaper had been judicially declared to be one of general circulation, while perhaps not conclusive of that fact as against those who had not been parties to such judicial proceeding, would be evidence that it was a newspaper of general circulation.

3. Newspapers $\S$ 3(5)—Small circulation held not to show publication was not newspaper.

That a newspaper which had been adjudged one of general circulation, had a small circulation, only about 180 copies daily in a city of approximately 16,000 population, and that it was devoted chiefly and especially to the publication of court proceedings, legal notices, etc., did not deprive it of the character of a newspaper within the legal requirements both of statutes and of the provisions of trust deeds relative to giving notice by publication.

4. Mortgages $\S$ 369(3)—Inadequacy of price paid by mortgagee purchaser held not ground for setting aside sale under trust deed.

Where loan of \$2,000 was secured by trust deed and at sale under the trust deed the mort-

gagee bid in the property for \$480, although it was worth \$4,800, such hard advantage over the makers of the trust deed was not one to which he was not entitled under its strict terms.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Margaret L. Baldwin against D. L. Brown and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kaye & Siemon, W. W. Kaye, and Alfred Siemon, all of Bakersfield, and L. E. Nathan, of Los Angeles, for appellant.

J. W. Wiley, of Bakersfield, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action commenced by the plaintiff to set aside a sale of real estate made under the power granted to the trustee in a trust deed. The facts out of which this litigation arose are practically undisputed and may be briefly summarized as follows:

On and prior to the 25th day of March, 1916, F. H. Baldwin and Margaret L. Baldwin were husband and wife, residing at Bakersfield, Kern county, California. On said last-named date F. H. Baldwin borrowed the sum of \$2,000 from D. L. Brown, the defendant herein, and thereupon executed and delivered to said Brown his promissory note for said sum of money, signed by himself and his wife as comakers thereof. The plaintiff herein alleged in her complaint that she signed said note only as an accommodation maker thereof, but this the defendant Brown in his verified answer denies, and alleges that the said plaintiff and her said husband signed said note as joint and several makers thereof, and not otherwise. The trial court found in favor of the defendant Brown upon this issue. At the time of the execution of said note, and to secure the payment of the same, F. H. Baldwin and his wife signed and executed their joint deed of trust upon the premises involved in this litigation, which constituted at the time a portion of the community property of the makers of said trust deed, and in which deed of trust the defendant Security Trust Company, a corporation doing business in the city of Bakersfield, was named as trustee. On August 2, 1917, an action for divorce was instituted by the plaintiff herein against her husband F. H. Baldwin in the city and county of San Francisco, which action was thereafter transferred to the county of Kern for trial, and was there tried, with the result that on or about September 22, 1919, findings were filed and a judgment given, made, and entered, awarding the plaintiff an interlocutory decree of divorce and undertaking to divide and assign to the respective parties in severalty the property

which had theretofore been their community property. In the course of this division the trial court set apart to the defendant F. H. Baldwin the foregoing property covered by said trust deed as his sole and separate estate, subject to said trust deed and the indebtedness secured thereby, the court, however, making no other direction as to which of said parties should pay or should be relieved from payment of said indebtedness. The court, in making said interlocutory decree, also assigned certain other property, situate in the city of Bakersfield and which had theretofore been community property, to the plaintiff in said divorce action as to her sole and separate estate. F. H. Baldwin defaulted in the payment of said promissory note, and thereafter and on or about October 1, 1919, the defendant Brown required and directed the Security Trust Company, as the trustee named in said deed of trust, to sell the said real estate in order to satisfy said indebtedness secured thereby. By the terms of said deed of trust it was provided that in the event of default in the payment of the promissory note secured thereby and of a direction to the said trustee to sell the premises described therein the said trustee "shall first advertise the time and place of such sale with a description of the property to be sold, at least once a week for three successive weeks in some newspaper published in the county in which any portion of the lands to be sold are situated." Pursuant to this direction the trustee proceeded to advertise the sale of said property, and selected as the medium for such advertisement a small newspaper published daily in the city of Bakersfield and called "The Daily Report." This newspaper had been in existence for a number of years prior thereto in the city of Bakersfield, and some years prior to the particular publication about to be made therein had caused itself to be adjudged to be a newspaper of general circulation in accordance with the terms of the statute permitting the status of newspapers to be thus established. Its circulation was, however, very small, amounting to only about 180 copies daily in a city of approximately 16,000 population. It was, however, devoted chiefly and especially to the publication of court proceedings, legal notices, notices of sale of real estate under probate, foreclosure and trust deed proceedings, and its subscribers were chiefly among attorneys, real estate dealers and others who would be more particularly interested in such proceedings and in such sales. The publication of this particular sale was made in said newspaper in strict accordance with the provisions of said trust deed as to the length and frequency of said publication and as to the time and place of said sale. No other attempt was made, either by the creditor or the trustee, to notify the parties to said trust deed or to the obligation secured

thereby or to inform the general public as to the fact, time, and place of said sale. At the time and place appointed by said publication the sale of the property occurred. D. L. Brown, the creditor and the defendant herein, was the only bidder at said sale. He bid the sum of \$480 for the whole of said property, and it was sold to him by the trustee for said sum, although according to the findings of the trial court the property at the time of said sale was of the value of \$4,800. Thereafter, and on November 6, 1919, the trustee conducting said sale and in pursuance thereof made, executed, and delivered to the said D. L. Brown, as the successful bidder thereat, a deed of conveyance of the whole of said property sufficient in form to convey title to the same. The plaintiff alleged that she had no knowledge whatever of said sale until on or about January 16, 1920, at which time she learned of the same through the service upon her of a writ of attachment in an action which the defendant herein, D. L. Brown, had commenced against her to recover the amount of the deficiency still due upon said promissory note, approximately \$2,400; whereupon and shortly thereafter she had an interview with said Brown in which she requested that he convey the premises to her upon payment by her of the entire amount of said note with interest and counsel fees, together with the costs and expenses of said sale. This Brown refused to do; whereupon the plaintiff commenced the present action to set aside said sale. The trial court found substantially the foregoing facts, and as a conclusion of law therefrom found and decided that the plaintiff was not entitled to the relief prayed for in her complaint, and accordingly gave its judgment in favor of the defendant and for his costs. This is an appeal from such judgment.

The only contention which the appellant urges upon this appeal is her claim that the sale of the premises in question by the trustee to the defendant herein was for a price which was grossly inadequate and that such gross inadequacy of price was accompanied by certain inequitable circumstances which would have warranted the interference of a court of equity, and which the trial court should have considered of sufficient weight to have justified it in setting aside said sale, and that its failure so to do was reversible error. In making this contention the appellant concedes that mere inadequacy of price, however gross, would not be sufficient, standing alone, to furnish a ground for setting aside said sale and in so conceding concurs in the like conclusion expressed by this court in the cases to be hereinafter commented upon.

[1] The appellant, however, urges six sets of circumstances alleged to be disclosed by the record before us which, taken in connection with the circumstances of gross in-

adequacy of price, would have sufficed to compel a setting aside of said sale. These are, first, "that the plaintiff was merely an accommodation maker of the promissory note." As to this contention the findings of the trial court are against the appellant and are sustained by the evidence in the case. Second, that "when the property involved was subsequently assigned to her husband she became merely a surety for the payment of the debt." This contention, however, falls with the former one, since her relation to the creditor as a joint and several maker of the note could not be changed without his consent by the result of a divorce proceeding and division of properties between herself and her husband to which the creditor was not a party. Third, "if the sale is not disturbed the plaintiff will be made to pay the deficiency and thus discharge a debt which she does not owe." This is a non sequitur. She always owed the debt, and the fact that she was obliged to pay the deficiency and thus discharge her obligation would not of itself be an inequitable circumstance. Fourth, "the property was purchased for only one-fifth of the indebtedness, and being purchased by the defendant Brown this alone was a badge of fraud, he having loaned \$2,000 on the credit of this property alone." This is only another way of stating that the purchase price was grossly inadequate, which, as she concedes, is not of itself sufficient to justify setting aside said sale, the only added circumstances in this connection being that the creditor was the purchaser at said sale and had cause to know the actual value of said property and hence the gross inadequacy of his bid thereon. But unless the appellant could show by either reason or authority that the creditor must be held to a different rule of duty than that applicable to other bidders for property offered at public sale, this circumstance can be of no avail to the appellant since it adds no modicum of weight to the fact of inadequacy of price bid for the property at such sale. No sound reasons and no authority whatever are cited to sustain the appellant's conclusion in this regard. Fifth, "the notice of sale was insufficient, not being published in a newspaper but only in an obscure publication." Sixth, "the plaintiff had no actual knowledge of the sale and her lack of knowledge was excusable." These last two contentions are in a sense the complement of each other, since, if the publication was inadequate, the plaintiff's lack of knowledge, either actual or presumptive, would have been sufficient to justify her assault upon said sale. But if, on the other hand, the notice of sale was sufficiently published it would impart to the plaintiff constructive notice of such proposed sale by which she would be bound by virtue of her covenants in the trust deed, and, if so, her actual knowledge, or the want of it, would be an immaterial factor in the case.

We are therefore driven to the sole and only point in the appellant's several contentions: Was the notice of sale insufficient? Upon this point the trial court found:

"That the notice of said sale was printed and published for the time required in said deed of trust, in the Daily Report, a newspaper printed and published in the said county of Kern, state of California, for the time prescribed in said deed of trust.

"That said Daily Report was a newspaper printed and published in the county of Kern, state of California, and had been such newspaper so printed and published, for more than one year prior thereto.

"That said Daily Report was, on the 18th day of August, 1913, by the superior court of the county of Kern, state of California, adjudged to be a newspaper of general circulation by a judgment of said court."

[2, 3] As to the first two of the foregoing findings it must be conceded that they hold that the notice in question conforms fully as to the place of its publication with the requirements of the deed of trust, that the notice of sale thereunder shall be published "in some newspaper published in the county in which any portion of the lands to be sold are situated." The last of said findings to the effect that the publication referred to had been theretofore judicially declared to be a newspaper of general circulation, while it would not perhaps be binding upon the plaintiff or conclusive of the fact as against those who had not been parties to such judicial proceeding, would still be a circumstance supporting the other findings of the court to the effect that the publication in question was a newspaper and was such a newspaper within the intent of the deed of trust as might furnish a sufficient medium for the publication of the notice required by its terms. The publication had, it is true, a very small circulation, but it appears from the record, and particularly from the exhibit of the files of said publication, that it met the requirements of a newspaper and that it was such a daily publication as is not infrequently maintained in cities of considerable population for the chief purpose of giving notice by publication to those classes of persons most immediately interested therein of court proceedings, of real estate transactions and of probate and execution sales. Interspersed with these notices were to be found certain other matters of general interest usually found in newspapers; such as "want ads" and a limited amount of current news items. The publication, as appears upon its face, was in its thirty-sixth volume, and hence must have been existent in the place of its publication for a goodly number of years. The mere fact that its circulation was small, amounting to only about 180 issues daily in a city of 16,000 inhabitants, would not of itself, in our opinion, suffice to exclude it from the designa-

tion of a "newspaper," nor of such a newspaper as might properly be the medium for such publicity of the notice of sale as the trust deed required. The cases are not a few holding similar publications specially devoted to the giving of legal notices to be "newspapers" within the legal requirements of statutes relative to the giving of notices by publication and of the provisions of trust deeds to argue convincingly against any holding to the contrary, since to so hold would be to work havoc with legal proceedings and land titles which have long been dependent upon the sufficiency of publications of the identical character of that involved in the instant case. *Kerr v. Hitt*, 75 Ill. 51; *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441; *Turney v. Blomstrom*, 62 Neb. 616, 87 N. W. 339; *Lynch v. Durfee*, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 793, 45 Am. St. Rep. 404; *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507. This being so, we are constrained to hold that the publication of the notice of sale in question was sufficiently made to satisfy the requirements of the deed of trust under the terms of which the sale of the premises in question to the defendant Brown was conducted.

This brings us finally to a consideration of the decisions of this court upon which the respective parties hereto rely. They are chiefly *Odell v. Cox*, 151 Cal. 70, 90 Pac. 194, *Winbigler v. Sherman*, 175 Cal. 270, 165 Pac. 943, *Rauer v. Hertweck*, 175 Cal. 278, 165 Pac. 946, and *Bock v. Losekamp*, 179 Cal. 674, 179 Pac. 516. It will not be necessary, however, to review these cases in detail since they are all considered, compared, and the proper rule to be deduced therefrom stated, in the case of *Sargent v. Shumaker*, 223 Pac. 464, just decided by this court, and wherein it is declared that, as the foregoing cases hold, the mere inadequacy in price, however gross in the sum bid for property at a public sale, will not in itself be sufficient ground for setting aside such sale if otherwise legally made, but that in addition to proof of such gross inadequacy in the price bid at such sale there must be proof of some element of fraud, unfairness, or oppression on the part of the creditor bidding in the property thereat before the court will be justified in depriving the purchaser of his legal advantage. The court further holds that, where the price thus bid for the property is greatly disproportionate to its actual value, very slight evidence of unfairness or irregularity will suffice to authorize the relief sought. In that case this court considered some of the very alleged irregularities which the appellant urges as existent in the instant case and also certain others not here present, and presenting an even stronger case than the present one, for relief, but holds that none of these are sufficient to constitute such a legal showing of

fraud, unfairness, or oppression on the part of the purchasing creditor as would suffice to justify this court in avoiding the sale.

[4] In the instant case the evidence wholly fails to show any action or inaction on the part of the defendant which would bring his conduct with respect to his trust deed and the sale thereunder within the limits of the rule above stated. He simply stood upon his rights and duties as a creditor of the parties to his promissory note and the trust deed securing the same, and, while it is true he gained a hard advantage over the plaintiff herein in so doing, it has not been shown that it was not an advantage to which he was entitled under the strict terms of the plaintiff's obligation. This being so, under the authority of the cases above cited, and especially of the case of *Sargent v. Shumaker*, supra, we are constrained to uphold the findings and judgment of the trial court.

Judgment affirmed.

We concur: WILBUR, C. J.; MYERS, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

(65 Cal. App. 510)

PEOPLE v. HEINRICH. (Cr. 1049.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1924. Rehearing Denied March 6, 1924. Hearing Denied by Supreme Court April 3, 1924.)

1. False pretenses §49(1)—Attempt to commit grand larceny by fraudulent statements held shown.

Evidence held sufficient to show an attempt to commit grand larceny by false and fraudulent statements made to induce prosecuting witness to give defendant cash security for faithful performance of duties as superintendent of ranches which defendant neither owned nor controlled.

2. Criminal law §44—Proof necessary to establish attempt to commit crime stated.

To bring a case within a statute concerning an attempt to commit a crime it is sufficient that preparations therefor were followed by some overt act offering a prospect of successful accomplishment of the crime if not interrupted.

3. False pretenses §21—That check given fictitious held no defense to prosecution for attempt to commit larceny by fraudulent statements.

That a check given by prosecuting witness to defendant as cash security for faithful performance of duties as superintendent of property, which defendant neither owned nor controlled, was fictitious, held no defense to a prosecution for attempt to commit grand larceny by fraudulent statements.

4. Criminal law §370, 371(3), 372(9)—Evidence of similar false representations to others held admissible in prosecution for attempt to commit larceny by fraudulent statements.

In a prosecution for attempt to commit grand larceny by making false representations

to induce prosecuting witness to give cash security for performance of duties as superintendent of property, which defendant neither owned nor controlled, evidence of similar representations by defendant to others held admissible to prove guilty knowledge, intent, and system.

5. Criminal law §1173(2)—Refusal to instruct that certain issue did not arise, there being no contention that it did, held not prejudicial error.

In an action for attempt to commit grand larceny by fraudulent representations made to induce prosecuting witness to give cash security for performance of duties as superintendent of property, which defendant neither owned nor controlled, refusal to instruct that defendant was not charged with attempted larceny of a check which prosecuting witness gave him held not prejudicial error, where it was not contended that larceny of the check rather than attempted larceny of the amount thereof was the gravamen of the offense.

6. Criminal law §829(1)—Refusal of instruction substantially covered by instructions given held harmless.

Refusal to instruct, in the language of Pen. Code, § 20, that "in every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence" held harmless, where the substance thereof was adequately covered by other instructions.

7. Criminal law §770(2)—Instructions on immaterial matter properly refused.

Instructions on an immaterial matter are properly refused.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

C. A. Heinrich was convicted of attempt to commit grand larceny, and appeals. Affirmed.

George Appell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was charged by indictment with an attempt to commit grand larceny. From a judgment of conviction and from an order denying his motion for new trial, defendant has appealed to this court.

In brief the evidence shows that defendant advertised in a newspaper for a superintendent to take charge of a large ranch at a salary of \$350 per month and a percentage of the income from the ranch, and requiring that such superintendent deposit with defendant a cash bond. A Mr. Crandell, who was a detective in the office of the district attorney, answered the advertisement. Later Mr. Crandell met defendant, and had a conversation with him regarding the proposed employment, in which conversation defendant informed Mr. Crandell that he had a large estate in Mexico, consisting of several small ranches, on each of which a foreman was em-

ployed; that the position offered was that of a superintendent who would have charge of all the foremen and handle the wages of the employees, and that it would be necessary that Crandell put up a cash bond in the sum of \$5,000, or that in lieu of cash he might take a Mexican surety bond. Defendant also told Crandell that the land was owned by a London syndicate, of which a Mr. Totten was president. At a later date Crandell again met defendant and delivered to him a check in the sum of \$5,000, which check was fictitious as to the drawer thereof as well as the bank upon which it purported to be drawn. At the same time an agreement relative to the employment and covering the receipt and disposition of the \$5,000 was executed and delivered as between the parties. The evidence further showed that defendant was possessed of an apparently, genuine agreement giving him the right to purchase approximately 70,000 hectares of land in Mexico, together with "the machinery and the utensils for agriculture, the cattle, the personal and movable property, buildings, wells, improvements of all kinds, and so forth, for the price of one million pesos."

After defendant had been arrested, he made a statement, in the nature of an admission, to a deputy district attorney to the effect that the property had been purchased by the British Land & Packing Company, and that defendant was a general manager of the property; that no deed had been actually received, but that \$350,000 had been paid in escrow on account of the purchase. The secretary of the abstract company with which the alleged escrow was made testified regarding same and the deposit made therein by A. R. Totten of one check for \$250,000 drawn on a bank in Chicago, which check, when cashed under certain conditions in the escrow specified, was to be used as a loan, and was to be secured by a second mortgage on certain properties in Mexico identified as including at least a part of the property which defendant had agreed to purchase. He also testified to the receipt by the abstract company of another check for the sum of \$100,000, which, according to the instructions accompanying same, was required to complete the \$350,000 escrow, which sum was to be held subject to the order of C. A. Heinrich, and to apply on the purchase of the ranches La Labor, Majarros, and San Leonel, containing 180,000 acres of land, more or less, and situated near the city of Tepic in the state of Nayarit, republic of Mexico. The abstract company was further instructed to forward said \$350,000 to such bank or company in Mexico as was thereafter designated by said C. A. Heinrich.

It was shown by the vice president of the bank upon which these checks were drawn that the drawer of the checks never had any funds or deposit in such bank. Evidence was also introduced to show that defendant had

negotiated with three other men regarding their proposed employment as superintendent, and that defendant had made statements to them similar to those which he made to Crandell.

[1] It is contended by appellant that the evidence does not prove that any crime was attempted to be committed. In that connection it will be observed that a so-called trust agreement and a set of "by-laws," each of which was signed by Totten, defendant, and another person named P. R. Heinrich, and a power of attorney from Totten to defendant, were also introduced in evidence, all of which tended to show the association and the relationship existing between Totten and defendant with reference to the Mexican properties. A reading of these several instruments, together with the other documents introduced in evidence, demonstrates that the "British syndicate," which defendant stated was the owner of the Mexican property, was composed wholly of Totten, defendant, and the other Heinrich, and that not a single dollar had ever been paid by either defendant or the "syndicate" on account of the purchase price of the Mexican ranchos. The foundation for the employment of Crandell by defendant as the pretended manager of the properties was entirely wanting. The statements made by defendant to Crandell with reference thereto were false and fraudulent, and were held out to Crandell for the purpose of inducing him to give to defendant the sum of \$5,000 as security for the faithful performance of his duties as superintendent of the property which defendant neither owned nor controlled.

[2, 3] Defendant raises the point that, because the check given by Crandell to defendant was fictitious, no crime was committed nor attempted to be committed, for the reason that the check itself was of no value; but the offense did not consist in the mere taking of the check. The offense was that defendant attempted to feloniously take \$5,000 from Crandell, and the fact that the check which was supposed to represent and to be good for that amount was of no value is of no materiality in that connection. The attempt to commit the crime had been made before the fictitious check had been delivered to defendant; all the preliminary preparations for consummating the act had taken place long before that time had arrived. The option on the land had been secured, the trust agreement, by-laws, power of attorney, escrow instructions, and the two bogus checks deposited with the abstract company had all been executed in advance of any overt act toward the perpetration of the fraud. Then came the newspaper advertisement, followed by the several conversations containing the misrepresentations by defendant to Crandell, and, as a finality, the execution and delivery of the contract of employment and the delivery of the fictitious check of \$5,000 to de-

fendant. In the case of *People v. Stites*, 75 Cal. 570, 17 Pac. 693, acts of the defendant with reference to an attempt to commit a criminal offense were far from being as complete comparatively as were the acts of the defendant here, and yet they were held sufficient. The ruling in the case of *People v. Mann*, 113 Cal. 76, 45 Pac. 182, wherein the facts as to the overt act were slight as compared to the evidence thereof in the instant case, is that, where an unsuccessful effort is made by a defendant in pursuance of a preconceived plan to wrongfully deprive another person of money, the objection that the scheme failed of accomplishment constitutes no defense. In the case of *People v. Mayen*, 188 Cal. 256, 205 Pac. 435, 24 A. L. R. 1383, preparation, followed by an attempt to get possession of money, was held sufficient. To the same effect are *People v. Paluma*, 18 Cal. App. 131, 122 Pac. 431, and *People v. Vaughn*, 25 Cal. App. 738, 147 Pac. 116, 117. All that is necessary to bring a given case within the meaning and intent of the statute concerning an attempt to commit a criminal offense is that preparations therefor shall be followed by some overt act which, if not interrupted, offers a prospect of successful accomplishment of the crime. As is said in *People v. Vaughn*, 25 Cal. App. 738, 147 Pac. 116:

"The fact that she was prevented from the commission of the crime by any circumstances whatever does not alter the situation; and if upon the completion of the transaction she would have been guilty of the crime of grand larceny by trick and device, then we are of the opinion that the evidence is sufficient to sustain the finding of the jury implied from their verdict that she was guilty of an attempt to commit grand larceny by the same means."

And again, in *People v. Stites*, 75 Cal. 576, 17 Pac. 696, quoting the language of Blackburn, J., in an English case:

"If the actual transaction has commenced which would have ended the crime if not interrupted, there is clearly an attempt to commit the crime."

The fact that it was an impossibility to commit the intended crime by reason of the fact that the check was valueless is no defense to the charge of attempt to commit grand larceny. It has been held that—

"An attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny." *People v. Lee Kong*, 95 Cal. 668, 30 Pac. 801, 17 L. R. A. 626, 29 Am. St. Rep. 165, citing *State v. Wilson*, 30 Conn. 500; *Commonwealth v. McDonald*, 5 Cush. (Mass.) 365; *People v. Jones*, 46 Mich. 441, 9 N. W. 486; *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732.

In the case of *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411, it is held that one who attempted to obtain money by false pre-

tenses was guilty of an attempt, although his intended victim had no money; and the case entitled *In re Magidson*, 32 Cal. App. 566, 163 Pac. 689, is authority to the effect that a defendant was guilty of an attempt to receive stolen goods, although the property was discovered by the police, removed from its place of secretion, and returned to the owner of the property before the defendant reached it.

[4] Over the objection of defendant evidence was admitted to the effect that to other persons defendant had made representations similar in many respects to those made by defendant to Crandell. The rule in this state is well established that in analogous cases such evidence is admissible for the purpose of proving guilty knowledge, intent, and system. *People v. Whalen*, 154 Cal. 476, 98 Pac. 194; *People v. Gray*, 66 Cal. 275, 5 Pac. 240; *People v. Cory*, 26 Cal. App. 735, 148 Pac. 532; *People v. Eddards*, 25 Cal. App. 660, 145 Pac. 173.

[5] Defendant offered an instruction beginning with the following statement: "You are instructed that the defendant is not herein charged with the attempted larceny of a check, but charged with the attempted larceny of \$5,000," and defendant here complains of the action of the trial court in refusing to give that part of the instruction which referred to the fact that defendant was "not herein charged with the attempted larceny of a check". As heretofore stated, the larceny of the check itself was not the gravamen of the offense. Apparently no one connected with the case made any contention otherwise. We are unable to perceive just how a failure to state that particular fact to the jury could have harmed defendant any more than a failure to state to the jury many other facts not pertinent to the cause could in any wise have prejudiced defendant's case. It was defendant's proposed instruction, and he here admits that as given it correctly stated the law.

Complaint is also made that certain instructions are conflicting; but upon examination of them this court is unable to agree with counsel for defendant in that regard.

[6] It is also contended that the court erred in refusing to give to the jury an instruction in the language of section 20 of the Penal Code, requested by defendant, that "in every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." While the giving of such instruction would not have been error, the substance of the proposed instruction was adequately covered by other instructions given to the jury; hence defendant was in no wise harmed by the action of the court in that connection.

[7] Appellant further predicates error upon the refusal of the court to give, at defendant's request, several other instructions. Each of them has to do with what this court has heretofore indicated in its opinion is an

immaterial matter; that is, the bearing that the fictitious check for \$5,000 has upon the ultimate question of defendant's intent to steal that sum of money. The attempt was not to steal the check itself, but was to steal \$5,000. Whether the check was good or bad is of no consequence; hence the instructions offered in connection with that feature of the case were properly refused.

So far as this court is able to determine, every feature of the case was fully and fairly covered by instructions given to the jury. No prejudicial error appearing, it is ordered that the judgment and the order denying the motion for new trial be and the same are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

65 Cal. App. 530

STRADLEY v. TOUT et al. (Civ. 3947.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1924.)

1. Pledges ⇐58(1)—Pledgee of promissory note cannot sue pledgor as guarantor.

Civ. Code, § 3108, providing that a holder having a lien on a negotiable instrument is deemed a holder for value to the extent of his lien, limits such holder's right to the extent of his lien, and does not create a new right, and is not inconsistent with and does not repeal section 2888, providing that no title to property subject to a lien is transferred by the lien, notwithstanding an agreement to the contrary, and the rule that a pledgee of a note cannot sue pledgor as guarantor is therefore unchanged, notwithstanding section 3138.

2. Bills and notes ⇐357—Pledgee of note held entitled to enforce payment against indorser prior to pledgor.

Under Civ. Code, § 3138, providing that a holder in due course may enforce payment on the instrument against all parties liable thereon, a pledgee of a note is the holder for value and in due course as respects indorsers prior to pledgor, and, in the absence of knowledge that such a prior indorser was owner of one-half the note, pledgee was entitled to enforce payment against him.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by L. J. Stradley, doing business as the Stradley Grocery Company, against Hugh B. Tout, Charles C. Albert, and Y. C. Valencia. From a judgment for plaintiff against defendant first named, and in favor of defendants last named, plaintiff appeals. Affirmed in part, and reversed in part.

Kaye & Siemon, of Bakersfield, for appellant.

Wesley Grijalva, of Bakersfield, for respondents.

CURTIS, J. Plaintiff instituted this action against the defendants to recover the

amount due on a promissory note, executed by defendant Tout, and indorsed and payment thereof guaranteed by defendants Albert and Valencia. The defendant Tout failed to appear in the action, and judgment by default was rendered against him for the full amount of the note. The court refused to give judgment against either of the defendants Albert or Valencia, but rendered judgment in their favor; that is, a judgment that plaintiff take nothing against either of said defendants. The appeal is taken by plaintiff on the judgment roll only, and from only that part of said judgment in favor of the defendants Albert and Valencia. The findings show that the note was executed by Tout in favor of Albert, who, prior to its maturity, indorsed the note to Valencia without consideration, and for the purpose of collection. Valencia, before its maturity, indorsed the note and delivered it to plaintiff as security for the payment by said Valencia of groceries purchased and to be purchased by Valencia from the plaintiff. The amount due plaintiff on this grocery account the court found was \$1,851.75. The court further found that the amount due on the note was \$2,000 principal, \$151.20 interest, and \$200 attorney's fees, for which amounts the court gave judgment in plaintiff's favor against defendant Tout, and further provided that plaintiff, after paying himself the amount found due him, should pay the balance, if any remaining in his hands, to Valencia and Albert. The court found that, although the note was executed in favor of Albert, at all times Albert and Valencia each owned one-half of said note, but that plaintiff had no knowledge of the ownership of the one-half of said note by the defendant Albert.

[1] It is the contention of plaintiff that the findings show that he was the bona fide holder of the note sued on in due course under the so-called Uniform Negotiable Instruments Law, that he held the note as pledgee, and that he had the right to enforce payment thereof from all parties liable thereon, including Albert and Valencia, and to apply the proceeds upon the indebtedness owing to him by Valencia, and that the court therefore erred in granting judgment in favor of the defendants Albert and Valencia.

Reliance is placed by plaintiff, in support of his contention, upon two sections of the Civil Code which were adopted in 1917, at the time of the enactment of the so-called Uniform Negotiable Instruments Law. Said sections are a part of said law and are as follows:

"Sec. 3108. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

"Sec. 3138. A holder in due course holds the

instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Plaintiff concedes that prior to the enactment of the above sections of the Code the decisions of the Supreme Court of this state were adverse to his contention, at least in so far as the defendant Valencia is concerned. In the case of *Sparks v. Caldwell*, 157 Cal. 401, 108 Pac. 276, the Supreme Court stated that:

"The one question presented is whether or not a pledgee can sue a pledgor as guarantor of a collateral security in the nature of a negotiable instrument."

It was held that no such action could be maintained, for the reason that the title to the pledged security was still in the pledgor, and that by his indorsement thereof to the pledgee, even when such indorsement contained (as it does in the present case) an express guaranty for the payment of this pledged security, he only gave to the pledgee authority to collect the amount due from the maker of the pledged security, and to apply such sum to the payment of his own debt. The court held that this was so by virtue of section 2888 of the Civil Code, which provides that—

"Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

Plaintiff contends that section 2888 is inconsistent with the provisions of 3108 of the Civil Code, and that, as the latter section was enacted long subsequent to the adoption of section 2888, it repealed the latter section by implication. We are unable to agree with plaintiff in his contention that the terms of these two sections are inconsistent with each other. Section 2888 provides simply that no title to property, subject to a lien, is transferred by a lien or by a contract for a lien, notwithstanding any agreement to the contrary. Section 3108 provides that where the holder has a lien on a negotiable instrument he is deemed a holder for value to the extent of his lien. Nothing is said in said section 3108 about any transfer of any title to the instrument from the owner thereof to the owner of the lien. By the very terms of this section, the owner of the lien is limited in his right over the pledged instrument, to the extent of his lien. This clearly implies that he is not the owner of such instrument, but that he holds the same simply as security for the payment of his debt. No new right was created in favor of a holder for value of a negotiable instrument, pledged to him as secur-

ity, by the enactment of section 3108. Prior to the adoption of this section, an indorsee of a negotiable instrument merely as collateral security for a debt (even though it be a pre-existing debt) owing to him by his indorsee, took the instrument free from all equities that might exist against the indorser of which the indorsee had no notice (*Ponce v. McElvy*, 47 Cal. 154; *Griswold v. Morrison*, 53 Cal. App. 93, 200 Pac. 62), and he could proceed to collect the same and apply the proceeds thereof on his own debt. He could not, however, as we have already seen, recover against his immediate indorser. *Sparks v. Caldwell*, supra.

Nor is appellant supported in his claim for a judgment against defendant Valencia by the provisions of section 3138 of the Civil Code. It is true that by the terms of this section "a holder in due course" (and plaintiff is such a party) "may enforce payment of the instrument * * * against all parties liable thereon," but we have already seen that Valencia is not one of the parties liable for the payment of the instrument. Therefore no right is given plaintiff by this section to recover against him. The judgment, therefore, in favor of defendant Valencia, the pledgor of said note, was correct and should be affirmed.

[2] The defendant Albert occupies a different position, however. At the time plaintiff acquired the note from Valencia the name of defendant Albert appeared thereon as an indorser and guarantor. While the court found that he was the owner of one-half of said note, it further found that plaintiff had no knowledge of such ownership at the time he acquired the note. The plaintiff was therefore, as far as the defendant Albert was concerned, a holder for value and in due course of business. He held it free from any defects of title of any prior party thereto, and free from any and all defenses available to any prior party, and was entitled to enforce payment against all parties liable thereon, which included the defendant Albert. Section 3138, Civ. Code. The trial court therefore erred in granting judgment in favor of defendant Albert in so far as plaintiff's right to collect said note is concerned. The defendant Albert is liable for the payment of said promissory note, and judgment should be entered against him for the amount due thereon.

That part of said judgment in favor of defendant Valencia is affirmed, but that part of said judgment in favor of defendant Albert is reversed, with directions to the trial court to modify said judgment by causing judgment to be entered against said defendant Albert for the amount found to be due on said promissory note.

We concur: CONREY, P. J.; HOUSER, J.

65 Cal. App. 502

PEOPLE v. FROEHLICH. (Cr. 1036.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1924.)

1. Larceny $\S$ 65—Conviction of grand larceny held sustained by evidence.

Evidence held sufficient to sustain a conviction of grand larceny by theft of an automobile.

2. Criminal law $\S$ 1159(5)—Defendant's testimony in explanation of possession of stolen property held insufficient to authorize reversal.

That defendant, in a prosecution for grand larceny, testified to such circumstances attending his possession of the stolen property as would have removed the inference of guilt, held insufficient to authorize reversal, in view of his prior contradictory statements and the unreasonableness of his story, the truth or falsity of which was for the jury.

3. Criminal law $\S$ 823(9)—Instruction as to effect of defendant's failure to satisfactorily account for possession of stolen property held not reversible error.

In a grand larceny prosecution, an instruction that defendant's failure to "satisfactorily" account for his possession of the stolen property was a circumstance tending to show his guilt held not misleading, or ground for new trial under Const. art. 6, $\S$ 4½, as resulting in a miscarriage of justice, in view of an instruction that defendant could not be convicted, unless the jury were convinced beyond all reasonable doubt that he was guilty of the crime charged.

4. Criminal law $\S$ 945(1)—Denial of new trial because of newly discovered evidence not of character to change result not disturbed.

Unless newly discovered evidence is such as to make it manifest that the case would or should result differently on new trial, the trial court's order denying the motion therefor based on such ground will not be disturbed.

5. Criminal law $\S$ 958(6)—Affidavit in support of motion for new trial for newly discovered evidence held insufficient.

An affidavit in support of a motion for new trial for newly discovered evidence that certain witnesses would testify as to giving defendant a ride in an automobile to a certain city on the day he was accused of having stolen a car therein, and that he was in and about a certain poolroom at and after the time the car was stolen, held insufficient, in view of the conceded facts of his arrival there on such day and his presence in the poolroom before the car was stolen, and the sheriff's testimony as to his inability to locate and subpoena the only witness who could testify as to defendant's presence at the poolroom at or after the time the car was stolen.

Appeal from Superior Court, San Luis Obispo County; T. J. Norton, Judge.

J. F. Froehlich was convicted of grand larceny, and appeals. Affirmed.

John R. Stowe, of San Luis Obispo, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CURTIS, J. The appellant, with two others, Clyde T. Phillips and Charles E. King, were charged with the crime of grand larceny in the theft of an automobile. The defendant Froehlich was separately tried. He was convicted by a jury, and from a judgment sentencing him to imprisonment in the state's prison and an order denying a motion for a new trial, an appeal has been taken. The automobile, which the appellant was charged with stealing, was owned by W. F. Wickham and was left by him standing in front of the Hot Springs Hotel at Paso Robles, San Luis Obispo county, at about half past 9 o'clock of the evening of February 2, 1923. In about 15 minutes thereafter the owner returned to the place where he had left his machine and it was gone. It was found at about half past 7 o'clock on the night of February 4, 1923, in the city of Los Angeles, at which time it was being driven by the defendant Phillips, who, with the appellant and defendant King, was riding in the front seat of the machine. The three defendants were taken in custody by the police of the city of Los Angeles, and thereafter turned over to the authorities of San Luis Obispo county.

The car was a new one and bore no number plates, there being simply an application for a license on the windshield. It was equipped with a bumper in front, a set of side wings, a sun visor, and motometer. When it was recovered by the authorities in Los Angeles, the application for license was gone from the windshield and two 1922 license plates had been put on the car. The side wings, sun visor, and bumper had been removed from the car. The bumper was afterwards recovered at Norwalk, about 18 miles southeast of Los Angeles.

The defendants, Phillips and King, did not testify at the trial. The appellant took the stand in his own behalf and testified that he, with King and Phillips, was in Paso Robles on the night of the theft of the automobile, and that a man by the name of Wilkins employed Phillips to drive the stolen machine from Paso Robles to San Diego, and that Phillips had asked appellant and King to ride with him on the trip; that the three then got into the machine, which was standing in front of the Alexander Hotel, a short distance from the Hot Springs Hotel, and they drove from Paso Robles to Bakersfield and then down to Los Angeles, where they arrived on the morning of the 3d of February. From Los Angeles they drove to Norwalk, where Phillips put the 1922 number plates on the car and left the bumper. They drove around Norwalk and Santa Fé Springs

and into Los Angeles once, and possibly twice, before they were arrested on the evening of February 4th.

While the defendants were in the custody of the officers, a number of conversations were held between them and the officers. James H. Shafer, one of the officers who made the arrest, testified as follows:

"I went out of the room again and brought the defendant and King into the room where Officer Boycott and Phillips were. Phillips says, in the presence of the defendant and King, 'You mean to say that you wasn't with me when we got this automobile?' and Froehlich didn't say nothing, just kind of stood there, this man there, Froehlich, I guess it is. 'Didn't you and King and myself go out of the poolroom in Paso Robles and walk around the block looking for a car, and you said, "Here is a car, let's take this one," and we got into that car and drove it south.' When he didn't deny that statement, then I immediately said, 'Let's all of us go to the jail.' I hadn't intended that day to put these two fellows in jail because I had nothing against them, and when he said that, 'Isn't that the truth, that you went with me, you two boys went with me and you picked this car out and you said, "There is a car that looks all right, we can drive that one," and we drove it together,' then I took them over to the station and locked them up. Q. Did the defendant here at any time deny the statement made by Phillips? A. No, sir. Q. Did he, himself, make any further statement? A. No, sir; he did not. I might correct that. Later at the sheriff's office, whether it was Froehlich or King I don't know. They were practically together within a radius of five feet. One of them made the statement: 'Well, I guess you got it on us.' That is all that was said."

Officer Boycott, who was also present at this conversation, testified that it was Froehlich who made the remark, "Well, I guess you got it on us." This officer also testified that while all three of the defendants were present they told him that they met in a poolroom at Paso Robles; that they wanted to go south, but did not know how to get there and did not want to walk; that they went out to find a car to ride down in, and they came upon the Wickham car in front of the big hotel in Paso Robles; that they took this car and started out, and they told him they were going to Mexico; and that Phillips and Froehlich took turns in driving the car, as King was not able to drive. According to the testimony of this officer, Froehlich first told him that "Phillips came along in the car between Paso Robles and here (Los Angeles), and they never saw him before, and he asked them if they did not want to ride."

The testimony further shows that neither the appellant nor any of the defendants had ever seen the man Wilkins before the night the machine was stolen, nor had any of them ever heard of him since that time; that a subpoena for Wilkins to attend the trial had been issued and placed in the

hands of the sheriff for service. The sheriff testified at the trial that he not only searched for Wilkins in San Luis Obispo county, but that he also had officers search for him in the cities of San Francisco, Oakland, Los Angeles, and San Diego, and that he published a notice in the San Francisco Examiner asking for information in regard to Wilkins, but that he had never been able to find Wilkins, nor had he received any information whatever regarding him.

[1, 2] In view of the foregoing statement of facts, it is difficult to understand how the contention can seriously be made that the evidence is insufficient to support the judgment, yet this appears to be the main ground advanced by appellant for a reversal of the judgment. The evidence unquestionably shows that the automobile was stolen. The testimony of the owner upon this point was clear and complete and uncontradicted. The evidence is equally satisfactory that the defendant was found riding in the machine with the two other defendants two days after the theft, many miles away from the place where the machine was stolen. In addition to these facts, we have the testimony of the officer Boycott that when all three defendants were present they told him that they met in a poolroom at Paso Robles; that they wanted to go south, and that they did not want to walk; that they went out and found this car, got in it, and drove away. And furthermore, after the appellant and King had made the statement to the officers in Los Angeles that they were picked up on the highway between Paso Robles and Los Angeles and given a ride by Phillips, the latter accused them, in the presence of the officers, of going with him and picking out the car which was stolen and that the three got into the car and drove away with it, and neither appellant nor King made any denial of this accusation, nor said anything in reply thereto, except that the appellant did say, "Well, I guess you got it on us." This evidence unquestionably justified the jury in rendering the verdict of guilty, and was sufficient to support the judgment of conviction. This evidence was all before the court at the time appellant made his motion to advise the jury to acquit, and justified the court in denying said motion. It is true the appellant took the stand and told a story, which, if believed by the jury, would have entitled him to a verdict in his favor; but it was for the jury to pass upon the truth or falsity of his statement, and by rendering a verdict adverse to him it is plain that they considered his story a fabrication. It was contradicted by statements that he had previously made to the officers and was so unreal and unreasonable that we would have been surprised had any intelligent jury placed any reliance in it. We think the following language used by the Supreme Court in the case of *People v. Luchetti*, 119 Cal.

501, 51 Pac. 707, is applicable to the case before us:

"Appellant contends that having given a reasonable account of the circumstances attending his possession of the cow, that it removes the inference of guilt, and that therefore the verdict should have been in his favor. But whether the account he gave was either true or reasonable was for the jury to determine, and in such case we cannot disturb the verdict, unless we can say that his explanation of his possession was so clearly and evidently true that the opposite conclusion could only be reached by a jury under the influence of passion or prejudice. We think the jury rightly concluded that his story was fabricated and, therefore, that he was guilty of the larceny."

[3] The appellant further complains of the giving of the following instruction:

"If the jury believe from the evidence the property was stolen and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to satisfactorily account for such possession, or to show that such possession was honestly obtained is a circumstance tending to show his guilt of the alleged larceny, and the accused are bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered with other facts tending to establish guilt if the evidence discloses any such."

This instruction in all material respects is the same as that approved in the case of *People v. Alba*, 52 Cal. App. 603-608, 199 Pac. 894, and the authorities therein cited, with the exception that instead of the words "the failure of the defendant to satisfactorily account for such possession," the instruction approved in *People v. Alba*, supra, contained the words "the failure of the defendant to account for such possession." Appellant contends that by the use of the word "satisfactorily," in this instruction, the court committed an error prejudicial to his rights.

In *People v. Roberts*, 122 Cal. 377, 378, 55 Pac. 137, 138, the court said:

"When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances which are in no sense presented here."

The Supreme Court reversed this case on account of the erroneous statement of law by the court in such instruction. In view, however, of the fact that in the present action the court further instructed the jury that the burden of proof was upon the prosecution and that the defendant was entitled to the benefit of any reasonable doubt and could not be convicted unless the jury were convinced by the evidence in the case beyond all reasonable doubt that he was guilty of the crime charged, we are of the opinion that the jury were not misled by the in-

struction complained of. Besides, the case of *People v. Roberts*, supra, was decided before the adoption of section 4½ of article 6 of our Constitution, by the well-known provisions of which courts are directed not to set aside any judgment or grant any new trial on the ground of the misdirection of the jury unless, after an examination of the entire cause, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. We are satisfied that the evidence in this case was amply sufficient to establish the guilt of the defendant beyond all reasonable doubt, and that if the court erred in giving the instruction complained of, that the jury was not misled thereby, nor did any miscarriage of justice result therefrom.

[4, 5] Among the grounds upon which appellant based his motion for a new trial was that of newly discovered evidence. Appellant filed an affidavit, sworn to by himself, in support of this ground of his motion. The affidavit in brief states that the appellant was in the county jail of San Luis Obispo county from the time of his arrest up to the time of his trial; that he was a stranger in said county and was without the financial means necessary for him to make a search for certain witnesses, who, if produced, would have testified in his favor, and that said witnesses were not present at the trial for that reason; that since his conviction he had procured funds sufficient to enable him to make a search for said witnesses, and if granted a new trial he would be able to procure said witnesses and have the benefit of their testimony upon a second trial. One of these witnesses, the affidavit sets forth, would testify that he gave appellant a ride from San Ardo to Paso Robles, in an automobile, on the day that appellant was accused of stealing the machine in question; and that the other of said witnesses would testify that appellant, was on the same night, in and about the poolroom at, and after, the time the automobile was stolen.

We question very seriously whether this evidence, if it should be produced at a subsequent trial, would materially assist appellant in his defense. Unless such evidence is of a character as to make it manifest that the case would, or should, result differently on a new trial, the order of the trial court denying the motion will not be disturbed. *People v. Sing Yow*, 145 Cal. 1-4, 78 Pac. 235. The testimony of the witness that he gave appellant a ride into Paso Robles on the day the automobile was stolen would not have had any material bearing on the case. All the parties conceded that appellant arrived there on that day, and the particular means employed by him in traveling would not, we believe, have had any great weight with the jury in determining whether he was guilty or innocent of the offense with which he was charged. Nor is there any dis-

pute as to the presence of appellant in the poolroom, before the automobile was stolen, so witnesses testifying to this fact could not perceptibly aid defendant. Evidence that he was in the poolroom at and after the machine was stolen might be of material assistance to the defendant. Appellant testified fully as to his presence in the poolroom on the various occasions of the night the car was stolen, and from his testimony the only person that could possibly testify to the fact that the defendant was there at, or after, the time the machine was stolen, was the mysterious and elusive individual, known to the appellant and his codefendants as "Wilkins," but defendant's affidavit failed to show any fact upon which the court could reasonably base a belief that the appellant could secure the attendance of Wilkins at the trial, no matter how long a continuance might be granted. The testimony of the sheriff of San Luis Obispo county showed that he had been exceedingly diligent in his efforts to locate Wilkins and to subpoena him as a witness at the trial; but, as we have heretofore seen, he was unsuccessful in these efforts. From the showing made by the appellant in his affidavit, there is no reasonable probability that the appellant could succeed where the sheriff had failed. Therefore we are unable to see how the appellant, if granted a new trial, can expect any material assistance from any of the witnesses referred to in his affidavit. Neither do we believe from the showing made by appellant that the result of a new trial would be any different from that already held.

For this reason we are of the opinion that the trial court properly denied the motion for a new trial upon the ground of newly discovered evidence as well as upon all other grounds upon which it is based.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

(65 Cal. App. 479)

PADDON et al. v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,
CO. et al. (Civ. 4883.)

(District Court of Appeal, First District, Division 2, California. Feb. 1, 1924. Hearing Denied by Supreme Court March 31, 1924.)

Contempt $\S$ 80—Party charged with contempt held not entitled to writ of prohibition.

A petition for a writ of prohibition will be denied where at the time the order sought to be reviewed by the writ was made proceedings were pending charging petitioner with contempt of orders of the trial court.

Application for a writ of prohibition by William Locke Paddon and others, directed

against the Superior Court, City and County of San Francisco, and Walter Perry Johnson, Judge, etc., and others. Writ denied.

See, also, 223 Pac. 91.

J. L. Smith, of San Francisco, for petitioners.

Preston & Duncan, of San Francisco, W. A. Andrews, of Oakland, C. A. Linn, of San Francisco, and Myron Harris, of Oakland, for respondents.

PER CURIAM. It appearing to the court that proceedings were pending charging the petitioner, William Locke Paddon, with contempt of the orders of the trial court at the time the order herein sought to be reviewed was made, and it further appearing that the said William Locke Paddon is the real party in interest herein, it is ordered that the petition for a writ of prohibition be denied upon the authority of *Knoob v. Knoob* (Cal. Sup.) 218 Pac. 568, *Soderberg v. Soderberg* (Cal. App.) 219 Pac. 82, and *Weeks v. Superior Court*, 187 Cal. 620, 203 Pac. 93.

All the Justices concur.

(65 Cal. App. 517)

HAIGH et al. v. HILL et al. (Civ. 4181.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1924.)

1. Evidence $\S$ 265(5)—Evidence held to show driver of automobile acted as agent of father.

As under Motor Vehicle Act, $\S$ 8, as amended by St. 1917, p. 391, $\S$ 7, a transfer of ownership of an automobile was not complete until transferee had received the certificate of registration and written her name thereon, where, in action for injuries from negligent operation of automobile driven by the daughter of defendant, who was passenger therein, the daughter stated that her father had given her the car but that it was registered in his name, admission by defendant that they were not going to make any point of technical ownership justified the inference that the driver was acting as defendant's agent.

2. Appeal and error $\S$ 1056(1)—Error, if any, in sustaining objection to question not prejudicial.

In action for injuries from negligent operation of an automobile driven by the daughter of the owner, who was a passenger therein, any error in excluding a question to defendant as to whether he exercised any control or operation over the automobile as a conclusion was not prejudicial, since the question could have been restated in such manner as to draw from witness the desired testimony.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by George H. Haigh and another against C. F. Hill and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant.
Paul Blackwood, of Los Angeles, for respondents.

CONREY, P. J. In this action plaintiffs recovered judgment against the defendants in a sum awarded as damages for personal injuries received by Mrs. Haigh, resulting from alleged negligence in the operation of an automobile. The appeal is by defendant C. F. Hill alone. He raises no question challenging the amount of the judgment. The only claim presented by appellant is that as to him the judgment should be reversed because the proved facts did not establish any liability on his part for the negligence of his codefendant, and because the court erred in a ruling upon evidence relating to facts upon which his liability depends.

The complaint contained no direct statement concerning the ownership of the automobile. It merely alleged that "the defendants and each of them, their servants, agents, and employees," operated and ran the automobile in such a careless and negligent manner that it caused the same to collide with Mrs. Haigh, whereby the stated injuries were inflicted upon her. The defendant Ruth Hill is the daughter of appellant, and at the time of the accident July 14, 1921, her age was 21 years. In his answer, appellant denied that at the time and place of the collision "this defendant or his servants or agents or employees operated or ran an automobile in such a or any careless or negligent manner as to cause same to collide with plaintiff or throw her violently or otherwise or at all to the pavement," etc. He further pleaded contributory negligence of Mrs. Haigh, and in that connection alleged that the defendant Ruth Hill "was at said time operating her said automobile in a careful and prudent manner," etc. He further alleged that at said time he was exercising ordinary care, caution, and prudence in the premises, and was then and there a guest of defendant Ruth Hill.

[1] Counsel for appellant concedes that, if ownership of the automobile by appellant C. F. Hill had been alleged in the complaint and not denied, then it would appear prima facie that Ruth Hill was his agent, but contends that the obverse of this condition is here presented.

At the time of the accident Ruth Hill was driving the car. The only other persons in the car were Mrs. Hill, who was sitting at the right of Ruth Hill on the front seat of the car, and appellant, who was occupying a place in the rear seat.

Plaintiffs proceeding under the provisions of section 2055 of the Code of Civil Procedure examined defendant Ruth Hill as an adverse witness. In response to a question she stated that she owned the car. Responding to further questions she stated that her father had bought the car and in March, 1920, had given

it to her; that on renewing the license for this car in 1921 she had caused it to be registered again in his name, as it had been during all of 1920. At this point in the examination the attorney for defendants interfered, with the statement that "we are not going to make any point of the technical ownership of the car," although he further stated that, if plaintiffs insisted on going into that matter, he could and would prove that Mr. Hill had given to Ruth Hill a bill of sale of this car. Plaintiffs' attorney later stated that he would like to again offer evidence in proof of ownership of the automobile; but he was not permitted so to do. The offer was very informal and amounts to nothing.

The "Vehicle Act" in force at the time of this accident, in section 8 thereof (St. 1917, p. 391), referring to transfer of ownership of automobiles, provided for notice to the motor vehicle department of the state, of the fact of any such transfer, and for the issuance of new registration certificates.

"Until said transferee has received said certificate of registration and has written his name upon the face thereof in the blank space provided for said purpose by the department, delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

It is manifest that at the time when the attorney for the defendants interrupted the examination of the witness Ruth Hill by making the statement that "we are not going to make any point of the technical ownership of the car," it was understood by the court that this was intended as an admission that (notwithstanding the existence of the said bill of sale) he was admitting that the legal ownership of the car remained vested in the defendant C. F. Hill. We think that the facts last above stated are a sufficient reply to appellant's claim wherein he contends that there is no evidence to justify the court's finding "that this defendant, C. F. Hill, either drove, operated, or ran said automobile at said time and place, either personally or by any duly authorized agent." The fact being established that appellant was the owner of the car and was actually riding therein, the additional fact that another person was operating the machine, under the circumstances shown by the evidence, fully justified the inference that the driver was acting as the agent of the owner. A finding that he was in the car as her guest at that time would have been contrary to the evidence.

[2] While appellant was testifying in his own behalf, a ruling was made as follows:

"Q. Now, did you have or exercise any control or operation over this Dodge car on this particular evening before and immediately preceding the accident? A. No, sir.

"Mr. Blackwood: Objected to, and I think it calls for a conclusion.

"The Court: I think it does. Objection sustained. The answer is stricken out."

Appellant contends that this was a substantial error, and cites authorities in support of his proposition that the court would not have erred in overruling the objection. *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272; *Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739; *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 103 Pac. 190; *Majors v. Connor*, 162 Cal. 131, 121 Pac. 371.

Assuming, without deciding, that under these authorities the court erred in sustaining the objection, we do not rank it as a prejudicial error. Under the ruling as made the question easily could have been restated in a manner that would have conformed to the ruling and yet would have drawn from the witness the desired testimony. Rulings of this class should not be accepted as a basis for the reversal of a judgment.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 521

PEOPLE v. McNAMARA. (Cr. 1156.)

(District Court of Appeal, First District, Division 1, California. Feb. 8, 1924.)

1. Burglary ☞42(3)—Evidence held sufficient to sustain conviction.

In a burglary prosecution, evidence of defendant's exercise of proprietary control of a stolen dress worn by a woman he was living with, and her testimony as to what he told her to say if asked where she obtained it, held sufficient to sustain a conviction.

2. Criminal law ☞407(1)—Evidence of accused's silence when incriminatory statements were read to him held admissible.

Accused's silence when statements implicating him directly or indirectly were read to him was admissible with the statements as justifying an inference of guilt, especially where later he made inculpatory statements in the presence of his accuser relating to the same subject-matter.

3. Criminal law ☞1169(2)—Admission of incriminatory statements by one testifying to practically same matters held not prejudicial error.

In a burglary prosecution, admission of a statement by a woman living with defendant as to how she acquired possession of the stolen dress held not prejudicial error in view of her testimony as to practically the same matters and her cross-examination at length.

4. Criminal law ☞721(6)—District attorney's remark that no testimony adduced against that of people held not forbidden comment on defendant's failure to testify.

In a burglary prosecution, where defendant offered no explanation of his possession of the stolen property, the district attorney's remark that "not a single piece of testimony has been

brought forward here against the testimony produced on behalf of the people" did not infringe on defendant's rights or violate the statute prohibiting adverse comment on or reference to defendant's failure to testify.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Joseph McNamara was convicted of burglary, and appeals. Affirmed.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. T. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was charged by information with the crime of burglary. Upon arraignment he pleaded not guilty. He was tried and convicted of the offense in the second degree. Thereafter he presented motions for a new trial and in arrest of judgment. These motions were denied, and he was sentenced to imprisonment for the term prescribed by law. This is an appeal from the judgment and from the order denying the motion for a new trial.

The main point relied upon for a reversal is that the evidence is insufficient to justify the verdict. It appears therefrom that Mrs. Agnes Murray, the complaining witness, on the evening of March 3, 1923, at about 7 o'clock p. m., left the flat where she was living at 892 Eddy street in the city of San Francisco, and returned shortly after midnight. She then discovered that a ladder had been placed against the house, and upon investigation ascertained that her personal effects had been disturbed, and some of her clothing was missing, among which was a certain black dress. It was found in the possession of and being worn by one Grace Ford, who was living with the defendant in a room on Ellis street. Upon being questioned concerning her possession of the stolen garment the Ford woman made a written statement, which she signed. The material portions thereof are as follows:

"Statement of Grace Ford, April 2, 1923:

"My true name is Grace Ford; 23 years of age; live in Coronado Hotel, 373 Ellis street, room 411. Have lived there three or four months with Joseph H. McNamara, now charged with burglary in the city prison. I have lived off and on with McNamara for about a year and a half.

"About March 3, 1923, McNamara brought a dress to our room; it was a little after 9 o'clock in the evening. This dress was the one which Mrs. Murray identified in the Coronado Hotel lobby as hers, the one I was wearing. When McNamara brought the dress to the room he said, 'What do you think of the dress?' I said 'Swell. Give it to me.' He said, 'Give you hell.' He hung it up in the clothes closet. One morning some time later he said 'Try it on.' I did. He said, 'It looks swell on you.' He said 'Take

it off.' I did. He told me if any one ever asked me when I was wearing it on the street or if it was in the room to tell them that I had bought it.

"About March 24, 1923, I visited him in the city prison. He said to me, 'I see you have the dress on.' I told him I had been down stairs with the detectives and was going to make a statement. He shrugged his shoulders and said nothing."

Subsequently this statement was read to the defendant in the presence of the Ford woman and certain police officers, at which time he refused to state whether it was true or not. Later, however, in conversing with Grace Ford in the hearing of the officers, defendant made certain statements with reference thereto, the substance of which was related by one of the officers at the trial as follows:

"McNamara said, 'Did you write them statements, Grace?' Grace said, 'No; but I had a talk with my dad, and he told me to tell the truth, which I did, and the officers wrote them down and read them, and I signed them, and you know they are true.' McNamara said, 'I just beat two raps worse than this one. So can you. Stand pat; they have nothing on us, and we will get out of this one.' Grace said 'I will not lie. I told the truth to them. It was you who got me into this jam by bringing those things to the room and giving them to me. Now you tell the truth and get me out. You know you told me to tell anybody that I bought them.'"

The Ford woman was a witness at the trial, and she testified that she had made the statement and that it was true. On cross-examination she admitted that she had declared to defendant's counsel that the statement was false, and that she had bought the dress from another woman, but on her redirect examination she again reasserted that her admission to defendant's counsel was false, and that her signed statement was true.

[1] The evidence as above narrated is all that was had at the trial; and appellant contends that it is insufficient to convict. Our attention is drawn to the fact that there is no direct evidence tending to show that defendant committed the crime charged, or that he ever had possession of the stolen article. Upon the question of possession it is argued that the authorities are uniform to the effect that the possession of recently stolen property, in order to be evidence against the accused, must be a personal and exclusive one, for the reason that such character of possession alone indicates that the goods have come to the possessor by his own act or with his consent. Accordingly it is claimed that, as the evidence does not show exclusive possession in the defendants, it is insufficient to convict.

We do not so view the evidence. The statement of the Ford woman shows that de-

fendant brought the garment in question to the apartment where she and the defendant were living. It further shows that notwithstanding the fact that they occupied the apartment together the defendant exercised a proprietary control of the stolen garment. Moreover, under these circumstances, the jury was entitled to conclude that whatever possession the Ford woman may have had of the garment was the possession of defendant. *People v. Porter and Young* (Cal. App.) 220 Pac. 20. In this connection it is further contended that, even assuming the possession to have been in defendant, the mere possession of recently stolen articles is insufficient to justify a conviction.

[2] Assuming this to be true, the testimony of the Ford woman supplies additional evidence tending to establish defendant's guilt. She was told by him to say that if any one asked her where she obtained the dress to tell him that she had bought it. In addition thereto the defendant's silence when his consort's statement was read to him is a circumstance that the jury had a right to consider in determining guilt or innocence. The silence of an accused as regards statements in his hearing which implicate him directly or indirectly may be proved with the statements, and from his acquiescence the jury may infer that the statements are true and that they tend to prove his guilt. Silence is assent as well as consent, and may, where a direct and specific accusation of crime is made, be regarded as a quasi confession (*Underhill on Evidence*, § 122). An innocent person will ordinarily emphatically repel or deny an accusation of crime, and his silence under such circumstances will justify an inference that he is not innocent. *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789; *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

Not only did the defendant remain silent when the statement was read to him, but later, and in the presence of his accuser and the officers, he made the inculpatory statements above referred to. These were circumstances which the jury had a right to consider.

[3] We are cited to the recent case of *People v. Patterson* (Cal. App.) 221 Pac. 394, in support of the contention that the trial judge committed prejudicial error in allowing the statement of the Ford woman to be read to the jury. We do not deem a discussion of that case necessary. There the defendant was not confronted with the party making the accusatory statement; but, even if we assume that the admission in evidence of the statement in the instant case was error, the defendant was in no manner prejudiced thereby. The Ford woman was a witness at the trial, and she testified to practically the same matters contained in her statement, and, as heretofore shown, she was cross-examined at length, and it is not

contended that her evidence was not competent or material.

[4] And, finally, it is claimed that the district attorney violated a right of defendant when he gave utterance to the remark that "not a single piece of testimony has been brought forward here against the testimony produced on behalf of the people." While a violation of the statute forbidding adverse comment upon or reference to the failure of a defendant in a criminal case to testify is inexcusable, we do not think the remark in question infringed upon the rights of the defendant or violated the rule. As no explanation was offered on behalf of defendant as to the possession of the stolen goods it was competent for the district attorney to refer to such want of explanation, since such possession unexplained was a circumstance affecting his guilt. *People v. Waugh*, 30 Cal. App. 402, 158 Pac. 336; *People v. Miller*, 45 Cal. App. 494, 188 Pac. 52.

No other questions are presented.

From what we have said it follows that the judgment and order should be, and they are hereby, affirmed.

We concur: ST. SURE, J.; SHORT, Justice pro tem.

65 Cal. App. 499

DAVIS v. DAVIS. (Civ. 3953.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1924.)

1. Judgment ¶112—Default admits facts alleged in complaint.

By default, defendant admits the facts alleged in the complaint.

2. Husband and wife ¶296—Complaint in action for separate maintenance held sufficient.

A complaint alleging, in a wife's action for separate maintenance, that defendant was working as a plumber and asking that plaintiff be awarded "a permanent support of sufficient amount to support herself" and that the community property be assigned to the parties in such proportion as the court found just, *held* sufficient, though the facts known to plaintiff concerning defendant's income or earning capacity and facts showing the extent of plaintiff's need of support were not stated.

3. Husband and wife ¶4—Wife entitled to support, though not dependent on husband.

A wife is entitled to support from her husband in accordance with his station in life, though she is not dependent on him and has ample means of her own.

4. Appeal and error ¶1039(4) — Omission of allegations as to husband's income and extent of wife's need of support held not ground for reversal of decree awarding separate maintenance.

Failure of the complaint, in a wife's action for separate maintenance, to state facts known to her concerning defendant's income

or earning capacity and facts showing the extent of her need of support, *held* not ground for reversal of a decree for her, in view of the moderate amount allowed and the court's power to modify it from time to time.

Appeal from Superior Court, Los Angeles County; Thos. O. Toland, Judge.

Action by Mary L. Davis against George E. Davis. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Gertrude M. Caldwell, of Los Angeles, for appellant.

Georgia P. Bullock, of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff obtained a decree against her husband, the defendant, whereby the defendant is ordered to pay to the plaintiff as separate maintenance for her support the sum of \$50 per month. By the same decree, the court awarded to the plaintiff certain community property consisting of a house and lot described in the complaint and in the decree.

The complaint stated facts showing that the defendant had been guilty of extreme cruelty toward the plaintiff, and that at a date about two months prior to the commencement of this action, and at all times thereafter, defendant willfully and without cause deserted and abandoned the plaintiff. The complaint did not make any definite statement concerning the income or earning capacity of the defendant, other than that during the immediately preceding two years "defendant has been working as a plumber." And the complaint contained no allegation concerning the necessities of the plaintiff or the amount necessary for her support; although it was stated that the alleged acts of the defendant inflicted upon the plaintiff grievous bodily injury and grievous mental suffering, and that her health had been greatly impaired thereby. Basing her claim upon the facts above stated, plaintiff in her complaint asked "that she be awarded a permanent support of sufficient amount to support herself," and that the community property be assigned to the respective parties in such proportion as the court should find to be just. Summons and complaint were duly served upon the defendant personally. As he did not appear to defend, his default was entered, and the court proceeded to hear and determine the matter. Thereupon judgment awarding separate maintenance was entered as hereinabove stated. The defendant now appeals from the judgment.

The points presented in support of the appeal are that the complaint is fatally defective in that it contained no allegation showing the necessity for plaintiff to receive from defendant any sum whatsoever for her maintenance; that the defendant by his default

admitted nothing more than the facts alleged in the complaint; that the judgment is erroneous in that it makes an allowance for attorneys' fees. As to the last point, it does not appear that such allowance was made by the judgment.

Section 137 of the Civil Code provides that when the wife has any cause of action for divorce, she may, without applying for divorce, maintain an action against him for permanent support and maintenance; and that the court, in granting the wife permanent support and maintenance of herself or of herself and children in any such action, shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction. It has been held that in an action for divorce where the decree was entered by default, and the complaint contained no allegations of defendant's ability to pay alimony, it could not successfully be maintained that the portion of the judgment requiring the payment of a sum for the support of the plaintiff was void, merely because no statement of the husband's ability to pay was contained in the complaint.

"The provision for support in such cases is ordinarily an incident of the judgment of divorce; the jurisdiction of the court (which is the extent of our concern at present) to make such provision is not dependent upon averments in the complaint of the husband's resources—any more than its power to dispose of the children depends upon an allegation of the relative fitness of the parents for their custody." *Gaston v. Gaston*, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86; *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520.

[1-3] While it would have been better pleading if the plaintiff in her complaint had stated the facts so far as known to her concerning the income or earning capacity of the defendant, and also facts showing the extent of the plaintiff's need of support, yet we are of the opinion that neither of these omissions furnishes a sufficient ground for reversal of the decree from which this appeal has been taken. The contents of the complaint were sufficient to inform the defendant that the plaintiff would ask the court to award her a suitable allowance, together with a separate interest in the community property. The complaint alleged that the defendant was actively engaged in the employment of his trade. By his default the defendant admitted the facts alleged. Those facts were sufficient to raise an inference that he was able to pay some amount toward the support of his wife. It is the law that every wife is entitled to demand of her husband a support in accordance with his station in life, even if she be not dependent upon him at all and al-

though she has ample means of her own. See opinion by Supreme Court following opinion of court of appeal in *Shebley v. Peters*, 53 Cal. App. 288, at page 293, 200 Pac. 364, 366. The facts alleged were sufficient to state a cause of action.

[4] Considering that the amount of the allowance is apparently very moderate, and considering further that the court by law has authority to modify the amount of such allowance, from time to time as may appear to be just, it becomes very clear, notwithstanding some indefiniteness in plaintiff's pleading, that no miscarriage of justice has occurred.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

193 Cal. 406

LARSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (four cases).
(S. F. 10835-10838.)

(Supreme Court of California. March 19, 1924.
Rehearing Denied and Opinion Modified April 18, 1924.)

1. Master and servant §375(1)—Compensable injury dependent on causal connection between employment and injury.

Under the Workmen's Compensation Act, to secure compensation, there must be a causal connection between the employment and injury, and the injury must originate in a risk connected with the employment, and flow from that source as a rational and natural consequence.

2. Master and servant §375(1) — Injuries from explosion in bunkhouse held compensable.

Where workmen on a ranch were required to accept the employer's accommodations for board and lodging, such accommodation being part of their pay, and the bunkhouse was the only place provided for that purpose or for passing time while momentarily unemployed, injuries to plaintiff employees from an explosion caused by another employer in the bunkhouse were compensable under Compensation Act.

3. Master and servant §373—Injuries from explosion caused by choreman pouring oil on bunkhouse fire held compensable.

Where plaintiff employee had finished his day's work and was waiting for supper in a bunkhouse in which the workmen were required to board and lodge, an explosion caused by a choreman throwing coal oil on bunkhouse fire, which he was hired to build, was an industrial hazard incidental to plaintiff's employment within Workmen's Compensation Act, § 6a.

4. Master and servant §375(1)—Death of ranch foreman, from explosion in bunkhouse, held compensable; "arising out of employment."

Where a ranch foreman, who lived with his family in a cottage on the ranch, sometimes ate at the bunkhouse furnished for the men, and had gone there after work to give orders to men constituting a night shift, his death from explosion caused by a choreman pouring oil on the fire "arose out of his employment" within the Compensation Act.

5. Master and servant §375(1)—Injuries to dredge operators quitting work early while waiting for supper in bunkhouse held compensable.

Where dredge operators were supposed to work until 6 o'clock and sometimes did repair work thereafter, for extra pay, but not being furnished with lights quit work on short days when it got dark, injuries to them from an explosion caused by pouring oil on a bunkhouse fire to revive it while they were waiting for supper, having quit work at 5:30, happened within their employment and were compensable under the act.

In Bank.

Four proceedings under the Workmen's Compensation Act by Walter J. Bohn for injuries, and by Mrs. Anna Stevens for herself and as guardian ad litem for Leonard Stevens, a minor, for the death of August Stevens, her husband, and by Clyde English and by Cecil Miracle, respectively, for injuries, claimants, opposed by Eric Larson, employer. From an order of the Industrial Commission granting an award in each case, the employer brings certiorari. Affirmed.

Redman & Alexander, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

WASTE, J. Four proceedings in certiorari were initiated in this court by the above petitioners—an employer and his insurance carrier—to annul awards made by the Industrial Accident Commission. The employer, Eric Larson, owns and operates a large grain ranch, some 8 or 10 miles from the town of Stratford in Kings county, on which he maintained bunkhouses for the comfort and accommodation of his workmen. On the evening of February 4, 1923, at about 5:30 o'clock, a number of the employees were in one of

these bunkhouses, in which a fire was burning in a wood stove used for heating the place. For the purpose of reviving the fire, the camp choreman, Joe Smith, poured coal oil into the stove from a five-gallon can. An explosion resulted which set fire to the bunkhouse. Smith and the foreman of the ranch, August Stevens, were burned to death. Cecil Miracle, Walter J. Bohn, and Clyde English, employees of the ranch, were more or less severely burned. Application was filed with the respondent Industrial Accident Commission by the widow of Stevens for a death benefit, which was granted. Claims of Miracle, English, and Bohn were also filed, and resulted in an award in favor of each of the three employees. The applications were considered together by the Commission, and the four proceedings now before this court will be considered as one.

[1] Petitioners' principal contention is that the accident resulting in the death of Stevens, and the injuries to the other applicants for compensation, was not due to an industrial hazard, and therefore does not fall within the provisions of section 6a of the Workmen's Compensation Act (St. 1917, p. 834). It is, of course, a fundamental doctrine that it was not intended by the compensation act that an employer who comes within its provisions shall be the insurer of his employee at all times during the period of the employment, but is liable for compensation only when the injury occurs to the employee while performing some act for the employer in the course of his employment, or is doing something that is incidental thereto. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence. *Cal. Casualty Indemnity Exch. v. I. A. C.* (Cal. Sup.) 213 Pac. 257. But whether a given accident is so related or incident to the business in which the employee is engaged must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. *Cudahy Packing Co. v. Parramore*, 44 Sup. Ct. 153, 68 L. Ed. —; *Assurance Corp. v. I. A. C.*, 186 Cal. 653, 656, 200 Pac. 419.

[2] Petitioners' first premise is that the injured men were not required to be in the bunkhouse at the time of the explosion and their consequent injury. The proposition falls before the evidence in the case. The Larson ranch was situated 10 miles from Stratford, and there was no nearer place where they could obtain lodging. The bunkhouse was the only place provided for that purpose, and was the only place where the men could pass the time while momentarily

unemployed. The consideration for their services was not alone the wages paid by Larson, but board and the lodging furnished at the bunkhouse were reckoned as a part of their pay. Larson testified that the men could not live in town and work for him. The employees, therefore (other than the foreman Stevens, who was furnished a separate house by the employer), were compelled to lodge in the bunkhouse. There was no alternative. The men were required to accept the accommodations provided by their employer, or not work for him. This clearly established fact differentiates the proceedings here under review from the many cases cited and relied on by petitioners, and affords the correct basis for the decision in this case. The question thus presented for our consideration is not a new one, and may be regarded as definitely settled in this state.

Almost the same contentions that are now made by these petitioners were presented for our consideration in a case only recently decided. *Associated Oil Co. v. I. A. C.* (Cal. Sup.) 217 Pac. 744. The question there submitted for decision was whether injuries occurring about and in an employer's bunkhouse, situated on the employer's premises, sustained by employees during their leisure hours, while reasonably using the bunkhouse in a proper manner during intermissions from work, are within the purview of the Workmen's Compensation Act. We held that employees are in the course of their employment while properly spending their time, when off duty, in the bunkhouse furnished by the employer for such purpose, and at which the men are compelled to live. We said:

"The general rule appears to be that when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. (1 *Schneider Workmen's Compensation Law*, p. 608, par. 279.) The test is whether or not the workman is given a choice in the matter and is as free as possible to come or go as he pleases."

Compensation was denied the employee because he had the choice of going elsewhere for lodging, but preferred the quarters provided by the employer. The facts of the case we are now considering present a situation in which "the employer places the employee in such circumstances that his time is never his own, where he has no discretion as to where he shall sleep and where he shall eat. Under such circumstances the workman must be considered in the employ of the employer all of the time, or at least performing a service which is incidental to the employment he is engaged in." *Holt Lumber Co. v. Industrial Comm.*, 168 Wis. 381, 170 N. W. 366; *Honold on Workmen's Compensation*, § 109, p. 373.

[3] The petitioners further contend that

the act of the choreman Smith in pouring coal oil from a five-gallon can into the slumbering fire did not constitute an industrial hazard. The right to compensation under the Workmen's Compensation Act is by no means restricted to those cases where the injury occurs while the employee is actually presently manipulating the tools of his calling. *Judson Mfg. Co. v. I. A. C.*, 181 Cal. 300, 302, 184 Pac. 1. "Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter." *Cudahy Packing Co. v. Parramore*, supra. And such injury is proximately caused by the employment. *Work. Comp. Act*, § 6. In the present case there is a direct causal connection between the injuries received by the men in the explosion at the bunkhouse and their employment by Larson. The presence of the men in the bunkhouse was in the course of and incidental to their employment, as already shown. Larson testified that part of the duty of the choreman Smith was "making fires at the bunkhouse." His act in attempting to revive the fire in the stove was therefore an act done in connection with the employer's business. He so carelessly and negligently performed that duty that the explosion resulted, and the men were injured. His negligence has not been shown to have been either willful or sportive, and must be considered a risk incidental to the employment of himself and the other employees on the ranch. *Laurino v. Donovan*, 186 App. Div. 387, 173 N. Y. Supp. 619. This case was cited approvingly by this court in *Storm v. I. A. C.* (Cal. Sup.) 214 Pac. 874. The fact that the injuries to the employees were not of a kind to be anticipated, nor peculiar to the employment in which they were engaged, does not defeat the claims to compensation in this case. *Assurance Corp. v. I. A. C.*, supra.

The petitioners contend that the injured employee Bohn had no work to do in the bunkhouse; that he was there only for his own convenience, and was merely "loafing" at a time when he should have been at work in the fields. There is nothing in the record to support this contention. Bohn was employed in irrigating on the ranch, and was paid so much an hour for his services. He commenced his day's work immediately after breakfast at 6 o'clock in the morning, and generally quit about 6 o'clock in the evening. As an irrigator, he was on duty practically all of the time to watch the water. He testified he "was supposed to go whenever the water called" him. On occasions he had "to turn the water off or something" after 6 o'clock. On the day of the accident his work was over for the day, and he quit at 5 o'clock and went to the bunkhouse to pass away the time until supper was ready.

[4] The ranch foreman Stevens lived with his family in a cottage on the ranch. Sometimes he ate at home and sometimes with the men. On the day of the accident he had been working in the fields. Before going home for dinner, he went to the bunkhouse for the purpose of giving orders to the men constituting the night shift operating the caterpillars on the place. The explosion occurred almost immediately after he got there. He was therefore actually engaged in the discharge of a duty, and was doing something for his employer, at the time he received the injury which resulted in his death.

[5] The contention of the petitioners that English and Miracle were "stealing from their employer's time" is not well founded. These claimants were employed together on a dredger operated by petitioner Larson on the ranch some four or five miles from the bunkhouse. They began work at 7 o'clock in the morning, and were supposed to work until 6 o'clock at night. Occasionally they repaired the dredger after that time, and did other work for which they were paid overtime. They were not furnished with lights, and, during the short days, stopped work when it got dark. On such occasions they were usually in camp before 6 o'clock. On the evening in question they were through with their work for the day. They arrived at the bunkhouse at about 5:30, and were waiting for supper when the explosion and fire occurred.

The award in each case is affirmed.

We concur: **LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; MYERS, J.; LENNON, J.**

193 Cal. 398

MONTECITO COUNTY WATER DIST. v. DOULTON. (S. F. 11048.)(Supreme Court of California. March 18, 1924.
Opinion Modified April 11, 1924.)**1. Waters and water courses — 216—Issuance of water district bonds authorized in conformity with statute held not invalidated by subsequent amendment.**

Act May 11, 1923 (St. 1923, p. 312), amending Act June 10, 1913 (St. 1913, p. 1049), §§ 15, 21, 22, as amended by Stats. 1915, p. 26, St. 1917, p. 225, and St. 1919, p. 816, by requiring that the lands benefited by creation of a proposed bonded indebtedness of a water district be stated in the board of director's resolution, and that only such lands be included in the voting precincts designated in the board's notice of the election, etc., held not retroactive, so as to invalidate the further issuance and sale of bonds theretofore authorized, voted for, and directed to be issued and sold in conformity with the statutes existing at the time of the resolution authorizing and the election approving them, nor does it alter the method of levying or collecting of taxes for payment of the principal and interest thereon.

2. Statutes — 267(2)—Not construed as retroactive as to pending proceedings, unless such intent expressly declared or necessarily implied.

While the Legislature may pass retroactive laws not impairing contract obligations or injuriously affecting vested rights, statutes must not be construed as retroactive, so as to affect pending proceedings, unless such intent is expressly declared or necessarily implied from the language used.

In Bank.

Mandamus by the Montecito County Water District against H. J. Doulton, as President of the Board of Directors. Writ granted.

Heaney, Price & Postel, of Santa Barbara, and F. M. Angellotti, of San Francisco, for petitioner.

O'Melveny, Millikin, Tuller & Macneil, Sayre Macneil, and Paul E. Schwab, all of Los Angeles, for defendant.

RICHARDS, J. This is a petition for a writ of mandate wherein the Montecito county water district, a public corporation, seeks to compel the respondent, H. J. Doulton, as president of said district, to sign certain bonds of said district which he has thus far refused to do. The facts out of which this proceeding arose, as set forth in said petition and conceded by the respondent to be truly stated thereunder, are briefly as follows: The Montecito county water district was duly organized and exists under the provisions of an act of the Legislature entitled "An act to provide for the incorporation and organization and management of county water districts," etc., approved on June 10,

1913 (Stats. 1913, p. 1049), as amended in 1915 (Stats. 1915, p. 26), and in 1917 (Stats. 1917, p. 225), and in 1919 (Stats. 1919, p. 816). The location of said district is in the county of Santa Barbara, state of California. On the 20th day of January, 1923, the board of directors of the said Montecito county water district duly passed and adopted a resolution declaring it to be necessary for said district to incur a bonded indebtedness for the purposes and in an amount set forth in said resolution, which also fixed the maximum term the bonds representing such indebtedness were to run before maturity and the maximum rate of interest to be paid thereon, and further fixing the date at which a special election should be held for the purpose of authorizing said bonded indebtedness. The said resolution in all respects conformed to the requirements of the statute as the same stood at the date of the adoption of said resolution and also at the date fixed for the holding of said election. The said board of directors of said district also adopted on said date and in due form a resolution providing for the giving of notice of such election. Thereafter, and on March 1, 1923, the said special election was duly and regularly held throughout said district, pursuant to the resolution calling the same and providing for the notices thereof, which were duly and regularly given, at which said election the said proposition to incur said bonded indebtedness and issue said bonds was carried, and so declared to be by the said board of directors thereof upon a proper canvass of the votes cast thereat. The amount of said bonds thus authorized to be issued was \$850,000, each of said bonds being issued in the sum of \$1,000, and bearing interest at 4 per cent. per annum, payable semiannually. Thereafter and on the 20th day of July, 1923, the said board of directors of said water district, pursuant to the authority by which they were thus invested, duly and regularly sold at public auction 100 of said bonds to the Pacific Southwest Trust & Savings Bank of Santa Barbara for the full par value thereof, plus interest to the date of issuance, plus a premium of \$50, and thereafter duly received said sums as the purchase price thereof, and delivered said bonds to the said purchasers; all of said bonds so sold are still outstanding, and no part of the principal thereof has as yet been paid thereon.

Thereafter, and on the 14th day of February, 1924, the board of directors of said water district duly passed and adopted a resolution providing for the sale by said district of an additional amount of said bonds, amounting in the aggregate of their face value to the sum of \$200,000; that thereafter there was presented to the said H. J. Doulton, as president of the board of directors of said water district, the said bonds in the said sum of \$200,000 in value for his signa-

ture as such official, pursuant to the terms of the resolution providing for the issuance of the same, but the said H. J. Doulton, as such president of said water district, refused and still refuses to sign all or any of the said bonds; that the sole reason assigned and existing for the said failure and refusal of the said H. J. Doulton, as president of said water district, to sign said bonds or any of said issue thereof is this: That while said bonded indebtedness and entire bond issue of said water district was resolved upon, authorized, valid, and directed to be issued under and in strict conformity with the said statute of 1913, and the amendments thereto adopted prior to May 11, 1923, the said statute of 1913 was further amended by an act of the Legislature approved upon said last-named date (Stats. 1923, p. 312), and, while the first issue of \$100,000 in their aggregate value of said bonds above referred to were ordered sold, and were in fact sold and issued prior to said date, the said amendment of said statute so passed and approved on May 11, 1923, purported to work a change in the language and effect of said statute as it read prior to said amendment in the following respect, viz.: That whereas, under the terms of section 15 of said statute as it stood prior to said amendment thereof, it was contemplated that the lands within the entire district were to be benefited by the purposes to be subserved through the authorization and creation of a bonded indebtedness by said water district, and through the issuance and sale of the bonds thus authorized to be issued and sold, and through the expenditure of the moneys derived from the issuance and sale of said bonds for the purposes to be thus subserved, the amendment to said section of said statute contemplated that only certain lands within the boundaries of said water district were to be or might be benefited by the creation of said bonded indebtedness and the issuance and sale of said bonds for the declared purposes to be subserved thereby, and hence said amendment to said statute required that in the resolution of the board of directors of a water district, providing for a bonded indebtedness and declaring the purpose for which said proposed indebtedness was to be incurred, the lands within the district to be benefited thereby should be stated, and said amendments to said section 15 of said statute further provided that the board of directors of such water district, in their notice of the election to be held for the purpose of determining whether such bonded indebtedness should be created, should include within the boundaries of the voting precincts within which such election was to be held only those lands which were to be benefited as stated and declared in the resolution of said board proposing the creation of such indebtedness, and that said election should only be held within such

boundaries, and that only the qualified electors residing within such boundaries should be entitled to vote at said election. Said amendment adopted on May 11, 1923, further provided, by amendments to section 21 of said statute, that in the event that the revenues of the district should be inadequate to pay the principal or interest of any bonded debt, the board of directors should cause a tax to be levied upon the lands within said district described in the resolution of the said board of directors, declaring the necessity for incurring such bonded indebtedness and that such lands only should be liable for such tax. Said amendment also changed the provisions of section 22 of said statute so as to provide that the lien of such taxes as were so levied for the payment of the principal or interest due upon such bonded indebtedness should be laid only upon the lands within said district which were stated and described in the resolution of the board of directors of said district providing for the creation of such bonded debt. The foregoing changes in the statute of 1913 as it read prior to the enactment of the amendment thereto approved on May 11, 1923, having been made therein after the passage and adoption of the resolution of the board of directors of the Montecito county water district authorizing the creation of the bonded indebtedness of said water district above referred to and after the election held in said water district determining that such bonded indebtedness should be created in accordance with the terms of said resolution, and after the issuance and sale of the first issue of said bonds in the amount in their aggregate value of \$100,000, but before the resolution of said board of directors directing the further issuance and sale of an additional \$200,000 in the amount of their aggregate value of said bonds, were held by the said H. J. Doulton, president of said water district, to be operative to the extent of invalidating the attempted issuance and sale of said additional amounts of said bonds as were thus directed to be issued and sold after the adoption of said amendment to said statute, for the reason that said bonds as to the liability which their issuance and sale created was not limited to the particular lands within said district to be benefited by the expenditure of the moneys to be derived therefrom in accordance with the requirements of said amendment to said statute adopted on May 11, 1923.

[1, 2] The precise question thus presented by the application for this writ is as to whether the said amendment to the statute of 1913 is to be given such retroactive effect as to render void the further issuance and sale of the bonds of said water district duly authorized, voted for, and directed to be issued and sold prior to the adoption of said amendment and in full conformity with the terms and provisions of said statute as it

read at the time such bonded indebtedness was authorized by the resolution of said board of directors and at the time of the holding of the election within said district approving the creation of said bonded indebtedness and the issuance and sale of said bonds in accordance with the terms of said resolution. We are entirely satisfied that the amendment to the statute of 1913, approved on May 11, 1923, is to be given no such retroactive effect, and is not to be held as in any manner vitiating or injuriously affecting the further issuance and sale of the bonds of said water district in accordance with the action of the board of directors of said district and of the electors thereof taken prior to the adoption of said amendment and affecting the entire issue and sale of the bonds thereof, duly authorized prior to the passage of said amendment, nor does it alter the method of levying or collecting the taxes for the payment of principal and interest of said bonds. The reasons which impel us to this conclusion are the following: The said amendment to the statute of 1913, adopted on May 11, 1923, does not purport, either by its express terms or by any reasonable implication, to be retroactive in its operation or effect, and it is a well-established principle of statutory construction that, while the Legislature has power to pass retroactive laws which do not impair the obligations of contracts or affect injuriously vested rights, it is equally true that statutes are not to be construed as intended to have a retroactive effect so as to affect pending proceedings, unless such intent is expressly declared or necessarily implied from the language of the enactment. It was so held by this court in the case of *Vanderbilt v. All Persons*, 163 Cal. 507, 126 Pac. 158, and in the very recent case of *East Bay Municipal Utility District v. Garrison* (Cal. Sup.) 218 Pac. 43. See, also, *State Commission, etc., v. Welch*, 20 Cal. App. 624, 129 Pac. 974; *Smith v. Lyon*, 44 Conn. 175; *Estate of Richmond*, 9 Cal. App. 402, 99 Pac. 554; *State ex rel. Ruesswig v. McDonald*, 101 Minn. 349, 112 N. W. 278; *Village of Champlain v. McCrear*, 165 N. Y. 264, 59 N. E. 83; *City of Newport v. Newport Nat. Bank*, 146 Ky. 736, 143 S. W. 377; *Eddy v. Morgan*, 216 Ill. 437, 75 N. E. 174; *Mayne v. Board of Com'rs*, 123 Ind. 132, 24 N. E. 80.

Counsel for the respondent chiefly relies upon two decisions of this court to sustain his position that the effect of the amendment to the statute made in 1923 was to render it impossible to legally issue the bonds in question under the terms of the statute as it stood prior to said amendment.

The first of these cases is *Fritz v. San Francisco*, 132 Cal. 373, 64 Pac. 566, in which this court held that the bond issue which had been voted and duly authorized under the terms of a statute permitting such bonds

to be issued, in effect prior to the adoption of the San Francisco charter, which took effect on January 8, 1900, could not be legally issued after the date when said charter went into effect. An examination of that case, however, shows that the conclusion arrived at by this court in that regard was predicated upon the provisions of section 8, article 11, of the Constitution, which in its then form provided that upon the ratification by the Legislature of such charter of the city it "shall become the organic law thereof, and supersede any existing charter * * * and all amendments thereof, and all laws inconsistent with such charter." It will thus be seen that the act under which the bond issue in that case was authorized was expressly superseded by the charter, and that the intent to render the charter retroactive to that extent was thus made to clearly appear. The amendment to the county water district act here in question is not predicated upon any such constitutional provision, but, on the contrary, appears in all its terms and intendments to be prospective, and hence not applicable to the issuance of bonds which had theretofore been fully provided for and duly authorized under the provisions of the valid act. The other case upon which the respondent relies is that of *Wichmann v. City of Placerville*, 147 Cal. 162, 81 Pac. 537, in which case a bond issue of the city of Placerville had been duly voted for and authorized, while said city was operating under a charter created by a special act of the Legislature in the year 1859. Thereafter and prior to the actual issuance of said bonds the city of Placerville was reincorporated under a new charter by a special act of the Legislature adopted in 1863. This court held that the bonds which had theretofore been authorized could not be issued after the adoption of said new charter, for the reason that the reincorporated city was a new and different corporation from that in existence under said former charter, and hence that said bond issue could not become effective as against the new municipal corporation. The differentiation between that case and the case at bar would seem to be obvious. We do not deem it necessary to review in detail the cases from other jurisdictions cited by respondent, since those cases are based upon the provisions of the special statutes of those states under which they arose, nor do we deem it necessary to deal with the other questions presented and argued by the respective parties to this proceeding, for the reason that their discussion is rendered unnecessary by the views already expressed herein.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; MYERS, J.; LAWLOR, J.; WASTE, J.; LENNON, J.; SEAWELL, J.

193 Cal. 388

PEOPLE ex rel. GILLESPIE v. LA BARRE et al. (S. F. 10918.)

(Supreme Court of California. March 18, 1924.)

1. Physicians and surgeons ⇐2—Act conferring power to appoint board of chiropractic examiners held in pari materia with earlier act.

The Initiative Act, conferring the power on the Governor to appoint a board of chiropractic examiners (St. 1923, p. lxxxviii) is not sui generis, and must be considered in pari materia with the Medical Practice Act (Codes and Gen. Laws 1917-1921, Act 2164), since the act is intended to accomplish what all general health laws are designed to accomplish, and since section 18 provides that the act shall not be considered as repealing the Medical Practice Act of June 2, 1913, and section 13, that chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to public health.

2. Physicians and surgeons ⇐3—Only persons lawfully engaged in "practice" eligible as chiropractic examiners.

The Initiative Act, conferring the power on the Governor to appoint a board of chiropractic examiners (St. 1923, p. lxxxviii), and providing that each member shall have practiced chiropractic in the state for three years next preceding the date upon which the act takes effect, contemplates the appointment of persons who have been lawfully engaged in such practice under licenses issued under the Medical Practice Act (Codes and Gen. Laws 1917-1921, Act 2164), since "practice" means the engagement in the treatment or healing of the sick in accordance with the rules which the state has prescribed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Quo warranto by the People, on the relation of George D. Gillespie, against Ray S. La Barre and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. F. Rose, Raymond Benjamin, and Frank B. Austin, all of San Francisco, for appellants.

Frank V. Kington, of Galt, Glensor, Clewe & Van Dine, of San Francisco, and U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen., for respondent.

Norman E. Malcolm, of Palo Alto, amicus curiæ.

SEAWELL, J. This is a proceeding in quo warranto, instituted by the people of the state of California, upon the relation of George D. Gillespie, to remove from office,

on the ground of ineligibility, the five members of the state board of chiropractic examiners appointed by the governor of the state, acting, it is claimed, within the power conferred upon him by the initiative measure approved at the general election held November 7, 1922, effective December 21, 1922 (Stats. and Amends. 1923, p. lxxxviii).

The trial court found said appointees to be wanting in the legal qualifications necessary to entitle them to occupy the respective offices to which they had been appointed, and this appeal is taken from the judgment and order entered by said court, declaring said appointees ineligible for membership in said state board of chiropractic examiners, and removing them from office.

Section 1 of said act provides:

"The board is hereby created to be known as the 'state board of chiropractic examiners,' hereinafter referred to as the board, which shall consist of five members, citizens of the state of California, appointed by the Governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a graduate thereof and hold a diploma therefrom.

"Each member of the board first appointed hereunder shall have practiced chiropractic in the state of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. * * *

It is a fact admitted in the case that none of the five members of the board of chiropractic examiners appointed under the initiative or Chiropractic Act was ever the holder of a license or certificate issued by the state medical board to practice, either as a physician and surgeon, or as a drugless practitioner. In fact, it is admitted that all treatments administered by them or either of them to the sick or to those who applied for any sort of treatment for a period of three years next preceding the date upon which the Initiative Act went into effect was done without authority of law and in violation of law. It is also stipulated that at the time said Initiative Act went into effect there were 91 persons lawfully qualified to practice within the state as chiropractors, and who had been actually engaged in such practice for the full term required by the act. Such authority is conferred by the Medical Practice Act (Codes and General Laws, 1917-1921, p. 1607), which provides that any person holding a drugless practitioner's certificate or a physician and surgeon's license is entitled to practice the chiropractic form of treatment. To assume to practice without such a certificate or license was an offense against the state.

The question of the eligibility of said appointees to membership in the "board first appointed" turns largely upon the meaning

of the language of the act, which provides that each member—

"shall have *practiced chiropractic* in the state of California for a period of three years next preceding the date upon which this act takes effect, *thereafter* appointees shall be *licentiates hereunder*." (Italics ours.)

It is appellants' position that the act recognizes persons as eligible to appointment to said office who had practiced chiropractic for a period of three years next preceding December 21, 1922, without having obtained a license or a certificate so to do from any board or legally constituted authority whatsoever, and whose right to exercise administrative authority must therefore rest upon the doing of a series of acts which, during the period covered by their commission, were denounced as public offenses, and which acts, by the express provisions of the initiative measure under which the present right is asserted, are also declared to be offenses against the law.

[1, 2] Respondents, on the other hand, take the position that the act contemplates the appointment to office of persons who had lawfully engaged in the practice of chiropractic methods under a certificate or a license issued by competent authority only. It is not disputed that neither the state Medical Act nor the Initiative Act permits any person to engage in the practice of medicine or surgery or the treatment of the sick in any form without a certificate or license so to do. The position of appellants is that the Initiative Act is *sui generis* and stands unrelated to any other law regulating the treatment of the sick, and no reference or recourse may be made to general laws as aids to the interpretation of the act. This claim is untenable. The act was intended to accomplish the same object that all general health laws are designed to accomplish. It is undoubtedly in *pari materia* with all other acts regulating the same general subject.

"It is a well-settled rule that different statutes relating to the same subject are to be construed together. *State v. Young*, 17 Kan. 414. 'Statutes are to be regarded as forming parts of one great and uniform body of law, and are not to be deemed isolated and detached systems complete in themselves.' *Robertson v. The State*, ex rel. Smith, 109 Ind. 79, 87, 10 N. E. 582, 643." *Green et al. v. Hodges*, Governor, 91 Kan. 658, 138 Pac. 605.

"When two or more statutes, whenever passed, relate to the same thing or the same class of things or to the same general subject-matter, they are in *pari materia* and are to be construed as forming an unitary system and as one statute." *People ex rel. Doscher v. Sisson*, 222 N. Y. 387, 118 N. E. 787.

See, also, *Town of Highgate v. State*, 59 Vt. 39, 7 Atl. 898; see, also, *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; *In re Madalina*, 174 Cal. 693, 164 Pac. 348,

1 A. L. R. 1629; *Alexander v. Lowrance*, 182 N. C. 642, 109 S. E. 639.

The language of the act itself furnishes convincing proof that it and the Medical Practice Act are to be construed, so far as consistent, in *pari materia*. Section 18 thereof provides that nothing therein shall be considered as repealing the "Medical Practice Act" of June 2, 1913 (St. 1913, p. 722), or any subsequent amendment thereto, except in so far as said act or its amendments may conflict with the provisions of the Initiative Act as applied to persons licensed under the latter act, to which extent any and all acts in conflict with the Initiative Act are repealed. Section 13 seems to dispose of the question in these words:

"Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to *all matters pertaining to the public health*, * * * and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made." (Italics ours.)

The act provides for a high standard of ethics and very closely follows in this respect and in procedural regulations the Medical Practice Act. We think it cannot be affirmatively shown by an examination of the act that it was the intention of the framers, or, indeed, the supporters of the act, to induct into the practice of medicine or the art of healing and treatment of the sick such a radical change in existing laws as to requite with reward the things which were condemned as offenses against the state. The fact that the statute by its own words denounces the acts upon which it is sought to establish a legal right furnishes a forceful argument against the claim that the measure intended to qualify persons for appointment to places on the board who had practiced chiropractic without having obtained a license so to do, notwithstanding the fact that there were persons whose eligibility could not be questioned. Appellants place special significance upon the italicized words of the following sentence:

"Each member of the board first appointed hereunder shall have practiced chiropractic in the state of California for a period of three years next preceding the date upon which this act takes effect, *thereafter* appointees shall be *licentiates hereunder*." (Italics ours.)

The implication which arises from the above-quoted language more strongly favors the interpretation that the *practice* therein referred to is meant such as was recognized by existing laws, but that *thereafter* only such persons as were licensed under the Initiative Act would be deemed to possess the required qualifications, than the interpretation contended for by appellants.

The word "practice" means, of course, engagement in the treatment or healing of the

sick in accordance with the rules which the state in the exercise of the police power has prescribed. It is not necessary to read into the act, as appellants so vigorously insist, the word "lawful" or "legal" before the word "practice," in order to justify the conclusion that the act contemplates the holding of a license under the Medical Practice Act as a prerequisite for eligibility on the part of an appointee to membership in said board. Lawfulness is a fixed element which inheres in every statute. It is a fundamental principle of law that a right cannot be founded upon a wrong. Curative or palliative statutes, enacted under peculiar or pressing circumstances, to enable a wrongdoer to adjust himself to the law's requirements, are not altogether unknown to legislative history. But, generally, if not universally, such statutes have exacted of such person that he submit himself to an examination or otherwise prove his qualifications. In all such cases, however, the intent of the statute to condone the offense must *clearly appear*.

But, without resorting to rules of statutory construction, it seems clear to us that the first meaning that the average person would give to the word "practice," as used in an act applying to a practitioner of medicine and surgery, or to others employing any of the methods of treatment recognized by the state, is that such practitioner should possess all of the qualifications required by law, and shall have complied with all rules governing such practice.

The above italicized clause means just what its simple language imports, to wit, three years' practice in conformity with the standard fixed by law. How is the state to know whether applicants for appointment possess the standard qualifications except by applying its legal test? The act is silent as to any method or procedure by which qualification is to be otherwise determined. This being so, indicates that the standard fixed by law must be the only true criterion of qualification.

Appellants argue that section 8 of the act cannot be rationally construed on any other theory than that it means to recognize unlawful or unlicensed practice in creating its standard of qualification for membership in said board. It is suggested that if "practice" means "lawful practice," there would be no occasion to license those who hold certificates under the Medical Practice Act. Our conclusion is neither at variance with nor inconsistent with the language of said section.

Sections 5, 6, 7, 8, 9, and 10 deal with the schedule of minimum educational requirements established by the act, and also with the examination of applicants for license thereunder. These sections are confined solely to the issuance of licenses to practice *chiropractic* under the provisions of the In-

itiative Act. Section 1 deals with the qualifications for membership in the first and succeeding boards.

Section 8 provides as follows:

"Any person who shall have practiced chiropractic for two years after graduation from a chiropractic school or college, one year of which shall have been in this state preceding the date upon which this act takes effect or any person who graduated from a chiropractic school or college prior to January 1, 1922, and who shall present to the board satisfactory proof of good moral character and having pursued a resident course of not less than two thousand hours in a legally incorporated chiropractic school or college, shall be given a practical and clinical examination in chiropractic philosophy and practice, and if he, or she, make a grade of seventy-five per cent. in such examination, the board shall grant a license to said applicant to practice chiropractic in this state under the provisions of this act. * * *

It will be observed that a license issued under the Initiative or Chiropractic Act confers a higher mark of learning and efficiency upon its holder than does a drugless practitioner's certificate issued under the Medical Practice Act. The minimum educational requirements of the Chiropractic or Initiative Act call for a course of study embracing the same subjects as the Medical Act, but it extends over a period of 2,400 hours as against 2,000 hours for the drugless practitioner. This of itself, from a professional or business standpoint, would give an advantage in public favor to the licentiates under the Chiropractic Act over the drugless practitioners. But the more substantial advantage of holding a license under the Chiropractic Act consists in the preferments and prestige which eligibility to membership in the state board of chiropractic examiners carries with it. This badge of honor and distinction is withheld from the holders of certificates issued to drugless practitioners. Certificate holders under the Medical Practice Act, who are practicing the chiropractic methods, will naturally, for competitive and other reasons, desire to be placed upon an equal plane in public favor with licentiates under the Chiropractic Act, and will naturally present themselves for examination. The sections above referred to prescribe the terms, recognizing years of practice, by which they as well as others may become licensed under said act. The credits to which applicants are entitled for each year of "actual practice," as provided by the Chiropractic Act, are based upon lawful or legal practice as prescribed by the Medical Practice Act, which formerly was the only act governing the subject.

The phrase "actual practice" is open to but one construction. It is the opposite of casual or occasional or clandestine practice, and carries with it the thought of active, open, and notorious engagement in a busi-

ness, vocation, or profession. It is not to be presumed that a person would boldly engage in active and open violations of the law for a period of three years, or that he would be permitted to do so if he so willed. To follow appellants' view it is necessary to presume the continuous existence of unlawful acts, which is contrary to every rule of interpretation or construction.

Appellants claim that section 9, subd. (a), which provides that the board shall, upon receipt of the fee of \$25, issue a license to each member of the board, gives support to their interpretation of the act. It is as easily reconcilable to respondents' theory. Drugless practitioners held no license, but certificates merely, and it was no doubt deemed expedient to raise each member of the board to which he was appointed as an examiner of applicants, to the standard prescribed for licentiates under the act of which he was an administrative officer.

Laws regulatory of the practice of the law, medicine, and the treatment of the sick by various methods, are not new subjects. The meaning of the word "practice" in its relation to the practice of the law, which is analogous to the practice of medicine, was determined in *State v. Marks*, 30 La. Ann. 97. Marks, the defendant, had pursued a course in the law department at the University of Louisiana. He had served four years as district attorney of a judicial district, and while occupying said office was elected judge of his judicial district. He had never been admitted to practice law by the Supreme Court of Louisiana. The Constitution of that state provided that a district judge "shall have practiced law in this state for two years next preceding his election." Const. 1868, art. 84. The Constitution did not require that a person should be a lawyer to be eligible to the office of district attorney. Defendant's right to occupy the judicial office was attacked by a writ of quo warranto. In holding the defendant ineligible to the office, the Supreme Court said:

"It cannot be presumed that the organic law, in using the words, 'shall have practiced law in this state,' can intend anything but a practice under legal permission. Those who frame a fundamental law, or any law, cannot be supposed to have in contemplation the conferring a benefit in express terms upon a violator of the law. If therefore a person shall practice law, without first obtaining legal permission and in defiance of prerequisites ordained as of essential compliance, he cannot base upon the fact of having thus practiced a legal right to do something else, of which a lawful practice is the condition precedent. The certificates of clerks, and the testimony of litigants, that the defendant had practiced law for two years is of little consequence, unless they are accompanied by a satisfactory exhibition of the authority from which he derives his legal right to practice."

See, also, *Jamieson v. Wiggin*, 12 S. D. 16, 80 N. W. 137, 46 L. R. A. 317, 76 Am. St. Rep. 585; *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920; *State v. Schmahl*, 125 Minn. 533, 147 N. W. 425; *Freiler v. Schuykill County*, 46 Pa. Super. Ct. 58.

For a list of authorities which construe the meaning of the word "practice" in its relation to the practice of dentistry, medicine, and chiropractic methods, in harmony with the general view we have taken of the subject, see *State v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *State v. Wilson*, 61 Kan. 791, 60 Pac. 1054; *Green v. Hodges*, 91 Kan. 658, 138 Pac. 605; *State v. Board of Dental Examiners*, 96 Or. 529, 188 Pac. 960, 190 Pac. 338; *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431.

Appellants very greatly rely upon *Bohannon v. Board of Medical Examiners*, 24 Cal. App. 215, 140 Pac. 1089, as "determinative of the interpretation of the words 'practiced' and 'actual practice' as found in the Chiropractic Act," and as meaning unlawful practice. That case, like a few others that might be referred to, deals with expedient or emergency acts. The force of the *Bohannon* Case as authority here is broken by the weight of its own language. It was clearly the intent of the *act there discussed* to admit to practice persons who had practiced without a license a special branch of medicine and surgery for a period of not less than 35 years. It is there said:

"It is not seriously contended, nor can it be, that such is not the *express intent* of the Legislature." (Italics ours.)

These appellants, however, were required to submit to an *examination*, receiving a credit of 5 per cent. for each 10 years of practice. The fact that no examination is required as a prerequisite for membership in the board of examiners by the Initiative Act would indicate as a matter of course that the certificate of qualification issued by the state after examination conducted by its agents was a sufficient test of competency.

No impartial person, we think, who thoughtfully peruses the act before us, in the light of the well-recognized rules of statutory construction and the evident policy of the law itself, can be of the mind that it was *clearly intended* by said act, as said in the *Bohannon* Case, to make eligible for office those who had not qualified themselves to practice in accordance with the rules governing the subject. No overdrawn inferences of law or presumptions of fact can be indulged to bring about the results sought to be accomplished.

Nothing appears in the title or upon the face of the act to indicate that the electors who made it the law understood that the commission of a series of acts forbidden by law was to be made the legal basis for pro-

motion to high administrative places. Surely the act does not disclose any such intent. If this had been the intention it would have been a simple matter to have stated it.

We are of the opinion that the appellants' interpretation of the act cannot be sustained. Judgment affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; RICHARDS, J.; MYERS, J.

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WESTERN PAC. R. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 10919.)

(Supreme Court of California. March 25, 1924. Rehearing Denied April 24, 1924.)

1. Master and servant §417(7)—Findings of fact on evidence in compensation case conclusive.

The findings of the Industrial Accident Commission upon questions of fact are conclusive and are not subject to review where there is any substantial evidence to support them; and it is also a rule that where, from the evidence, two opposing inferences may be drawn, that inference which is accepted by the Industrial Commission must be sustained, if there is evidence in the record to support it and if it is a reasonable inference to be drawn from that evidence.

2. Master and servant §405(4)—Finding as to principal purpose of employee in going home sustained.

In a proceeding to recover compensation for death of one employed as collector and messenger, who, instead of returning directly to employer's office, went out of his way four blocks to his home, and was struck by an automobile after leaving home, evidence held to sustain a finding that the primary purpose of deceased in stopping at his home was to procure his raincoat, and not to bring meat home to his wife.

3. Master and servant §375(1)—Injury to messenger after securing raincoat at home held compensable as "arising out of employment."

Where one employed as a collector and messenger was struck by an automobile after leaving his home, where he had gone in the course of an errand for his employers to secure his raincoat before returning to the office, held, that the injury "arose out of his employment" within the Workmen's Compensation Act.

4. Master and servant §356—Compensation recoverable under Workmen's Compensation Act regardless of negligence.

Where one employed as a collector and messenger was struck by an automobile while riding upon an unlighted bicycle in violation of the Motor Vehicle Act, § 13, such fact did not deprive his dependents of compensation, in view of Const. art. 20, § 21, providing that the

liability of an employer for workmen's compensation shall be "without regard to the fault of either party," and it being the whole theory of the Workmen's Compensation Act to provide compensation, regardless of negligence.

5. Master and servant §375(1)—Riding unlighted bicycle held not to take employee out of "course of employment" within Compensation Act.

Where one employed as a collector and messenger was struck by an automobile while riding an unlighted bicycle in violation of the law, such fact did not take him out of the "course of his employment" within the Workmen's Compensation Act, though it constituted negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

6. Master and servant §375(1)—Negligence will not take employee out of "course of employment" within Compensation Act.

It is not the law that the performance of an authorized duty in a negligent manner will by itself take an employee out of the course of his employment, since such a defense would be tantamount to a defense of contributory negligence, expressly abolished in workmen's compensation cases.

7. Master and servant §380—Willful misconduct of employee no defense to claim for compensation for death.

Where one employed as a collector and messenger was struck by an automobile while riding an unlighted bicycle in violation of law, if such act was willful misconduct in the course of his employment, it was not a defense to a claim for compensation in view of St. 1919, p. 910, § 2, subd. 4, if the injury occurring by reason of the misconduct of employee resulted in his death.

In Bank.

Proceedings under the Workmen's Compensation Act for the death of Howard Johnson, by Mrs. Lucy Johnson, in her own right, and by Francis Johnson and Howard Johnson, minors, by their guardian ad litem, claimants, opposed by the Western Pacific Railroad Company, employer. From an award in favor of claimants by the Industrial Accident Commission, the employer brings certiorari. Award affirmed.

Stephen F. Otis and C. W. Dooling, both of San Francisco (F. M. Angellotti, of San Francisco, of counsel), for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Acc. Commission. Tye & Edwards, of Stockton (A. E. Graupner, of San Francisco, and A. P. Hayne, of Stockton, of counsel), for respondent Johnson.

LENNON, J. Certiorari to review and annul an award of \$5,000 to the wife and two minor children of Howard Johnson, deceased, an employee of the Western Pacific Railroad

Company. The facts of the case upon which the award is rested succinctly stated are these:

Howard Johnson, employed as collector and messenger by the Western Pacific Railroad Company, petitioner herein, was, on the 21st day of December, 1921, while riding on an unlighted bicycle from his home to the place of his employment, struck by an automobile and fatally injured. Two days later he died. About 5 o'clock on the day of the accident the deceased left the office of the petitioner on a bicycle to take a bill of lading for signing to the firm of Morgan & Miller located on the waterfront of the city of Stockton. When the deceased left the office, the weather was threatening, and one-half hour later, before he could return to the office, a heavy rainstorm broke. Instead of returning directly to the office, which was six blocks away, the deceased went out of his way four blocks to his home, where he procured his raincoat. On his way to his home he purchased some meat which he took home to his wife, and as he was leaving the house he told her that he would be detained that evening at his work. He was returning to the office when he was struck by the automobile and sustained the injuries which resulted in his death.

[1-3] The award of the Commission is predicated upon the finding that the controlling purpose of Johnson in making the detour to his home was to procure his raincoat or "slicker" in order to protect himself from the inclemency of the weather in the discharge of his duties. The petitioner contends that there is no substantial evidence in the record supporting this finding of the Commission, but that, on the contrary, the evidence shows that his controlling purpose was to bring meat home to his wife and tell her that he would be detained.

It is a well-recognized rule that the findings of the Industrial Accident Commission upon questions of fact are conclusive and are not subject to review where there is any substantial evidence to support them. *Massachusetts, etc., Co. v. Industrial Accident Commission*, 176 Cal. 488, 168 Pac. 1050; *Southern Pacific v. Industrial Accident Commission*, 177 Cal. 378, 170 Pac. 822; *Western Indemnity Co. v. Industrial Accident Commission*, 182 Cal. 709, 720, 190 Pac. 27. That is to say, the Commission is the final arbiter where there is a conflict in the evidence or where opposing inferences may reasonably be drawn. *Tartar v. Industrial Accident Commission* (Cal. Sup.) 218 Pac. 39; *Clapp's Parking Station v. Industrial Accident Commission*, 51 Cal. App. 624, 627, 197 Pac. 369. It is the rule that where from the evidence two opposing inferences may be drawn, that inference which is accepted by the Commission must be sustained if there is evidence in the record to support it and if it is a reasonable inference to be drawn from that evidence. *East-*

man v. Industrial Accident Commission, 186 Cal. 587, 598, 200 Pac. 17; *Polar Ice, etc., Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149. While there is evidence in the instant case from which the inference might be drawn that the primary purpose of the deceased in stopping at his home on his way back to the office was to take the meat home to his wife, or to notify her that he would be delayed, there is ample evidence from which the inference may be reasonably deduced that his primary and impelling purpose was to procure his "slicker."

It may be conceded that there is no direct evidence in the record as to what decedent's purpose was in going home. That purpose, however, can be inferred from the surrounding circumstances and from the conduct and conversation of the decedent on the evening in question. It cannot be denied that there is in the record sufficient evidence to show or tending to show that the deceased did obtain his raincoat at home. Thus it appears in the evidence that he was not wearing either his raincoat or his overcoat when he left the office and was wearing his raincoat when he was picked up at the time of the accident. It is not disputed that at the time the decedent left the office of the railroad company to go to the waterfront to have the bill of lading signed that there was a slight drizzle and that about a half an hour later, or about the time he was returning to the office, a heavy rainstorm broke suddenly. The raincoat of the decedent was not the ordinary cravenette raincoat, but was the kind commonly known as a "slicker." It had been purchased by the decedent a couple of weeks before, and ordinarily he kept it hanging on the back porch of his home. When he was leaving his home that evening with the raincoat on, he remarked with reference to the weather that it was "a hell of a night to be out in." It is not unreasonable to infer that being suddenly caught in a rainstorm, the first thought of the decedent was to proceed to his home, only four blocks distant, and procure his slicker to protect him from the weather. This, we think, is fairly inferable despite the fact that the office was only six blocks away. Although his normal quitting time was supposed to be 5 o'clock, he worked overtime so frequently that it was the rule rather than the exception for him to be detained at the office. Mr. Harkins, the superior officer of the decedent, testified that for some time prior to the time of the accident the decedent was working overtime nearly every day. There is also evidence that the decedent would not know until he returned to the office whether or not there was more work for him to do.

This is sufficient evidence, we think, to support the finding of the Commission that his main purpose in going home was to procure his raincoat. The contrary inference, contended for by the petitioner, that he went

home to bring the meat and tell his wife that he would be detained at his work, finds support only in the fact that he did bring the meat home and that he did tell his wife that he would be detained. Even so, his main purpose on the occasion in question might well have been to get his raincoat. There is no evidence that the deceased habitually and regularly purchased supplies for his family and returned to his work after taking them home. To the contrary, there is evidence in the record that it was not the habit of the deceased to bring the meat directly home after purchasing it and that oftentimes he would take it back to the office. The incident of the meat getting is, therefore, not opposed to the inference that the primary purpose of the decedent was to get his raincoat and that the purchasing and taking of the meat home was on this particular occasion but a mere incidental purpose.

The testimony of the wife is to the effect that the decedent had come into the house, had left the meat on the table in the kitchen, and was outside of the house and leaving without saying anything to her, when she called to him and asked him in effect what the rush was. He said something about "Sperry's" which she did not distinctly understand because of the noise of the rain, but she did understand him to say that he was in a hurry and not to get supper until after 6 o'clock as he would be late. This testimony necessarily negatives the inference that his primary purpose in going home was to tell his wife that he would be detained. Otherwise he would have located his wife before leaving the house or at least have left word with his daughter, who was practicing upon the piano in the front room.

Certainly the injury in the instant case "arose out of" the employment. The nature of the accident was one to which the decedent was particularly susceptible by reason of the nature of his employment which required his presence on the public highways. That is to say, the employment being one in which the employee was required to travel from place to place at the will of the employer, the risks of such travel were distinctly incident to the employment itself. *Globe Ind. Co. v. Industrial Accident Commission*, 36 Cal. App. 280, 283, 171 Pac. 1088; *London, etc., Co. v. Industrial Accident Commission*, 35 Cal. App. 681, 682, 170 Pac. 1074.

He was at the time of the accident "in the course of" his employment. His duties as a collector and messenger were such as to require him to be out of doors most of his time regardless of the condition of the weather. In order to do his work efficiently and well, it was necessary for him to be properly protected from inclement weather. It was, therefore, we think, a reasonable act for the deceased, a heavy downpour having commenced after he left the office, to proceed to his home, which was two blocks nearer than

the office, in order to procure his "slicker," which was particularly adapted for use in wet weather. This is particularly true in view of the fact that he would not know until he had returned to the office whether there would be other errands for him to perform for his employer.

Furthermore, it is to be reasonably anticipated that a person whose duties require him to be out of doors will seek protection from rain. In so seeking protection an employee is not to be held as a matter of law as deviating from the course of his employment. If, in the instant case, the decedent had sought shelter in a nearby store or under a friendly porch, the Commission would not be compelled to find, we think, that, while waiting for the rain to abate, the employee was outside of the course of his employment. *Chiulla De Luca v. Board of Park Commissioners*, 94 Conn. 7, 107 Atl. 611; *State Road Commissioner v. Industrial Accident Commission of Utah*, 56 Utah, 252, 190 Pac. 544; *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620. The procuring of his raincoat was but another means of seeking shelter. In going home for his raincoat in order that he might continue his duties, instead of seeking shelter under a roof, he was facilitating his work, and it cannot be said contrary to the finding of the Commission, that by so doing he had departed from the course of his employment.

[4] The fact that the decedent at the time of the injury was riding upon an unlighted bicycle in violation of section 13 of the Motor Vehicle Act (St. 1915, p. 397) of the state of California does not operate to deprive his dependents of the compensation to which they are entitled by reason of his death. The Workmen's Compensation Act now contains no provisions forfeiting the right of a dependent to compensation because of the violation of law on the part of the decedent contributing to his injury. The violation of an ordinance is ordinarily negligence per se which operates as a defense to an action for damages based upon negligence, but in a proceeding under the Workmen's Compensation Act the element of negligence has by law been wholly eliminated. Section 21 of article 20 of the state Constitution provides that the liability of the employer for workmen's compensation shall be "without regard to the fault of either party." The whole theory of the Workmen's Compensation Act (St. 1917, p. 831) is to provide compensation for an injured employee during his incapacity and for his dependents in case of his death regardless of whether such employee had or had not been negligent. As was said in *Union Iron Works v. Industrial Accident Commission* (Cal. Sup.) 210 Pac. 410:

"The proceeding before the Commission * * * is founded upon the provisions of the

Workmen's Compensation Act, from which the theory of fault is wholly eliminated."

[5, 6] The fact that the employee was riding upon an unlighted bicycle did not, as counsel for the petitioner contend, operate to take the employee "out of the course of" his employment upon the theory that the employee had incurred an added risk not contemplated by the nature of his employment. The fact that he was riding upon an unlighted bicycle constitutes negligence in the course of his employment rather than a circumstance which takes him outside of the course of his employment. It is a matter of common knowledge born of human experience that employees are sometimes negligent, and the negligence of an employee must therefore be included as one of the risks of any employment. The fact that an employee is guilty of ordinary negligence in any given case cannot be said, therefore, to impose a risk and responsibility upon an employer not incidental to the employment. It is not the law of this state that the performance of an authorized duty in a negligent manner will by itself take an employee outside of the course of his employment. Such a defense would be tantamount to a defense of contributory negligence expressly abolished in workmen's compensation cases. The conduct of an employee, of course, may be such as to remove him from the sphere of his employment. Particularly is this so when an employee undertakes to do an act not authorized by the duties of his employment, or places himself in a locality to which his duties do not require him to go. In such cases the "added peril" doctrine adds nothing to the general meaning of the term "in the course of the employment." The act of the deceased, however, in riding without a light on his bicycle, even if it were shown in the instant case to have been the result of negligence, was negligence of a character which might be anticipated from the nature of the employment which necessitated the use of a bicycle—oftentimes after dark. The very nature of the employment and the method of executing the duties of the employment in the instant case compel the conclusion that there would be times when the employee would be negligent in the operation of the instrumentality used to execute the duties of the employment.

[7] Assuming that the decedent willfully and deliberately started on his journey to the office without lighting the lamp on his bicycle, this at the most was not more than willful misconduct in the course of his employment. Willful misconduct is not a defense to a claim for compensation if the injury occurring by reason of the misconduct of the employee resulted in his death. Stats. 1919, p. 910, § 2, subd. 4.

The award of the Industrial Accident Commission is affirmed.

We concur: MYERS, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.

RICHARDS, J., being disqualified, does not participate in the foregoing.

65 Cal. App. 486

SILVA v. GORDO et al. (Civ. 2717.)

(District Court of Appeal, Third District, California. Feb. 2, 1924.)

Evidence — 420 (7)—Striking defense of delivery of note as security for performance of agreement held error.

Parol evidence being admissible to show the consideration or want of consideration for a note sued on, the court erred in striking out special defense that the note was given and received only as security for faithful performance of an agreement, which defendants were ready, willing, and able to carry out, irrespective of Civ. Code, § 3097, authorizing proof that delivery was conditional or for a special purpose only.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by John S. Silva against J. W. Gordo and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

L. T. Milburn, of Mariposa, and Edward Bickmore, of Merced, for appellants.

C. W. Croop, of Merced, for respondent.

PLUMMER, J. Action by plaintiff to recover the sum of \$1,000 for and on account of a promissory note made, executed and delivered by the defendants to the plaintiff herein. After admitting the execution and delivery of the note to plaintiff, as alleged in plaintiff's complaint, the defendants set up certain special defenses. The court, upon motion of the plaintiff, struck out the special defenses set up in the answer of the defendants. Plaintiff had judgment, and defendants appeal, seeking reversal of the judgment on account of the order of the trial court striking out the special defenses contained in their answer.

The plaintiff alleges that on or about the 20th day of October, 1921, at Mariposa, county of Mariposa, State of California, the defendants made, executed, and delivered their promissory note to the plaintiff in words and figures following, to wit:

"Mariposa, Cal., October 20, 1921.

"One year after date, without grace, we jointly and severally promise to pay John S. Silva, at Mariposa, California, the sum of one thousand dollars (\$1,000.00), without interest.

"J. W. Gordo.
"Charles Holden."

This is followed by the formal allegations, as to the plaintiff still being the owner and holder of said note and also that no part thereof had been paid.

The defendants' answer, admitting the execution and delivery of the note, denied that the plaintiff was the lawful owner or holder thereof, and also denied that no part of said promissory note had been paid.

A demurrer was sustained to the answer filed by the defendants and a second answer was filed containing in substance the same matters as hereinabove stated, and then for a further and separate defense the defendants allege that on or about the 20th day of October, 1921, the plaintiff was the owner of 31 head of cattle then in his possession; and that at said time and place plaintiff and defendants entered into a verbal agreement whereby plaintiff was to deliver said cattle to the defendants and the defendants agreed that they would feed and care for said cattle during the winter of 1921 and 1922; and that in the spring of 1922 plaintiff should have 10 head of said cattle to be selected by him, and that the defendants should retain the balance as compensation for feed and services furnished by them; and that in order to secure the faithful performance of said agreement of said defendants and the return to plaintiff of the said 10 head of cattle in the spring of 1922, plaintiff and defendants agreed that defendants should give to plaintiff their promissory note in the sum of \$1,000, payable one year after date. Defendants made, executed, and delivered to plaintiff their certain promissory note as set forth in plaintiff's complaint; that said note was given by defendants and received by plaintiff as security only for the faithful performance of said agreement; that plaintiff agreed that upon the return of said 10 head of cattle in the spring of 1922, he would return said promissory note to defendants; that defendants performed all of said agreement by them to be kept and performed, did care for and feed all of said stock during the said winter, and did on or about the said 28th day of April, 1922, notify plaintiff to select the 10 head of cattle theretofore delivered to defendants and did demand of plaintiff that he return to them the said promissory note; that plaintiff has refused and neglected to select the said 10 head of cattle and refused and neglected to return to defendants their certain promissory note; that defendants have at all times been ready, willing, and able to carry out the terms of said agreement, but the plaintiff has refused to accept, select, and choose 10 head of cattle and to surrender said promissory note. This portion of the defendants' answer was stricken out upon motion as hereinbefore stated. Upon the trial plaintiff made proof of the execution and delivery of the note and nonpayment, etc., and the defendants introducing no evidence, the court, findings being waived, en-

tered judgment for the plaintiff in the sum of \$1,000.

As authority for reversal the appellants cite a number of cases holding in substance as follows:

"As between the original parties to an instrument nothing is better settled than that the maker may show an original lack of consideration, or subsequent failure of consideration. * * * And it is equally well settled that such lack or failure of consideration may be shown by parol." *Muir v. Hamilton*, 152 Cal. 634, 93 Pac. 857; *Griswold v. Frame*, 48 Cal. App. 178, 191 Pac. 962.

This latter case goes a trifle further and holds that—

"It is always permissible, however, to show the want of consideration for the making of a contract, or that the contract has been discharged by direct payment, accord and satisfaction. * * *"

Cases are also cited by the appellants to the effect that parol evidence is admissible to show that a promissory note was delivered merely as security for the performance of the collateral oral agreement and that it has been discharged by the performance of such agreement. *Oakland Cemetery Ass'n v. Lakins*, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559.

In the case of *Howard v. Stratton*, 64 Cal. 487, 2 Pac. 263, in an action upon a promissory note where it was sought by parol evidence to show that it was given to secure the performance of an agreement whereby the payee conveyed certain lands to the maker in consideration that the latter should support him during the residue of his life, and that the defendant had performed the conditions of the agreement, the court held the exclusion of such evidence to be error and in so doing used the following language:

"The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the notes were given to secure the execution by Stratton of a promise to support and take care of Tyson, and that promise was fulfilled, the notes were discharged, and parol evidence is admissible to prove that a written agreement has been totally discharged. There is nothing in this which tends to contradict or vary a written contract."

In *Treadwell v. Himmelmann*, 50 Cal. 9, where the defendant executed a promissory note in favor of the plaintiff with the understanding that he should procure certain parties to assign to himself liens on land claimed by the plaintiff, which liens the defendant should hold for the benefit of the plaintiff in satisfaction of the note, it was held that the securing of said liens by the defendant and the holding of himself ready to turn them over to the plaintiff amounted to an accord and satisfaction and that his so doing should be regarded as payment. The court excluded

evidence of such parol agreement. This was held error.

"The evidence offered by the defendant in support of the special defense set up in the answer was improperly excluded. It did not contradict or vary the written instrument declared upon; on the contrary, the offer was to prove an executed parol agreement, in the nature of an accord and satisfaction. There is no difference in principle between this case and *Hapgood v. Swords* (2 Bailey S. C. 305), which was an action on a promissory note; and the defense was that at the time of the execution of the note it was agreed by parol that if the defendant would procure a purchaser for certain land of the plaintiff at a specified price, the plaintiff would surrender the note; and the defendant procured the purchaser at the stipulated sum. The court, while admitting that a written contract can not be contradicted or varied by parol, says: 'The legal effect of this verbal agreement is, that when the defendant has performed his part of it, it shall be regarded as a payment. The note is the value put by the plaintiff upon the defendant's services in procuring a purchaser of the land at a given sum.' This reasoning applies fully to the present case; and other authorities to the same effect are not wanting. (*Cowen & Hill's Notes to Phil. Ev.*, note 945; *Bradley v. Bentley*, 8 Vt. 243; 5 Vt. 514; 17 Pick. 171-4; 3 Fairf. 444.)"

These cases are affirmed in the case of *Schultz v. Noble*, 77 Cal. 81, 19 Pac. 182.

Subdivision b of section 3097 of the Civil Code, relating to negotiable instruments, reads as follows:

"As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

Under this provision in the negotiable instruments law it is held by a long list of authorities that parol is admissible to show " * * * that a bill or note, regular in form, was manually delivered to the payee upon the condition that it was to become an enforceable obligation only upon the happening of a certain event." Note No. 4, part 2, appended to the case of *Vincent v. Russell*, 20 A. L. R. 443.

Under similar circumstances it is held that—

"Evidence that the instrument was delivered conditionally does not contradict the writing within the meaning of the parol evidence rule; that rule presupposes the existence of a valid contract. The evidence in question is for the purpose of showing that there is no valid contract between the parties, because there is no finality of utterance."

See note to *Vincent v. Russell*, supra, page 430.

Under a negotiable instruments law reading precisely as the subdivision which we have quoted from section 3097 of the Civil Code, the Supreme Court of Colorado, in *Sayre v. Leonard*, 57 Colo. 116, 140 Pac. 196, has held that such conditional delivery may be shown and also that the purposes for which the instrument is executed may be shown by parol testimony, citing also a number of cases following the same rule. See, also, *Divine v. Western Slope Fruit Growers' Ass'n*, 27 Colo. App. 368, 149 Pac. 841, where the subject of the delivery of a negotiable instrument for a special purpose is considered and the authorities cited that parol evidence is admissible to prove such special purpose.

The facts held sufficient to establish conditional delivery in the cases heretofore cited dealing with that subject are no stronger than the allegations contained in the defendants' amended answer. No California case has been called to our attention where the subdivision of section 3097 of the Civil Code above quoted has been construed or passing upon the question of how the condition may be established; however, there are some California cases bearing upon the subject decided before the enactment of the present negotiable instruments law. In the case of *Jefferson v. Hewitt*, 103 Cal. 625, 37 Pac. 638, in an action to collect the amount of a note given in payment for a stock subscription where there was an oral agreement as to paying for the stock, etc., the court held:

"It is not necessary that a condition as to the payment of a note, in order to be valid, should be incorporated in the note, but if there is an oral agreement that the note is not to be paid unless a railroad is constructed before its maturity, in consideration of the note, upon failure of the construction of the road as agreed, there is a failure of consideration for the note."

Such agreement may be established by parol testimony. To the same effect is the case of *Billings v. Everett*, 52 Cal. 661.

There is also a distinction between a conditional delivery or a delivery for a particular purpose and a conditional promise. In the case of *Leonard v. Miner*, 120 Cal. 403, the court on page 406 (52 Pac. 655, 656) says:

"Evidence of a contemporary oral agreement between the parties to a bill or note, whereby the order or promise contained in the instrument is rendered null or conditional, or whereby the fact of payment is made to depend upon some contingent future event, comes within the same principle. [The rule excluding parol testimony to vary the terms of a written instrument.]"

It is then said:

"These remarks have no application to cases where the consideration of a promissory note is the subject of inquiry, or to cases of fraud or mistake."

The consideration for the note in this action is one of the matters sought to be present-

ed by that portion of the defendants' amended answer stricken out by the trial court and it is held by an almost unbroken line of authorities that parol testimony is always admissible to show the consideration or want of consideration and that such testimony does not vary or alter the terms of the written contract.

The delivery of the note in question is admitted by the defendants' answer, but the special defense immediately set up therein is sufficient to present to the trial court for consideration, whether such delivery was merely a manual tradition of the instrument and not an absolute and unconditional transfer of the title and property. We know of no way in which this subject can be presented to the court, unless it be by testimony outside of the written words of the instrument itself.

We do not need to hold, however, in this case for the purpose of the decision herein that the negotiable instruments law has made any change as to the admission of testimony showing conditional delivery or delivery for a particular purpose because the California cases which we have heretofore cited satisfactorily show that the facts and circumstances sought to be presented to the trial court, under the allegations contained in the defendants' amended answer, were proper to be presented and taken under consideration by the trial court on the question of whether the note had not been fully discharged and paid by reason of the defendants' having complied with their part of the oral agreement therein set forth.

In this case we are passing simply upon the pleadings and expressing no opinion upon the facts.

For the reasons herein stated the judgment of the trial court will be and the same is hereby ordered reversed, with directions to deny the plaintiff's motion to strike out the portion of the defendants' amended answer setting up the special defenses which we have hereinabove considered.

We concur: FINCH, P. J.; YOUNG, Justice pro tem.

(65 Cal. App. 526)

ALTSCHUL et al. v. ALEXANDER.
(Civ. 4180.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1924.)

1. Appeal and error — 397(5) — No duty on appellate court to search record for possible error in failing to find on all issues.

Where attention of the appellate court is not directed to any issue on which it is claimed there was a failure to find, nor is reference made to any evidence to support contention that trial court failed to find on all issues, no

duty devolves on the appellate court to search the record to discover possible error in that regard.

2. Trial — 397(5) — Failure to find on immaterial issue not error.

In action for failure and refusal to deliver grapes in accordance with contract, and failure to repay a named sum paid on account of purchase price, the failure to find as to truth of an averment that defendant was disappointed in not being able to buy the grapes from third persons to comply with the contract was not error; the issue being immaterial.

3. New trial — 90 — Denial of motion for alleged surprise held without error.

In action for failure and refusal to deliver grapes in accordance with contract, and failure to repay a named sum paid defendant on the purchase price, where plaintiffs' evidence to which defendant objected as hearsay and false and which he contended had taken him by surprise, was brought out by him on cross-examination, and was merely cumulative as to the value of the grapes, there was no error in denying motion.

4. New trial — 108(3) — Denial of motion for newly discovered evidence held without error.

Where newly discovered evidence on which defendant relied on motion for new trial, according to his personal affidavit, would be to the effect that witness who had testified as to the value of the grapes in question had been misinformed and mistaken as to the basis of a settlement of a similar transaction between plaintiffs and defendant, and on which witness had relied as basis for his testimony fixing value in the instant case, but where, in reaching its conclusion, trial court placed no reliance on his testimony and there was no likelihood that the newly discovered evidence would change the result, denial of new trial was not error.

5. Evidence — 543(4) — Foundation held properly laid for testimony by one as expert on values.

Evidence that witness for 22 years had engaged in the fruit and produce business, and had been in the city where grapes in question were marketed for a week almost immediately before the time fixed for their sale, and thereafter had bought grapes from another city over the telephone and by telegraph, laid a foundation for his testimony as an expert on values.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Harry S. Altschul and another, copartners, doing business under the firm name of the Altschul & Ehrlich Company, against San Felici Alexander. Judgment for plaintiffs, and defendant appeals. Affirmed.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

I. Henry Harris, of Los Angeles, for respondents.

HOUSER, J. This is an appeal by defendant from a judgment against him in favor of plaintiffs for the sum of \$2,350.

The substance of the complaint was that defendant agreed to sell to plaintiffs, and plaintiffs agreed to buy from defendant, five cars of grapes, to be delivered at a specified time, for the sum of \$72.50 per ton, on account of which contract plaintiffs had paid to defendant the sum of \$1,000 cash in advance; that to plaintiffs' damage defendant failed and refused to deliver the grapes in accordance with the terms of the agreement, and also failed to repay to plaintiffs the \$1,000 paid by them to defendant on account of the purchase price.

[1, 2] Appellant's first point on his appeal is that the court failed to find on all the issues. However, the attention of this court is not directed to any issue upon which it is claimed that there was such failure by the trial court; nor is reference made to any evidence to support such contention. In such circumstances no duty devolves upon this court to search the record for the purpose of discovering possible error in that regard. Inferentially, however, it appears that the alleged error of which appellant complains in this connection consists in a failure on the part of the trial court to find upon a question whether or not defendant was disappointed in not being able to buy the grapes from third persons, in order that he might comply with the terms of his contract with plaintiffs. Such an averment in the answer constituted no defense and raised no issue. If facts of that nature were to be deemed a valid reason for excusing nonperformance of the provisions of a contract, no reliance could be placed upon any covenant whatsoever being kept, no matter with what assurances or solemnity it may have been agreed upon, nor what consequences may have ensued upon its breach. The rule is well settled that no error may be predicated upon a failure by the trial court to find upon immaterial issues. *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Evans v. De Lay*, 81 Cal. 104, 22 Pac. 408.

[3, 4] Appellant next contends that the trial court erred in refusing to grant defendant a new trial upon a showing that material evidence offered by plaintiffs was not only hearsay, but that such evidence was false in fact, and that defendant had been taken by surprise thereby; also, that there was newly discovered evidence which defendant wished to introduce should a new trial be granted. The evidence to which appellant objects was brought out by himself on cross-examination

of a witness who had testified as to the value of the grapes. Such evidence, however, was merely cumulative. An examination of the record herein discloses the fact that, whereas the testimony of the witness in question showed that the grapes had a certain value, the finding of the trial court in that regard is that the grapes had a lesser value than that testified to by such witness and were of the value as testified to by two other witnesses. The "newly discovered evidence" which defendant proposed to introduce, had a new trial been granted, according to statements contained in an affidavit by defendant personally (and not by the proposed witness), would be to the effect that the witness who had testified to the value of the grapes had been misinformed and was entirely mistaken with reference to the basis of a settlement of a transaction similar to the one between plaintiffs and defendant, and upon which settlement, determining the value of the grapes involved in that matter, the witness had relied in fixing the value of the grapes in the instant case. In reaching its conclusion, it is apparent that the trial court placed no reliance upon the testimony of the witness. Even admitting the incorrectness of the testimony given by the witness on the former trial, and assuming that on a new trial he would either not testify at all, or that, if he were to testify, the evidence would not be favorable to plaintiffs' case, there is no likelihood that a different result would be reached. In such circumstances it would seem clear that no error was committed by the trial court in denying the motion for a new trial. *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *People v. Buckley*, 143 Cal. 375, 77 Pac. 169; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235.

[5] The last point made by appellant is to the effect that no sufficient foundation was laid for the introduction of testimony given by a certain witness as an expert on values. The evidence, however, shows that the witness, for a period of over 22 years, had been engaged in the fruit and produce business, and that he had been in the city of Fresno, where the grapes in question were to be marketed, for a period of one week almost immediately before the time fixed for their sale, and that thereafter he did his buying from Los Angeles "over the long distance phone and by telegraph." The foundation was clearly sufficient.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

65 Cal. App. 554

CREASE et al. v. JARRELL et ux.
(Civ. 4460.)

(District Court of Appeal, Second District, Division 2, California. Feb. 9, 1924.)

1. Appeal and error ⇨1010(1)—Sufficiency of evidence to establish fact is primarily for trial court.

The sufficiency of evidence to establish a given fact, even where the law requires proof of that fact to be clear and convincing, is primarily a question for the trial court, and, if there is substantial evidence to support the conclusion reached by trial court, his finding is not reviewable.

2. Easements ⇨17(2)—Sale of lots as bordering on alley held to create alley easement in favor of purchasers.

Where owners laid out a passageway or alley and sold lots as bordering thereon, they created easement in favor of abutting property owners and their successors in interest.

3. Easements ⇨52, 53—Duty of owners of easement to keep it in repair; minority owners may not by private agreement among themselves deprive others of interests.

It is the duty of owners of an easement to keep it in repair, and hence a minority of several property owners in whose favor an easement in an alley existed would not be authorized to speak for all and by the execution of a private agreement deprive them of vested rights by attempting to make their interests dependent upon the performance of a legal duty, as by an agreement that the use of the alley might be refused to any adjoining property owner declining to pay the proportional share of any tax, assessment, or upkeep expense.

4. Easements ⇨27—Alley right held not destroyed by merger.

While under Civ. Code, § 811, an alley easement might have been extinguished by merger had a landowner acquired title to all property enjoying an abutting owner's rights in the use of the alley, together with the way itself, yet ownership of title to a single lot and to the ground upon which the way existed did not destroy the easement of other adjoining lots of abutting owners.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by H. George Crease and others against Edwin A. Jarrell and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for appellants.

Emmons, Aldrich & Heck and R. B. Lambert, all of Bakersfield, for respondents.

CRAIG, J. The subject-matter of this action is a strip of real property situate in block 24½ of the Southern addition in the city of Bakersfield, approximately 25 feet

wide, running northerly from Blanche street about 150 feet, and thence westerly at right angles the same distance, which it is alleged was dedicated to the use of abutting property owners as an alley more than six years prior to the commencement of these proceedings in April, 1920. On or about March 17th of that year the appellants closed the passageway with fences and prepared the ground for crops, preventing respondents from using the same, whereupon the latter instituted this suit and prayed a decree that it be adjudged an alley by dedication, and an injunction against interference with its use as a passageway by owners of abutting lots. Appellants denied the dedication or existence of an easement and alleged that respondents had had a mere permissive use of the property, conditioned upon the payment by each of a proportionate share of taxes, assessments, and upkeep expenses incident to the maintenance of the alley as a driveway; and that it had previously been expressly agreed that such use might be refused upon failure to comply with these requirements; that appellants were legally justified in closing the driveway to respondents, because the latter had not paid any portion of said expenses, and that a predecessor in interest, the respondent Union Lumber Company, on or about the 23d day of July, 1918, had terminated the privileges of ingress and egress in the property described.

The trial court gave judgment for plaintiffs, and defendants appeal therefrom on the grounds of insufficient evidence of original ownership of Union Lumber Company, of the existence of an easement or right of way, or that a trust was created by the deed hereinafter mentioned, and errors are assigned as to rulings upon the evidence.

It appears from said complaint, and the court found, that all the parties are owners of interests in property situate in blocks 24 and 24½, and that all except the lumber company are in possession and use thereof, which said properties abut on the strip of land in controversy; that the lumber company was the original owner of the land in suit, from whom all the parties hereto derived title, and that on January 23, 1918, said company executed a deed in trust to Josiah A. Engle and wife, for appellants and respondents, of said property, providing that it should be used as an alley, and should be kept open, but that such use might be refused to any adjoining property owner declining to pay the proportional share of any tax, assessment or expense levied against the property. October 11, 1918, the Engles executed to all owners of property in block 24½ a written "Declaration," purporting to convey to them the right to use said strip of land for driveway purposes, and embodying similar requirements.

Subsequent to the execution of said declaration, and on December 1, 1919, the Engles executed and delivered to Edwin A. Jarrell and wife, appellants herein, an agreement for the sale of a 37½-foot frontage in said block 24½, 125 feet deep, which included a portion of the property involved in this suit. Appellants entered into possession, and now contend that they are owners of all the property in controversy, and that as successors in interest Josiah A. Engle and wife they have the right to erect the barricades heretofore mentioned, "after the plaintiffs had failed, refused and neglected and had declared their unwillingness to pay the taxes, assessments, charges and expenses in connection with the maintenance of said alley." Respondents allege in their first cause of action that for more than five years prior to the commencement of this action all the parties (except the lumber company) and their predecessors in interest had been using said driveway without let or hindrance, and that the same is necessary to the free use and occupation of their respective premises. It is further alleged, and the court found, that block 24½ was delineated upon a map recorded in the office of the county recorder November 25, 1898, and that one C. D. Brown, the then owner, laid out said property, and the alley, and that abutting lots of these parties were sold with the agreement that said driveway should be maintained as an incident to the appurtenant properties. Appellants deny these allegations, and assert that they have since 1919 laid out large sums of money in improving and fencing this property, relying upon representations of respondents Persel and the lumber company that none of the respondents had any right to its use on account of the aforesaid defaults, and that respondents Crease and the predecessor in interest of respondents Hershey had for valuable considerations released all their right, title, and interest therein.

[1] It is settled that the sufficiency of evidence to establish a given fact, even where the law requires proof of that fact to be clear and convincing, is primarily a question for the trial court, and, if there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. *Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432; *Spreckels v. State*, 30 Cal. App. 363, 158 Pac. 549; *Tucker v. P. E. Ry. Co.*, 174 Cal. 42, 161 Pac. 1147; *Rolland v. Porterfield*, 183 Cal. 466, 191 Pac. 913.

[2] Brown testified that in 1908 he and one Howard bought a portion of this block, which they subdivided and built up after they had purchased a portion of block 24; that they platted block 24½ into six pieces, and cut an alley in a northerly direction from Blanche street to the back end of their lot and then westerly to the westerly end of their property; that they sold all the lots

to various persons, whom he named, and thereafter by a blank deed sold the alley property to the Union Lumber Company, who later bought two of the lots; that at the westerly line of the alley there was a fence along the line of a walk, leaving space to get into the garage. He stated that Crease's fence was probably built in 1912, and that other lot owners had maintained fences on their back lines for a long time; the fence at the rear of the Engle lot (appellants' property) marked the boundary to the alley. Stone testified that when he went there the alley was in use by delivery boys, garbage men, and others, and that he used it until obstructed by appellants; that it was in daily use as a driveway. Brown when recalled testified that when he subdivided he used a pencil sketch showing the lots and the alley, and that he told purchasers that this alley gave them a back entrance to their property; that he gave them to understand that an alley had been dedicated to the people who bought lots; that subsequently he went to the Union Lumber Company, to Crease and to Engle, and told them that this property was being assessed to him, but that he had been sold out for some time, and did not intend to continue paying the taxes; that he would arrange so that they could take title if they would keep the alley open, and that on August 23, 1916, an agreement was entered into by the lumber company, Crease, and Engle, reciting that the lumber company had foreclosed a mortgage on the alley property, and that in consideration of Crease and Engle paying the taxes and assessments then existing as liens thereon, the company would, upon obtaining a deed, convey the premises to them, provided that such deed should contain a covenant that the property be used as an alley, and that it should be kept open. It was further testified that Brown insisted previously to the execution of such agreement that "all the property owners should share alike as to the expenses, and we put this clause in this agreement so that a particular person who would not pay his portion would be refused the use of the alley, but it should not be closed to the public or to the people who would pay it;" that he intended that if two or more people held it for the adjoining property owners, they should have the right to refuse any particular one the right to use it if he would not pay his share of the expenses. Witness Sherzer of the lumber company testified that when he became acquainted with the property he knew there was an alley to the adjoining lots; that he had told appellants that while he had given Engle a deed to the alley, he believed it was not a deed, because he had considered that the company was nothing more than a trustee for all the people in the alley, and merely desired that the matter be settled so that some one else would attend to the taxes;

that he was interested in seeing that Stone always had an easement. He testified that Engle at one time asked him to accept the property back, and to re deed it to Engle without the alley provision, but that he replied that the company then would have no access to its property, whereupon Engle agreed to file a declaration that it would be used for alley purposes, which was done. Legal title to the ground still is in the Engles.

From the foregoing details of the evidence it will be noted that this passageway was laid out, lots bordering thereon were sold, and rights therein accrued long prior to the suggestion of any contingency such as appellants here assert. Sherzer states that he never considered he had any greater right to the alley than anyone else, that the property owners were to be served by the alley when it was first laid out, and that he told Engle that he would get into a lawsuit if he insisted on closing it. We are of opinion that an easement was created by Brown in favor of abutting property owners and their successors in interest which could not be divested by subsequently asserted conditions in a writing between a few of the parties interested. *Anderson v. Citizens' etc. Co.*, 185 Cal. 386, 197 Pac. 113.

[3] It is the duty of the owners of an easement to keep it in repair (*Bean v. Stoneman*, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. 302; *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475), so that a minority of several property owners would not be authorized to speak for all and by the execution of a private agreement deprive them of vested rights by attempting to make their interest dependent upon the performance of a legal duty (*Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998). In *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690, it was held that when the owner of a small tract of land subdivides the same into lots, leaving a street, avenue, way, court, or cul-de-sac between them, opening on a public street, and sells such lots as bounding on the same, he covenants to his grantees or their successors that it is such, and they are entitled to the use thereof as an easement or right of way for purposes of travel, light, and air, and as a means of ingress and egress to their respective lots, and the grantor will not thereafter be heard to deny the same against a grantee or his successors. The court there said:

"Upon the facts stated, the case appears further to fall within the well-settled rule that where one lays out a tract of land owned by him into lots and makes a plan thereof showing streets, and sells according to such plan, lots

as bounding on such streets without any limitation, he irrevocably devotes such portions marked as streets, so far as the grantees and their successors are concerned, to use as streets. It can make no difference that the tract so subdivided is small, consisting as here of only one lot two hundred and seventy-five by one hundred feet (see *Stone v. Brooks*, 35 Cal. 489), or that the street shown is a mere cul-de-sac."

San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, is to the same effect.

[4] Appellants pronounce the acquisition by the lumber company of the alley property and one lot in block 24½ a merger of dominant and servient estates, and thus seek to establish extinguishment of the servient tenement under the provisions of section 811 of the Civil Code. Had the lumber company acquired title to all the property, enjoying an abutting owner's rights in the use of the alley, together with the way itself, a merger could not successfully have been denied; but the ownership of title to a single lot and to the ground upon which a right of way exists cannot be said to destroy the easement created in favor of all other adjoining lots of respondents which were originally laid out and sold with this benefit attached as a part, at least, of the consideration. However, had the lumber company at one time owned the alley property and all abutting lots, devoting the former to driveway purposes, and subsequently conveying the adjoining lots to the present owners, the case would be the same, since, "where the owner of two tenements sells one of them, or the owner of the entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and with all the burdens that appear at the time of the sale to belong to it as between it and the property which the vendor retains." *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 415, 129 Pac. 594.

It will be unnecessary to consider other points presented by appellants, since the theory upon which this opinion is written renders their decision immaterial. This is particularly true of the objections to the court's rulings upon the introduction of evidence, since all of the evidence to which objections were made would necessarily be admissible upon the theory of the case outlined in this opinion. We find no material inconsistency in the findings which, being sustained by the evidence, as we have indicated, authorize the judgment rendered.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(65 Cal. App. 588)

In re ROBINSON'S ESTATE.

MATLOCK v. CLARK.

(Civ. 4514.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1924.)

1. Appeal and error ⇨758(3)—Specifications must point out error; court under no duty to seek error.

A general statement in argument that the pleadings raised several material issues on which there was no finding, without pointing out the errors, *held* insufficient as a specification of error; the Appellate Court being under no duty to seek the errors.

2. Executors and administrators ⇨32(2)—Evidence held sufficient to show petitioner had some interest in estate.

In proceedings to revoke letters of administration with will annexed issued to one having no interest in the estate, evidence *held* sufficient to show that petitioner had some interest in the estate.

3. Executors and administrators ⇨19—No waiver of preferential right except as to nominee; failure to contest after nominee's resignation held not to forfeit right.

Where decedent's daughter declined the administration and waived her right in favor of a designated person, she did not thereby waive her right except as to such person, and on his resignation her failure to contest the appointment of another as administrator did not under Code Civ. Proc. § 1383 et seq. forfeit her preferential right to be appointed administratrix.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

In the matter of the estate of Mary J. Robinson, deceased. Proceeding by Mattie A. Clark to revoke letters of administration of Paul A. Matlock. From an order revoking letters of administration, the administrator appeals. Affirmed.

Sweet, Stearns & Forward, of San Diego, and Thomas K. Case, of Los Angeles, for appellant.

Ralph C. McComish, H. A. Gabriel, and W. R. Biaggi, all of San Jose, and Hamilton & Lindley, of San Diego, for respondent.

CONREY, P. J. Paul Matlock, formerly administrator with the will annexed of the estate of Mary J. Robinson, deceased, appeals from an order of the superior court revoking his letters of administration and directing that letters of administration with the will annexed be issued to Mattie A. Clark.

By order of date October 27, 1922, the will of the decedent was admitted to probate, and one L. O. Thomason was appointed administrator with the will annexed, and letters of administration to him were that day issued. Thomason filed an account and re-

port, together with his resignation, on the 20th day of November, 1922. On the 1st day of December, 1922, the account and report of Thomason were approved, his resignation was accepted, and Paul Matlock appointed administrator with the will annexed of said estate. Matlock duly qualified and letters of administration were issued to him on the said 1st day of December, 1922. He entered upon the performance of his duties, and among other things caused notice to creditors to be published. The decree showing due notice to creditors was entered on the 20th day of March, 1923. Thomason and Matlock were not related to the decedent, and Matlock was not interested in the estate at the time when his letters of administration were revoked. On the 2d day of March, 1923, Mattie A. Clark, daughter of the decedent, filed a petition praying that the letters of administration issued to Matlock be revoked and that letters of administration with the will annexed upon said estate be issued to petitioner Mattie A. Clark. This matter was heard after due notice of time and place of hearing. The case was tried upon issues raised by the petition, and by the answer filed by Matlock. Thereupon the court made the order from which this appeal has been taken.

The petition for probate of the will and for appointment of Thomason as administrator with the will annexed was filed on the 11th day of October, 1922. Together with that petition he filed a document signed by Mattie A. Clark wherein she stated that she declined to undertake the administration, waived her right to be appointed administratrix, and requested the court to appoint Thomason. When Matlock filed his petition for letters of administration after the resignation of Thomason, due notice of the application of Matlock and of the time and place of hearing the same was given to Mrs. Clark. Mrs. Clark did not appear in response to that notice. It was only after Matlock had qualified as administrator and had performed a substantial part of his duties as such administrator, that Mrs. Clark sought to revoke Matlock's letters of administration in order that she might be appointed in his place. The sole ground of her petition is that she has a better right to act as administrator with the will annexed of said estate because she is a daughter of the decedent and because Matlock is not related to the decedent and was not nominated by petitioner or any person entitled under the law to administer.

The points urged in support of the appeal are that the trial court failed to find upon material issues; that respondent is no longer interested in the estate of decedent; that respondent having long neglected to apply for letters of administration and having expressly declined to undertake administration of the estate and having waived her right to

be appointed administratrix, and having received notice of the hearing of appellant's application for letters, the court erred in revoking the letters of administration granted appellant and appointing respondent.

[1] The argument of counsel for appellant fails to point out any particular in which the findings are defective. They content themselves with a general statement that by reference to the pleadings it will be seen that there were a number of material issues made, and upon which evidence was introduced, upon which there is no finding. This is not a sufficient specification upon which this court should be expected to make a decision. If counsel do not bring to the attention of the court the alleged errors, the court is under no duty to seek for them.

[2] In support of his proposition that respondent is no longer interested in the estate, appellant contends that the evidence shows that the personal property left by deceased consisted of some trivial personal effects (gold bracelets, pins, etc.), and that the only real estate belonging to decedent at the time of her death consisted of a certain lot at Santa Fé Springs, "and that respondent had conveyed that lot to Lena M. Grohs, and had released Mrs. Grohs and her husband from all claims in law and in equity of every kind and character, unless she still had some claim against them or one of them for some royalty on account of production of oil on this lot." But appellant further claims that this royalty right was released by a deed executed by respondent to Mrs. Grohs, which deed is in evidence. It further appears from the testimony of one witness, although rather indefinitely, that there was another lot or parcel of real estate belonging to decedent located "in Santa Fé Springs or vicinity," and being other than the lot described in the deed of Mrs. Clark to Mrs. Grohs. After reading the evidence we are of the opinion that the evidence without any conflict therein proves that Mrs. Clark retained some interest, slight though it may be, in the estate of her mother.

[3] The principal question in the case relates to the right of respondent to withdraw her renunciation and her declination to undertake the administration of this estate, and to have the administrator removed after proceedings in administration had progressed to the point shown in the foregoing statement of facts. Respondent's waiver of her right to be appointed administratrix was included in and was a part of her request for the appointment of Thomason. After it had been acted upon, it might well be considered as an estoppel as between respondent and Thomason. It does not necessarily follow that she would have declined to undertake the administration or would have waived her right to be appointed administratrix except for the purpose of procuring the appointment

of Thomason. So far as Matlock is concerned, the question here presented should be considered without regard to the former waiver. As between respondent and Matlock, the only facts properly subject to consideration here are that respondent was served with notice of his application, and did not contest the same. His appointment under these circumstances did not operate as a forfeiture of her preferential right over appellant. The right here asserted by respondent is provided for by sections 1383 et seq. of the Code of Civil Procedure. Section 1385 declares that, if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked. It was the opinion of Judge Coffey, of the superior court of San Francisco, that the nomination of another as administrator simply estops the party making the nomination from afterward asserting his right to the prejudice of his own nominee. Estate of King, 4 Coffey, 10. It does not appear that there are any decisions to the contrary in this state. In Estate of Lowe, 178 Cal. 111, 172 Pac. 583, the most recent decision bearing upon the subject of attempted retraction of a waiver of a prior right to letters of administration, the controversy arose between a widow and certain children of the decedent in favor of whom the widow had filed a request for their appointment. It was held under the circumstances stated in the opinion that she had no enforceable right to withdraw that request.

The order is affirmed.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 584

DE LAVAL PAC. CO. v. UNITED CLEANERS' & DYERS' CO. (Civ. 3981.)

(District Court of Appeal, Second District, Division 1, California. Feb. 14, 1924.)

1. Election of remedies §7(1)—Acts constituting election stated.

Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies, or performs any act in the pursuit of such remedy whereby he has gained any advantage over the other party or has occasioned the other party any damage, he will be held to have made an election of such remedy and will not be entitled to pursue any other remedy for the enforcement of his right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

2. Sales §340—Demand for return of goods to seller held not election not to sue for price.

Where a gasoline purifier was sold on installments, title being retained by the seller,

a demand, on default in payments of installments, for the return of the purifier, was not an election not to sue for the purchase price, where buyer sent part of the purifier, retaining the bowl, and seller refused to accept it, and it was immaterial that seller had in its possession, at the time buyer shipped, a bowl of another purifier belonging to the buyer on hand for repairs.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge pro tem.

Action by the De Laval Pacific Company against the United Cleaners' & Dyers' Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Byron Coleman, of San Francisco, and Milton K. Young, Lyndol L. Young, William K. Young, and Forrest F. Murray, all of Los Angeles, for appellant.

Clark, Law & Clay, of Los Angeles, for respondent.

CURTIS, J. Plaintiff sold and delivered to defendant a gasoline purifier, the purchase price being \$1,080. Two hundred and fifty dollars of this amount was payable in cash and the balance in monthly payments of \$100. The contract of sale provided that the title to the purifier was to remain in the vendor until the purchase price was fully paid, and that in case of the default of the defendant to make any payment as provided by the contract, the plaintiff might take immediate possession of the purifier. Defendant failed to make any payments whatever on the contract except the initial payment of \$250. Some months after the date of the delivery of the purifier to defendant, and while defendant was in default in its payments, plaintiff endeavored to collect from defendant the amounts due. The defendant being unable to make the payments, plaintiff demanded of defendant the return of the purifier. In compliance with this demand the defendant shipped from Los Angeles, to plaintiff in San Francisco, all parts of the purifier with the exception of the bowl, which was a substantial part of the machine. The plaintiff, on ascertaining that the bowl was not shipped with the other parts of the purifier, refused to accept the shipment and returned it to the defendant. Thereupon plaintiff instituted this action to recover the amount due on the contract. The court found the facts substantially as above recited and gave judgment in favor of the defendant.

The theory, apparently, upon which the court rendered judgment in defendant's favor, was that plaintiff, by demanding the return of the purifier, had elected to take possession of the property under the contract, and therefore that it could not, after electing to retake the property, abandon such proceeding and sue for the recovery

of the amount due on the purchase price thereof.

The only question, therefore, involved in this appeal is whether the plaintiff, by demanding a return of the purifier, placed itself in such a position that it could not thereafter maintain this action. It is the respondent's contention that under the contract of sale the plaintiff had open to it two remedies, one whereby it might recover possession of the property conditionally sold, and the other whereby it might recover the balance due on the purchase price thereof; that by demanding the return of the property, it elected to pursue the first-mentioned remedy; and that having made its election, it could not thereafter abandon this remedy and invoke the other. In other words, respondent contends that the demand of the plaintiff for the return of the property amounted to an election of this remedy, and that it must confine itself to the remedy so elected for the enforcement of its claim against defendant.

[1, 2] Just what acts, on the part of one having two inconsistent remedies for the enforcement of a right, amount to an election of a remedy, is not always clear. The commencement of an action to enforce one of such remedies is generally considered sufficient to estop a party from thereafter pursuing the other remedy. 9 R. C. L. 960. Although it has also been held that "the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel in pais has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election." *Id.* 961; *Brice v. Walker*, 50 Cal. App. 49, 194 Pac. 721. "The doctrine of election of remedies is generally regarded as being an application of the law of estoppel." 9 R. C. L. 957. The rule might therefore be stated as follows: Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in the pursuit of such remedy, whereby he has gained any advantage over the other party, or he has occasioned the other party any damage, he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right. Applying this rule to the present action, we might well ask the question: Did the plaintiff, by demanding the return of the gasoline purifier, and by the acts of the parties following such demand, gain any advantage over the defendant, or occasion the defendant any damage? We think this question must be answered in the negative. Upon the demand being made, the defendant shipped to plaintiff certain parts of the purifier, which plaintiff rightfully returned to defendant for the reason that the bowl of the machine was not among the

parts shipped. Upon the return of this property to the defendant, it had in its possession everything it possessed at the time the demand was made. No advantage was gained over the defendant, nor was the defendant occasioned any damage by these transactions. The plaintiff was therefore well within its rights, in our opinion, when, upon defendant's refusal to comply with the demand, it returned the property shipped and brought suit for the recovery of the amount due upon the contract.

The court further found that defendant failed to return the bowl to the plaintiff for the reason that "plaintiff was holding in San Francisco a bowl belonging to another purifier of the defendant." It appears from the evidence that this second bowl had been sent to plaintiff for the purpose of having the same repaired. There is nothing in the findings of the court, nor in the evidence, that would tend to show that the plaintiff was holding this second bowl unlawfully, or for any other purpose than that for which it had been sent to the plaintiff by the defendant. The fact that the plaintiff had in its possession the second bowl, under the circumstances disclosed by the evidence, could not possibly afford the defendant any legal excuse for its failure to return to plaintiff the whole of the property demanded. For these reasons we are of the opinion that judgment should be reversed and that plaintiff should be awarded judgment in its favor for the balance due on the purchase price of the purifier as found by the court in its findings.

Judgment is therefore reversed, with directions to the lower court, upon the findings, to enter judgment in favor of plaintiff for the sum of \$830, together with interest thereon at the rate of 7 per cent. per annum from December 15, 1920, for a reasonable attorney's fee as provided in the agreement, and for costs of suit.

We concur: CONREY, P. J.; HOUSER, J.

65 Cal. App. 597

**SUTTER-BUTTE CANAL CO. v. GREAT
WESTERN POWER CO. OF CAL-
IFORNIA et al. (Civ. 2692.)**

(District Court of Appeal, Third District, California. Feb. 16, 1924. Hearing Denied by Supreme Court April 10, 1924.)

1. Waters and water courses — 254—Right to flow of water into ditch "real property."

The right to have water flow from a river into a ditch is real property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

2. Venue — 16—Action to restrain interference with flow of water into ditch may be brought in either county where water distributed.

Under Const. art. 6, § 5, an action to restrain an interference with the flow of water from a river into a ditch through which it is carried and distributed in two counties may be brought in either county.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by the Sutter-Butte Canal Company against the Great Western Power Company of California and another. From an order denying motion for change of venue, defendants appeal. Affirmed.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellants.

Isaac Frohman, of San Francisco, W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for respondent.

FINCH, P. J. This appeal is from an order denying defendants' motion for a change of venue.

The complaint alleges that the plaintiff is a public utility engaged in the sale and distribution of water to the inhabitants of Butte and Sutter counties for irrigation and domestic uses; that it is the owner of a canal heading at a point on Feather river in Butte county and running thence through that county and Sutter county; that it is the owner of the right to appropriate, divert through said canal, and use 2,500 second feet of the water naturally flowing in Feather river; that an appropriation of 2,000 second feet of said water was made at the head of said canal in the year 1902 and that an additional appropriation of 500 second feet thereof was made in 1918 at a point in Sutter county where plaintiff pumps water from the river into its aforesaid canal; and that the defendants claim said water adversely to plaintiff and "threaten to impound and store and take and divert large quantities of the waters of said Feather river above the said diverting works of plaintiff at times when there will remain less water flowing in the said river than the said quantity so appropriated and used by plaintiff, and so as to prevent plaintiff from diverting and using the same." The prayer is for a decree quieting plaintiff's title to the 2,500 second feet of water and enjoining defendants from interfering with plaintiff's use thereof.

The defendants demanded that the trial of the action be had in Butte county on the ground "that the cause of said action is for the determination of an estate or interest in real property and that the subject of said action, to wit, such real property and interest therein is situated, particularly the alleged property right in and to the alleged right of appropriation of 2,000 cubic feet per

second of the waters of the Feather river, as alleged in said complaint, in the county of Butte, state of California, and that said real property so alleged in said complaint to be the property of said plaintiff is a separate and distinct property and property right entirely situated in said county of Butte, state of California, and no part of said property or property right is situated outside of the said county of Butte."

[1, 2] Article 6, § 5, of the Constitution, provides:

"That all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

The parties are agreed that the property right asserted by plaintiff is real property. In *Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408, where the facts alleged were similar to those of the instant case, the court said:

"Water courses are either natural or artificial. Plaintiff's ditch was an artificial water course. * * * The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its water course. Granting that plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. Civil Code, 658. If the water course, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto. The acts complained of are preventing water from flowing in plaintiff's ditch; the ditch is located in both counties; therefore the subject of the action is in both counties, and the action might have been brought in either."

To the same effect are the cases of *Last Chance, etc., Co. v. Emigrant Co.*, 129 Cal. 277, 61 Pac. 960; and *Yolo County Consol. Water Co. v. Adamson*, 22 Cal. App. 493, 135 Pac. 48. In *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 726, 93 Pac. 858, 863 (15 L. R. A. [N. S.] 359) it is said:

"The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch. * * * A ditch for carrying water is real estate."

See, also, *E. C. Horst Co. v. New Blue Pt. Min. Co.*, 177 Cal. 631, 640, 171 Pac. 417.

Since the property involved is real estate, the plaintiff, under the constitutional provision quoted, had the right to bring the action in any county in which any part of such real estate is situated.

Appellant contends that since plaintiff's

alleged right to 2,500 second feet of water was initiated by two separate appropriations one in each county, the complaint states two separate causes of action. The merits of this contention need not be considered, because, if the appropriation made in Sutter county be eliminated, it appears from the other allegations of the complaint that plaintiff is diverting 2,000 second feet of water into its canal, through which the water is carried and distributed in both counties. Under the authorities cited, an action to quiet title to this 2,000 second feet of water alone could have been brought in either county.

The order is affirmed.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

65 Cal. App. 612

CORDS v. GOODWIN et al. (Civ. 4441.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1924.)

Mortgages $\Leftrightarrow$ 415(1)—Holder held entitled to foreclose mortgage as to land claimed by third party.

In action to cancel an agreement for satisfaction of purchase-money mortgage on payment of less than the amount of the mortgage because of shortage in acreage, to reform a release of the mortgage executed pursuant to agreement, and to foreclose the mortgage, in which no deficiency judgment was asked against mortgagor and parties who claimed under him, and relief sought was limited to a foreclosure of the mortgage against an overlap of which third persons had adverse possession, the mortgagor and parties who claimed under him held not entitled to a nonsuit on the ground that plaintiff failed to prove right of possession of the disputed strip, since plaintiff was entitled to enforce the mortgage against such strip, and to acquire whatever title he could obtain through a foreclosure of the mortgage, and thus place himself in a position to contest the title with third party.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by R. Cords, Jr., against J. W. Goodwin, the Wickenden Land Company, and others. Judgment of nonsuit, and plaintiff appeals. Affirmed as to defendant Wickenden Land Company, and reversed as to other defendants.

C. M. Fickert, of San Francisco, for appellant.

CONREY, P. J. The object of this action was to cancel a certain agreement relating to the satisfaction of a mortgage, to reform a release of the mortgage executed in pursuance of said agreement, and thereupon to

foreclose said mortgage. The ground on which the relief was asked was that the agreement and release were given in consequence of a mutual mistake of the parties. The present appeal is from a judgment of nonsuit. The respondents have not appeared herein.

The principal facts of the case are stated in the decision of the Supreme Court on a former appeal. *Cords v. Goodwin*, 173 Cal. 61, 159 Pac. 138. The mortgage was given by defendant Goodwin, to plaintiff's assignor Tillmann, to secure one-third of the purchase price of the mortgaged property, which was sold to the mortgagor at the price of \$150 per acre, it being stated in the contract that the tract contained 797 acres of land. The mortgagor and the mortgagee afterwards agreed that there was a shortage of 92.99 acres in the quantity of land of which the mortgagor had obtained possession. Thereupon they entered into an agreement under which the mortgagor paid that proportion of the debt which corresponded to the proportion of acreage which he had received, leaving the remainder to be paid only to the extent that possession of the disputed acreage (92.99 acres) should be obtained by the mortgagor. In prosecuting this action to reform the release of mortgage and to foreclose the mortgage, the plaintiff alleged that in fact there had never been any adverse claim to any of the mortgaged premises as described in the mortgage and agreements of the parties, and that therefore the mortgage indebtedness and the mortgage lien were in full force and effect according to their original terms, save only to the extent of the payments actually made.

In its decision of the former appeal the Supreme Court determined that upon the facts shown by the evidence there was a shortage of area in section 28 sufficient to account for 13.71 of the total claimed shortage of 92.99 acres, and that by reason thereof the mortgagor is entitled to a rebate of a stated amount on the purchase price and a corresponding reduction on the mortgage debt by reason of this deficiency in the area of that section. This left an alleged shortage of 79.28 acres in the several tracts lying in section 27, described in the deed and mortgage. This shortage was caused by the encroachment of the owner of Tinaquaic Rancho, adjoining upon the easterly side of section 27. Many years ago, in establishing the boundaries which he claimed, the owner of that rancho set fences upon the westerly boundary thereof adjoining section 27. These fences overlap the boundaries of the subdivisions of section 27 far enough to include said 79.28 acres. This land is properly within the boundaries of the description contained in the mortgage, but the purchaser, Goodwin, has never obtained possession thereof. The Supreme Court recognized the difficulty in final determination of the case as then

before the court for decision, which difficulty arose from the fact that the owners of said adjoining rancho, who were in possession of the overlap included within the mortgage description, were not parties to the action.

"The defendants have acquired the record title to the land included in the overlap, but have not received possession. If the judgment stands in its present condition we cannot say that the defendants may not hereafter be able to obtain possession of this overlap. The mortgage debt is not fully paid. If the defendants should succeed in obtaining possession of the overlap, or if the plaintiff should succeed in procuring it for them, he would be entitled to enforce his mortgage for the balance thereof unpaid and chargeable to this overlap, against the land included in the overlap."

The case was sent back for a new trial solely with respect to the land described in the mortgage lying easterly of the fence referred to in the Flournoy survey as the westerly line of the Tinaquaic Rancho. The Supreme Court ordered:

"Upon such new trial the court below is directed to allow the pleadings to be amended, to bring in as new parties the persons claiming the said overlap and thereupon to determine whether or not the present defendants, in virtue of their title derived from Tillmann, are entitled to possession of said overlap and if it concludes that they are so entitled, to enforce said mortgage against the land by foreclosing the same for the amount of land included in the overlap at the agreed price of \$150 per acre."

Thereafter in the superior court the complaint was amended, and "the Wickenden Land Company" was brought in as an additional party to the action, it being alleged that said company claimed some interest in said land, but that such claim or interest, if any, was subject and subordinate and subsequent to the lien of said mortgage. "The Wickenden Land Company" (answering as Wickenden Company) by its answer alleged that at the time of the execution of the mortgage and for a long time prior thereto and ever since it has been and now is the owner of all of said tract of 92.99 acres, and that its claim to said land is prior and superior to the lien of said mortgage. The other defendants denied that they have or claim any interest in or to said parcel of 92.99 acres. At the conclusion of the presentation of evidence on behalf of the plaintiff at the second trial, the Wickenden Company moved for a judgment of dismissal and nonsuit as to it, which motion was granted. Appellant concedes that this was a correct order because the court was not authorized to determine adverse possession issues in an action to foreclose a mortgage.

But the defendant Goodwin and the defendants Holton and Santa Maria Petroleum & Pipe Line Company, claiming under Goodwin certain interests in the land conveyed by Tillmann to Goodwin, also moved for non-

suit "on the ground, that the evidence introduced has not at all established the complaint, or tends to substantiate the issues pointed out by the Supreme Court as to what we should consider here." The court also granted the motion for nonsuit as made by these last-named defendants. In this we think that the court erred. It is stated by counsel for appellant that no deficiency judgment is asked against Goodwin, the maker of the mortgage, and that the plaintiff's relief, both by his complaint and by admissions and stipulations at the trial, is confined to a foreclosure of the mortgage against the mortgage security. It may be that the holders of the record title obtained under the conveyance made by plaintiff's assignor to Goodwin will be able to recover all of this land in an action against the Wickenden Company or its successor, if any, claiming to be the owner of said disputed parcel of land. If said holders of the record title are entitled to so recover, then, under the terms of the mortgage and supplementary agreement, the mortgage is enforceable against said land for that portion of the unpaid portion of the mortgage debt as to which the matter was left open by the Supreme Court's decision. If respondent Goodwin and those claiming under him do not intend to assert any claim of ownership in said land, they cannot be injured by a decree which will permit the plaintiff to acquire whatever title he can obtain through a foreclosure of the mortgage, and thus place himself in a position to contest the title with the adverse claimants.

The judgment of nonsuit in favor of defendant Wickenden Company is affirmed. The judgment against the plaintiff and in favor of the other defendants named therein is reversed.

We concur: HOUSER, J.; CURTIS, J.

65 Cal. App. 622

In re STOVER. (Civ. 4843.)

(District Court of Appeal, First District, Division 1, California. Feb. 20, 1924.)

Attorney and client —Conclusion of want of showing as to moral character held justified.

Where applicant for admission to practice law spent a great deal of time practicing with dice in a cigar stand, was known to police detectives as a "dice shark," had been twice arrested for cheating in dice games but discharged because evidence was deemed insufficient, and had engaged as a partner in a brokerage business without accounting to his copartner for copartner's share of certain profits, conclusion of board of bar examiners that he had not satisfied board as to his moral character *held warranted*.

Application by Ferdinand F. Stover for admission to practice law after refusal of Board of Bar Examiners to issue certificate. Denied.

Theo. L. Breslauer, of San Francisco, for applicant.

Eugene D. Bennett and John J. Goldberg, both of San Francisco, for respondents.

PER CURIAM. This matter was referred to Willard W. Shea, Esq., to take testimony and report the facts to this court. His report is adopted as part of this opinion and is as follows:

"Pursuant to the order of your honorable court, the undersigned commissioner, appointed by the court to take testimony in the above-entitled matter has the honor to submit the following as his report:

"The petitioner, Ferdinand F. Stover, was a candidate for admission to the bar of the state of California in the examination conducted by the state board of bar examiners in June, 1923. Although he showed in that examination that he possessed the necessary qualifications of learning, the board reported that 'after a full consideration we are unable to certify that the applicant has satisfied us as to his moral character, and for that reason alone we are unable to issue the usual complete certificate.' Subsequent to the above report Mr. Stover filed a new application to practice as an attorney and counselor at law, by this court. This application was opposed by the bar association of San Francisco, and, under date of December 17, 1923, the parties appeared in court, and the undersigned was appointed to take testimony and report facts.

"Hearings were held on December 27, 1923, and January 2 and 23, 1924.

"The following witnesses were sworn and testified for the petitioner: John Goss, O. J. Boden, Charles J. O'Connor, Theodore L. Breslauer, Harold P. Nelson and Ferdinand F. Stover.

"For the objector the following witnesses were called and examined: Albert L. Shepston, C. Meinberg, Frederick W. Kant, Carroll Single, Thomas J. Curtis, Edward J. Wis-cotchill and Hon. Walter Perry Johnson.

"From the testimony adduced and documentary evidence presented, your commissioner finds the facts as follows:

"That during the month of August, 1921, petitioner was twice arrested for alleged cheating in dice games in the stores of the United Cigar Company but was discharged because the evidence was deemed insufficient to convict.

"That during the same month he was arrested for attempting to 'short change' the cashier in a restaurant but that charge was also dismissed.

"That about that time the petitioner spent a great deal of time 'practicing' with dice in a cigar stand in which the witness Meinberg was employed.

"That the petitioner was then known to the two police department detectives who testified as a 'dice shark.'

"That subsequently petitioner operated a small brokerage business in which he was en-

gaged chiefly in buying and selling cigar stands. That in the month of November, 1921, he sold to W. G. Peterson, a seafaring man, one half interest in this business for \$750.00 and in July, 1922, petitioner filed suit against the said Peterson for a dissolution of the then unprofitable partnership. Peterson filed a cross-complaint alleging that the petitioner had carried on certain independent transactions and had not accounted to the partnership for the profits thereof, and he was awarded a judgment on the cross-complaint for \$247. In making this award Hon. Walter Perry Johnson, who tried the case, in a letter to the parties under date of June 7, 1923, stated:

"I am clearly of the view that plaintiff's conduct towards his partner is condemned by the law no less than by good morals; and that he must be held to account for the partner's share of the secret profits made in the two transactions mentioned."

"Judge Johnson subsequently explained that by the term 'secret profits' he did not mean that the transactions were entirely unknown to Peterson but that they were such transactions that the profits thereof should have been turned in as profits of the partnership."

While the facts, as above set forth, are quite different, we are of the opinion that the language used by the Supreme Court in *Re Wells*, 174 Cal. 467, at 476, 163 Pac. 657, 661, is also applicable here:

"While this conduct may not show great depravity of character, we think it must be admitted that it indicates in the respondent a want of that sincerity and integrity which the law demands of those who are to be allowed the privilege of practicing law."

The findings of the commissioner are sufficient to support the conclusion of the board of bar examiners, and the application is therefore denied.

65 Cal. App. 592

In re HANLON.

BERG v. LUDINGHOUSE.

(Civ. 4728.)

(District Court of Appeal, First District, Division 2, California. Feb. 15, 1924.)

1. Wills ⚡163(1)—Evidence held insufficient to show incapacity.

In will contest, evidence as to testamentary incapacity held not to fill the requirements of Code Civ. Proc. § 1835, defining satisfactory evidence.

2. Wills ⚡166(7)—Mere position to exercise undue influence does not warrant finding thereof.

Mere proof that daughter was in a position to exercise undue influence over the mind of testatrix does not alone warrant a jury or court in making a finding that a will perfectly valid on its face is invalid because obtained by undue influence.

3. Wills ⚡163(2)—Any presumption of undue influence lasts only until direct evidence given on the subject.

If the fact that a daughter of testatrix stood in the position of a fiduciary agent raised a presumption that a gift to her by will was obtained under undue influence, such presumption would last only until direct evidence was given on the subject.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Ellen Hanlon, deceased. Contest of will by Agnes Berg as against Mamie Ludinghouse, proponent. From a judgment setting aside the will, the proponent appeals. Reversed.

Wm. T. Eickhoff, of San Francisco, for appellant.

Clayton H. Garvey, of San Francisco, John D. Whitton, of Paris, France, and Leo H. Shapiro and Alex. Sheriffs, both of San Francisco, for respondent.

STURTEVANT, J. After the death of Ellen Hanlon, when her purported will was offered for probate, one of her daughters, Agnes Berg, filed an objection and protest against the will being admitted to probate. Thereafter a trial of the contest was had, and a judgment went for the contestant, and the proponent has appealed under section 953a of the Code of Civil Procedure.

In her attack the contestant specified two grounds: One that at the time of the execution of the will the decedent was mentally incompetent to make, execute, or subscribe a will; and, second, that at the time of the execution of the will the decedent was acting under the undue influence of various persons, and, in particular, Mamie Ludinghouse, another married daughter.

In her opening brief the appellant made the point that there was no conflict in the testimony, and that the testimony adduced at the trial was such that it fails to support the judgment on either theory. In her reply to this point the respondent sets forth by question and answer the testimony which she claims supports the judgment on the basis of undue influence. We shall take up these two theories separately in the order stated in the respondent's brief.

As to the first theory the respondent claims that the evidence showed "that Ellen Hanlon was feeble in health, suffering under disease, aged and infirm, and that for the past year of her life at least that she was sinking rapidly both physically and mentally; that for some years prior to her death she was suffering from a fatal malady, namely, a tumor; that she was being constantly doped with opiates to relieve her terrible pain and suffering, and that the doses were given stronger and oftener as she got worse; and

that at no time was she free from the effect of these opiates." It was further testified that the decedent was of unsound mind, and that she did not understand the act she was doing; that her answers were not responsive to the questions asked of her; that at times she had no mind at all, and did not know anything, and that her mind rambled and wandered; that her memory was gone; that she was mentally incompetent; and that the morphine was removed from her reach for fear she would commit suicide; and that Mamie Ludinghouse had herself admitted that "her mother was off and was not responsible for anything she did." And the respondent claims that evidence was introduced showing that the statements of the testatrix proved that her feelings toward her children, particularly to her son Mark, were far different from the feeling represented by the will.

Looking back over the summary just stated there was no evidence that during the last year of her life the decedent was sinking rapidly mentally nor that she was being constantly doped with opiates, nor that the doses were given stronger and oftener as she got worse, nor that the increased doses were given prior to the date that the will was made. Neither was there testimony that the decedent was at no time free from the effects of opiates, but, on the other hand, the opiates referred to consisted of morphine sulphate in one-quarter grain tablets, which were administered one tablet at a time three times daily, except when the patient was in a spasm of pain, which event occurred comparatively seldom. A prescription for one hundred tablets was filled September 13, 1920, and the will was made three days later; the next prescription was filled October 26, 1920. When the patient was under the influence of the opiate there were times when she had no mind at all and did not know anything, and her mind rambled and wandered, and her memory was gone, and she was mentally incompetent. When she was not under the influence of the opiate there is no testimony of any witness that such condition existed. The statement that the morphine was removed from the decedent's reach for fear she would commit suicide did not enlighten the jury as to whose fear was considered, nor what the fear was based on. The admission of Mamie Ludinghouse that her mother was off and not responsible for anything she did was possibly competent cross-examination of Mrs. Ludinghouse, but the statement was not testified to in any manner showing that Mrs. Ludinghouse had made such a remark as meaning otherwise than that such was her mother's condition when under the influence of the opiate.

During the several years she was afflicted the record makes it clear that the decedent did at times suffer severely; furthermore, that at some of those times opiates were

given in large doses; and that, while the patient was under the influence of the large doses of the opiates, her mind was greatly disturbed, but in this connection there is not a particle of evidence in the record that on the date the decedent made her will, or on any date immediately prior thereto, she had suffered a spasm of pain or had taken any extra or excessive doses of the opiates.

Each side called several witnesses as intimate acquaintances, and propounded to the witnesses a question asking the opinion of the witness as to the mental sanity of the decedent. No one of the witnesses called by the respondent gave a frank, free, full, direct answer to the question; but each one sought to limit, modify, or vary his answer. After each one had so answered, no one of the witnesses proceeded to state any fact or facts showing his or her answer to have any support as being based on any occurrence which would tend in the least to justify such an opinion. Neither in connection with the foregoing opinion evidence, nor in the other evidence introduced, was there a single trace of evidence to the effect that the decedent was ever at any time a fool, or that she showed any traces of any kind of insanity. Her doctor testified that she showed traces of senility. As the decedent was at the time 77 years of age, the doctor's testimony went no further than to state in medical language that the decedent was getting old.

In connection with this part of the case the respondent iterates and reiterates that the will of the decedent was unnatural. To what extent it was unnatural the respondent does not enlighten us. The decedent left an estate consisting of \$7,000, and she left eight children. For a period of four years immediately preceding her death she was an inmate of the home of Mrs. Ludinghouse, we may say, the sole devisee. During that time she had a small income, and during the same period she was incurring the expenses of doctors, medicines, nurses, etc. There is evidence in the record that by reason of the long sickness the patient had become afflicted with malodorous sores. No other child appears to have asked for or sought the privilege of caring for the deceased. To what extent, during her lifetime, she paid Mrs. Ludinghouse for her care and treatment does not appear in the record in any accurate set of figures. Had the whole estate been left and devised to Mrs. Ludinghouse, not by way of gift, but merely by way of payment, it would then appear that Mrs. Ludinghouse would be receiving a compensation less than the charge of ordinary hospitals. However, the will left to Mark Hanlon the sum of \$40 per month during the period of, and until the settlement of, the estate of the decedent, not exceeding two years. This bequest, together with the costs of administration, reduced the estate to a figure of \$5,000 or thereabouts, and it is further made to appear that it was

not unnatural that the decedent should have left to Mrs. Ludinghouse the bulk of her estate. Mark Hanlon, a son, had for some years received gratuities from his mother. Some witnesses said he was a drunk, other witnesses said that he was suffering from tuberculosis. His mother, by her will, left him \$40 per month for a limited period, and stated as she did so that when he learned that the remittance was to continue for only a short time that he would then make arrangements to care for himself. Considering all of the facts, we are unable to say that the will was in the least unnatural.

[1] Dr. Dannebaum declined to testify that he visited the patient on September 16, 1920, the date the will was made. No witness testified that on that date the decedent suffered from any paroxysm of pain; no witness gave any evidence to the effect that on that particular date the decedent was mentally incompetent. All of the testimony tendered by the respondent was in the nature of indirect evidence. It requires only a most cursory reading of the same to impress one to the effect that the evidence does not fill the requirements of section 1835 of the Code of Civil Procedure. That section provides:

"That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."

[2, 3] Passing to the second ground of the contest it will suffice to remark that the evidence does not purport to disclose a single word or a single act on the part of Mamie Ludinghouse showing the exercise of, or an attempt to exercise, any undue influence over the mind of her mother. The utmost that can be said in that connection is that the evidence shows that she was in a position to exercise undue influence. But that circumstance standing alone does not warrant a jury or a court in making a finding that a will, perfectly valid on its face, is invalid because the same was obtained by the exercise of undue influence. We note that counsel call attention to the fact that Mrs. Ludinghouse did, on the date that the will was executed and for some time prior thereto, stand in the position of a fiduciary agent of her mother, and that by the terms of the will she received a gift from her mother during the term of that relationship, and that counsel thereupon predicate the claim that it will be presumed that the gift was obtained under undue influence. Not conceding that such is the rule of law in this state, nevertheless such presumption would last only until direct evidence was given on the subject. That direct evidence was given by Mrs. Ludinghouse. She tendered herself as a witness, and was subjected to a direct examination and cross-examination. After she had been fully ex-

amined, not a trace of undue influence was elicited.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 698

HUENEME, M. & P. L. A. RY. v. FLETCHER, Director of Public Works, et al.
(Civ. 4326.)

(District Court of Appeal, Second District, Division 2, California. Feb. 21, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Injunction ☞137(4)—Preliminary injunction will not issue in doubtful case.

A preliminary injunction will not issue in a doubtful case.

2. Injunction ☞137(4)—Refusal of preliminary injunction on ground that outcome of final hearing doubtful held warranted.

In railroad's action to enjoin the state from constructing a highway across a strip of land which the railroad claimed to have purchased for right of way purposes, in which the defendants denied that the railroad owned the land, and on the hearing on plaintiff's motion for a preliminary injunction, produced evidence that the general public had continuously and uninterruptedly used the land as a road for more than 20 years, and that for more than 6 years thereof the road had constituted a county road, that railroad had made no protest until 8 weeks after the work of construction had commenced, refusal of preliminary injunction held proper.

3. Injunction ☞135—Granting or refusing of preliminary injunction discretionary with court.

A preliminary injunction may not be had as a matter of right, but the granting or refusing of such an injunction rests in the sound discretion of the court.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by the Hueneme, Malibu & Port Los Angeles Railway against A. B. Fletcher, as Director of the Public Works of the State of California and Chief of the Division of Highways thereof, and others. From order refusing preliminary injunction, the plaintiff appeals. Affirmed.

Nathan Newby and Grant Jackson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondents state officers.

Lorain Andrews, of Los Angeles, for respondent Lee Moor Contracting Co.

WORKS, J. On November 24, 1906, one Joseph H. Call and his wife conveyed to plaintiff a strip of land 60 feet wide across

their rancho as a right of way for a railroad. No construction work was ever done upon this right of way. Ten years later Call and his wife deeded to the county of Los Angeles a strip across the rancho, also 60 feet wide, as a right of way for a highway. Nearly 15 years after the deed to plaintiff, the Calls conveyed to the state of California a strip across the rancho 80 feet wide as a right of way for a state highway. The parcels conveyed by these three deeds, except for the greater width of the parcel last conveyed, are practically coterminous and coincident with each other, although each departs from each of the others occasionally along the side lines. The deed to the state recites that it is "subject to any right of way heretofore conveyed by the grantors to" plaintiff. After the conveyance to the state the strip described in its deed was entered upon by defendants, under authority of the state, for the purpose of constructing a state highway along it. Entry was at the same time made upon the parcels formerly conveyed by the Calls to plaintiff and to the county, this being so necessarily because of the practical identity of the three pieces. Defendants then commenced, and thereafter for some time prosecuted, the work of constructing a state highway along and over the ground covered by the three rights of way, in so far as they are identical. The entry upon the property was made and the construction work was prosecuted without the commencement of any proceeding in eminent domain for the purpose of condemning any interest which plaintiff may yet retain under the deed of 1906. This action was commenced for the purpose of enjoining defendants from taking plaintiff's property in the right of way described in the deed last mentioned without authority of law and, particularly, without the commencement of a suit in eminent domain for the purpose of condemning it. Upon the filing of the complaint the trial court issued its restraining order against defendants, accompanied by an order to show cause why a preliminary injunction should not issue. Upon the hearing pursuant to this order to show cause the court made its order refusing a preliminary injunction. From this order plaintiff appeals.

The Supreme Court, in the recent case of *Jacobsen v. Superior Court*, 219 Pac. 986, has enunciated the rule that real property cannot be taken from its owner for a public use without condemnation proceedings. Appellant argues the present appeal as if the question passed upon in the opinion cited were the question presented here, but such is not the case. It is true that a right of way was conveyed to appellant in 1906. It is true that the later deed to the state was subject to the deed of 1906. It is not true, however, that the record shows any present title in appellant under the deed of the year

named, or otherwise. The alleged title of appellant is put in issue directly under the pleadings. To the averment in the complaint that appellant is the owner of the right of way conveyed by the deed of 1906, respondents interpose direct denial. The question of title in the appellant is therefore in dispute in the case. Not only so, but all the other equities of the complaint are also denied. Except for the allegation as to appellant's title, the only equities set forth in that pleading are contained in a paragraph which reads:

"Before the commencement of this action, defendants, without plaintiff's consent and against its will, entered in and upon the property of plaintiff herein described and commenced the construction thereon and thereover of a road for public highway purposes, and defendants are now engaged in constructing over and across this property a public road for state highway purposes, and in the construction of such road will take and appropriate the larger portion thereof, the exact quantity of which defendants propose to and will take is unknown to plaintiff; that such portions as are not taken will be segregated from the portion taken and will be damaged to such extent that it will be of no value."

Responsive to this allegation is the following paragraph of the answer:

"Deny that prior to the commencement of this action said defendants or either of them, without plaintiff's consent and against its will, or without plaintiff's consent or against its will, entered in and upon said property alleged therein as belonging to said plaintiff, or that any construction whatsoever was or is without said plaintiff's consent and against its will or without plaintiff's consent or against its will; deny that said defendants or either of them are engaged in constructing over and across said property, a public road for highway purposes with exception of a portion thereof, and deny that in the construction of such road said defendants or either of them will take and appropriate or take or appropriate any portion thereof belonging to said plaintiff; deny that any portions of said property so described will in any manner whatsoever damage said plaintiffs or that any damage will result therefrom at all."

The answer also contains various affirmative allegations which form a basis for the showing made by respondents, by affidavits, at the hearing under the order to show cause.

At the hearing various affidavits were presented in support of the contentions of the respective parties to the action. When added to the state of the pleadings, some of the matters set forth in the affidavits are distinctly worthy of note. It appears from the affidavits offered upon the part of respondents that the entry of the latter upon the right of way was made by means of a large body of men, equipped with heavy road-building machinery, including a steam shovel; that the entry was made 8 weeks before any notice or

protest to respondents from appellant, and that during that time respondents openly and notoriously proceeded with construction work on the proposed state highway, with the expenditure thereon of considerable sums of money; that since 1916, or for a period of more than 5 years, the county of Los Angeles had, without protest from appellant, maintained a highway across the Call rancho upon a strip of land practically coincident with the rights of way granted by Call and his wife to appellant, to the county and to respondents, and that the highway had been constantly and extensively used during that time by the general public by means of hundreds of vehicles; that during that period the highway maintained by the county had been used by no person or corporation other than the county of Los Angeles and the general public; and that from 1905 to 1916 the general public had continuously and uninterruptedly used, for purposes of travel, a road across the Call rancho over the ground occupied by the highway maintained by the county since 1916. The affidavits presented by appellant show that it was the ultimate intention of appellant to build a railroad along the railroad right of way across the Call rancho, thence across the rancho Malibu into Ventura county; that appellant had expended a sum in excess of \$300,000 in the acquisition of rights of way, surveys, construction of roadbeds, laying of ties and rails, in the prosecution of its railroad enterprise; that the right of way occupied by respondents was necessary in order to enable appellant to construct its railroad; that appellant has been unable to complete its railroad because of the late war, but that it intends to do so at the earliest possible time; that the roadway traveled by the general public from 1905 forward and maintained by the county of Los Angeles from 1916 forward was originally constructed by the individual who afterward organized appellant and who owned practically all the shares of its stock, and that the maintenance of the road by the county was permissive on the part of plaintiff.

Upon the facts thus averred in the pleadings and sworn to in the affidavits, respondents make the following points, omitting two later to be mentioned:

(1) "A temporary injunction will never be granted to disturb and interfere with a public road which has already been completed before the injunction was asked."

This point is based upon the fact that a highway has been maintained practically along the three rights of way since 1905, and has been used uninterruptedly by the general public since that year.

(2) "An injunction will never be granted against the continuance of a public road, where

there is proof that for more than five years there has been user over the entire property sought to be enjoined."

(3) "A temporary injunction will never be granted where the plaintiff has stood idly by and allowed defendant to expend labor and money which would all be lost if the injunction is granted, especially when the defendant has a speedy and adequate remedy at law."

(4) "An injunction will not be granted to oust a party from possession under a claim of right where the plaintiff can sue in ejectment."

(5) "An injunction will never be granted where the plaintiff has lost right of way in the premises by reason of nonuser or abandonment, and the plaintiff is estopped from claiming any such right by lack of equity or its laches."

(6) "An injunction will never be granted where irreparable injury will be done to the defendants if the work attempted to be enjoined be stopped."

We shall make no attempt to pass upon any of these six points. We state them for the purpose of showing the nature of the controversy present in the litigation and as a preface to the brief consideration of the two remaining questions presented by respondents and upon which we shall make disposition of the appeal.

[1, 2] It is well settled that a preliminary injunction will not issue in a doubtful case.

"The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which the complainant seeks to have protected is in doubt, where the right to the relief asked is doubtful, or except in a clear case of right." 32 C. J. 36.

This rule is well recognized in this state. See *San Antonio Water Co. v. Bodenhamer*, 133 Cal. 248, 65 Pac. 471; *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530. Upon a consideration of all the matters of fact and of law which we have stated above it appears to us that the trial court was amply justified in refusing the preliminary injunction on the ground that it is doubtful what the outcome may be upon a final hearing of the cause.

[3] It is also a settled proposition of law that a preliminary injunction may not be had as a matter of right, but that the question whether such an injunction shall be granted or refused rests in the sound discretion of the court. *Flood v. Goldstein Co.*, 158 Cal. 247, 110 Pac. 916; *Lagunitas Water Co. v. Marin County Water Co.*, 163 Cal. 332, 125 Pac. 351. In the present instance we are far from being able to say that there was an abuse of discretion by the trial court in making the order which is the subject of the appeal.

Order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

65 Cal. App. 601

(224 P.)

BOICELLI v. GIANNINI. (Civ. 4724.)

(District Court of Appeal, First District, Division 1, California. Feb. 18, 1924. Hearing Denied by Supreme Court April 15, 1924.)

1. Deeds ⚡211(4)—Evidence held to support finding that a conveyance to son was not procured by undue influence.

Evidence held to support finding that aged parent's conveyance to son, to exclusion of other children, was not procured by undue influence.

2. Deeds ⚡72(7)—Conveyance from aged parent to child to exclusion of other children closely scrutinized.

A court of equity will closely scan and scrutinize a conveyance from an aged parent to one child to the exclusion of others to ascertain whether any undue influence has been exerted over the parent to acquire his confidence, and whether the confidence so acquired has been abused or betrayed.

3. Deeds ⚡68(1)—Father's absolute gift of land to son free from fraud cannot be set aside.

An absolute gift of land made by a father to his son, freely and voluntarily, in the execution of a purpose conceived by him so to dispose of the property, without the exercise of any fraud on the part of the son, and with full understanding on his part of all the facts and the effect of such a transfer, cannot afterward be set aside.

4. Deeds ⚡61—Parent's conveyance to son not set aside, though he subsequently made attempt to recall deed.

Aged father's gift of land to son to the exclusion of other children by deed delivered to third party for delivery on father's death will not be set aside in absence of fraud or undue influence, though the father subsequently attempted to recall the deed.

5. Deeds ⚡61—Grantor's delivery of deed to third party for delivery to grantee on grantor's death effectual to pass present title if such was grantor's intention.

Where grantor places deed in the hands of a third party for delivery to grantee on grantor's death, the delivery is effectual to pass a present title to the grantee, if the grantor's intention is to make such delivery absolute and place it beyond his power thereafter to revoke or control the deed, and in such case the grantor retains merely a life estate, and the third party holds the deed as a trustee for the grantee.

6. Evidence ⚡314(4)—Statements of interpreter selected by two persons speaking different languages as to their statements not hearsay.

An interpreter, who is selected by two persons speaking different languages as a medium of communication with each other, is regarded as a joint agent for that purpose, and the statements of the interpreter as to what they say in the presence of each other are regarded as the statements of the persons them-

selves, and are admissible as original evidence, and are not hearsay.

7. Vendor and purchaser ⚡228(2)—Purchaser with knowledge that grantor had previously executed deed not a bona fide purchaser.

Purchaser, who bought land with complete knowledge that vendor had previously executed a deed to his son and placed deed in the hands of a third party for delivery to son on vendor's death, held not a bona fide purchaser.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Antonio Boicelli against Mary Giannini. Judgment for plaintiff, and defendant appeals. Affirmed.

Owen D. Richardson and John P. Fitzgerald, both of San Jose, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent.

TYLER, P. J. This action was one brought to quiet title to certain real property situated in Santa Clara county, consisting of a ranch of some six acres. Both parties claim through a common ancestor, their father, Augustino Boicelli.

In support of his title plaintiff relied upon a deed of gift executed and delivered in escrow. Defendant claimed that this deed was procured by undue influence and fraud, and she charged in her pleadings that her father was of unsound mind at the date of its execution, and that it was therefore void. In her cross-complaint she asserted title through a grant, bargain, and sale deed executed by her parent to her two months before his death and some four years after the conveyance of the property to plaintiff. The consideration of this last alleged transfer consisted of her promissory notes.

Two trials were had. The first resulted in a judgment in favor of defendant. A motion for a new trial was made and granted, and judgment thereafter went in favor of plaintiff, and this is an appeal therefrom.

The principal ground relied upon for a reversal is that the evidence is insufficient to overcome the presumption of undue influence that attaches to a conveyance by a parent of advanced age when made to one of his children to the exclusion of others. This contention necessitates a review of the evidence, which is substantially as follows:

Augustino Boicelli had three children, Antonio Boicelli and Mary Giannini, the parties to this action, and another daughter, Virginia Pedemonte. On October 6, 1915, in the absence of and without the knowledge of his children Boicelli consulted one De Mattei, a business man of San Jose, with reference to the disposition of his property. De Mattei had been his friend and adviser for some 35 years. Boicelli at this time was of advanced age, being 82 years old. He informed De

Mattei that he "wanted to make out some papers, and that he desired to give certain real property to his son Antonio, and also certain other property to Mrs. Pedemonte, reserving to himself, however, the income thereof during his lifetime. De Mattei and Augustino proceeded to the offices of one Cavallaro, a lawyer familiar with the Italian language, who was advised by Augustino as to his intention. Cavallaro suggested a transfer of the property by means of deeds placed in escrow. The legal effect of such a transfer was fully explained to Augustino.

He was informed that property so conveyed would pass beyond his control, and that he would thereafter have no title in the same. This mode of transfer was satisfactory to him, so he stated; his desire being to simply retain the income in the property during his lifetime. He further stated that he wished to prevent expenses of administration. Deeds were accordingly prepared by Cavallaro, and they were signed and acknowledged by Boicelli. Escrow instructions were also prepared. The documents were left in the office of the attorney, but no delivery with intent to pass title was made at that time; Boicelli expressing the desire that he wanted his boy to see them.

Subsequently, on November 17, 1915, the son—who had no previous knowledge of his father's act—was informed concerning the same. He examined the prepared instruments, but not knowing Cavallaro he took them to James L. Atteridge, an attorney in San Jose, with whom he was acquainted, to see if they were properly executed. The father and De Mattei were present at this meeting. The older Boicelli was unable to speak or understand the English language, and De Mattei acted as interpreter for him and the attorney. Boicelli was asked by Mr. Atteridge what he wanted to do with his property, and he stated that he desired to deed certain portions thereof to his two children, Virginia Pedemonte and Antonio Boicelli, in such a way that he would be permitted to live on the property, but that title thereto would be in the children mentioned. They were not to go into enjoyment of the same until his death. Mr. Atteridge thereupon examined the instruments prepared by Mr. Cavallaro, and he advised Boicelli that they were imperfectly drawn and invalid, and would not operate to accomplish the intended purpose, as title would not pass thereunder. It was then explained to the grantor that the effect of delivering a deed in escrow was to part with all dominion and control over the same and that he would have no power thereafter to withdraw or recall it; that title would pass by virtue of delivery, and he would thereby be divested of ownership, and his only remaining interest thereafter would be his right to the reserved possession and enjoyment of the rents and profits until his death. The grantor stated that such was his

desire. Mr. Atteridge thereupon prepared escrow instructions and other documents relating to the transaction.

The grantor had expressed an apprehension that the reserved income might prove insufficient for his support. It was thereupon agreed that in this event the grantees, upon demand, should advance and pay to the grantor a sum not to exceed \$300 per annum from the date of the agreement. It may be stated, in passing, that this contingency never happened, and no demand for the fulfillment of this condition was ever made.

Boicelli was informed that accumulations might possibly accrue, and he was advised to make a will. He was asked whether or not he desired to make any provision for his daughter Mary Giannini, defendant herein, and he replied that, if she was to receive anything Antonio, the son, would have to give it to her. It was then agreed that the son should execute a note in her favor for the sum of \$500, payable upon the death of the grantor, and that like notes should be executed to each of her children for the sum of \$100. The notes were accordingly executed, and the grantor at the same time made a will, under the terms of which he left the residue of his estate in equal shares to his three children, naming them. He then executed and delivered to De Mattei a deed in escrow in favor of plaintiff to the property in question, with instructions to hold the same until his death, and then to deliver the same to his son. A like conveyance was made in favor of Virginia Pedemonte to a distinct parcel of land, now the subject of a second and independent action; there having been a severance of the two actions since the first trial.

About a year and a half after the delivery of the deeds in escrow, the grantor sought to regain possession of the same from De Mattei, but without success. Later, and on November 14, 1919, the grantor, by grant, bargain, and sale deed, conveyed to his daughter Mary Giannini, defendant herein, the property in question, and she gave her promissory notes for the entire purchase price. The property was valued in the sum of \$8,000, and one of the notes was for \$7,000, interest and principal being payable 6 years after date, a period when the father, had he lived, would have been 92 years old. Shortly thereafter Boicelli died; his death occurring in January, 1920.

From this evidence it is manifest that, if no undue influence was practiced upon the grantor in the original conveyances, the second attempted transfer is of no validity or effect, unless it can be said that defendant acquired the property as an innocent purchaser and without notice of the previous transfer.

Upon the subject of undue influence we are of the opinion that the evidence clearly shows that there is an entire absence or sug-

gestion of this element in the case. The plaintiff never knew of any intention on the part of his father to make the conveyance to him at the time the deeds were originally prepared and acknowledged, and he did not learn of his action until some time thereafter, when the original plan was carried out in its modified form, under which defendant, at plaintiff's suggestion, was benefited.

[1] We do not deem a further review of the evidence necessary, as it speaks for itself. It is clear therefrom that the grantor took independent advice, and that his act was free and voluntary, uninfluenced in any manner by the plaintiff or any one else. The evidence repels any presumption that undue influence was used by any person whatever, and fully supports the finding of the trial court that the execution of the deed to plaintiff was not accomplished by influence and fraud.

[2] We are not unmindful of the principles of equity jurisprudence with relation to such transactions. The principles are plain and well settled in this state. A court of equity will closely scan and scrutinize transactions of this character in order to ascertain whether any undue influence has been exerted over an aged parent to acquire his confidence, and whether the confidence so acquired has been abused or betrayed.

[3] In *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910, it is held that, although transactions between aged and enfeebled parents and one of several children whereby a parent conveys his entire estate to such child to the exclusion of other children dependent upon his bounty, will be watched and scrutinized with jealousy, and will generally be held presumptively void upon a showing of confidential relations, without a showing by the donor of any actual imposition upon him, and will be set aside upon the discovery of the least fraud, yet, where it is shown by the donee that the gift was freely and voluntarily made, and no imposition practiced, the conveyance will not be set aside. It is there declared that a person in possession of all his faculties has a right to dispose of his property as he sees fit, and to hold otherwise would be to establish a rule that no man could make a voluntary disposition of his estate except by will. An absolute gift of land made by a father to his son freely and voluntarily in the execution of a purpose conceived by him so to dispose of the property, without the exercise of any fraud on the part of the son, and with full understanding on his part of all the facts and the effect of such a transfer, cannot afterward be set aside. *De Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059; *Estate of Anderson*, 185 Cal. 701, 198 Pac. 407; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356.

[4, 5] Nor does the fact that deceased attempted to recall the deed in any manner affect the question. Where one makes a conveyance of property and places it in the

hands of a third party, to be delivered to the grantee named in it on the death of the grantor, such delivery is effectual to pass a present title to the property to the grantee, if the intention of the grantor is to make such delivery absolute and place it beyond his power thereafter to revoke or control the deed. Where a delivery is made under these circumstances, it is fully operative and effective to visit a present title in the grantee, the grantor retaining only a life estate in the property, and the third party or depository holds the deed as a trustee for the grantee named therein. *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703.

Here there is no question that an absolute delivery had been made; and, this being so, it was beyond the power of the grantor to recall his act, and his attempt to do so availed him nothing. *Smith v. Smith*, 173 Cal. 730, 161 Pac. 495.

Appellant insists that the trial court erred in admitting the testimony of the witness Atteridge as to what he told the grantor and what the grantor said in reply, it being hearsay. This claim is based upon the fact that the information was imparted and received through an interpreter.

[6] There is no merit in this contention. The grantor did not understand and was unable to converse in the English language. An interpreter who is selected by two persons speaking different languages as a medium of their communication with each other is regarded as their joint agent for that purpose, and the statements of what they say in the presence of each other are regarded as the statements of the persons themselves (*Kelly v. Ning Yung Ben Ass'n*, 2 Cal. App. 461, 467, 84 Pac. 321; 10 R. C. L., p. 930), and such statements of the interpreter are admissible as original evidence and are in no sense hearsay (2 Jones, Com. on Ev. § 267; *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813).

We are cited to *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063; *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 324; and *People v. Ong Git*, 23 Cal. App. 155, 137 Pac. 283, as opposing this rule. It will be noted that these are criminal cases. Different considerations control in criminal trials. There the interpreter is not the agent of the parties but the officer of the court. The cases have no analogy. 2 Jones, Com. on Ev. p. 481.

Moreover, the testimony of Atteridge concerning the details and surrounding circumstances of the execution and delivery of the deeds was cumulative and in full accord with other testimony upon the subject which in itself is sufficient to support the judgment.

[7] The suggestion that defendant was a bona fide purchaser is without merit. The evidence shows that she had complete knowledge of the acts of the grantor and his disposition of the property as early as the year

1918, which was prior to the alleged conveyance to her.

In conclusion, it may be stated that the evidence is amply sufficient to support the conclusion of the court below that the conveyance here involved was the voluntary act of the grantor free from any undue influence. This being so, it follows from what has been said that the judgment should be and it is hereby affirmed.

We concur: ST. SURE, J.; SHORT, Justice pro tem.

65 Cal. App. 561

REDWOOD HIGHLANDS CO. et al. v. TOWN OF REDWOOD CITY et al.
(Civ. 4682.)

(District Court of Appeal, First District, Division 2, California. Feb. 13, 1924. Hearing Denied by Supreme Court April 10, 1924.)

1. Municipal corporations — 514(7)—Additional assessment to pay interest on bonds held unauthorized.

Where a local improvement district of a city issued bonds under the Local Improvement Act of 1901, for a term of 10 years instead of one of 9 years as should have been done, the taxpayers being given 9 years to make their payments, a second assessment to make up the deficiency in interest was unauthorized; the written agreements of the taxpayers made at the inception of the improvement proceeding providing a special fund for the payment of such improvement which could not be exceeded.

2. Municipal corporations — 514(7)—Neither municipality nor bondholders can create additional burden by failing to call in or present bonds.

Where local improvement bonds have been issued under the Local Improvement Act of 1901, the municipal officers cannot by failing to call in the bonds, and the bondholders cannot by failing to present their bonds, create an additional burden on the taxpayers not assumed by them by contract and not created by the statute.

3. Judgment — 702—Judgment in mandamus held not to bar suit to enjoin levy of special improvement assessment.

A judgment in a mandamus proceeding, by bondholders against the board of trustees of a municipal corporation, requiring defendants to levy a second assessment to pay interest on local improvement bonds, held not to bar a subsequent suit to enjoin such second assessment on the ground that it had no basis to support it; the parties in the two proceedings not being the same, a different thing being litigated in a different capacity, and it not appearing that plaintiffs in the suit for injunction had notice of the pendency of the mandamus proceeding, in view of Code Civ. Proc. § 1908.

Appeal from Superior Court, San Mateo County; Benj. K. Knight, Judge.

Suit by the Redwood Highlands Company and others against the Town of Redwood City and others, to restrain levying of assessment for street work. Judgment for defendants, and plaintiffs appeal. Reversed.

H. W. B. Taylor, of San Anselmo, and Thos. P. Boyd, of San Rafael, for appellants.

Albert Mansfield, of Redwood City, and Theodore J. Savage, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to obtain an injunction restraining the defendants from proceeding to cloud the title of the plaintiff landowners by a purported assessment for local improvements. Judgment went for the defendants, and the plaintiffs have appealed, bringing up the judgment roll and a bill of exceptions.

The record presents no question regarding the sufficiency of the pleadings. No witness was examined on the trial, but all matters were stipulated to in a written stipulation executed by the parties and filed of record. The stipulation was so drawn that many facts alleged in the pleadings are referred to as paragraphs of the complaint or answer, as the case may be, and then in addition to such stipulations many probative facts were also stipulated to. It will not be necessary for us to recite the facts admitted in the pleadings and separate them from facts otherwise admitted in the record. As the case was tried upon an agreed statement of facts, counsel stipulated that the trial court need not make any findings, and none were made.

Except as hereinafter stated, the record discloses facts showing that early in April, 1909, the board of trustees of the town of Redwood City commenced proceedings looking toward the creation of two local assessment districts, thereafter numbered 13 and 14. The proceedings were had under "The Local Improvement Act of 1901." Stats. 1901, p. 34. A resolution was passed on the 19th day of April, 1909, referring the contemplated work to a civil engineer; on the 7th day of September, 1909, the engineer filed his report, and on the same date the board of trustees, with the exception of changing the names of certain streets in the district, adopted the report of the engineer and set the 18th day of October, 1909, as the time for parties interested to show cause, if any they had, why the improvements should not be carried out; that a hearing was had on the date last mentioned, and on the 20th of October the clerk transmitted to the tax collector the map, etc. The tax collector thereupon set the 12th day of January, 1910, as the date of sale. That, as provided in section 13 of the statute above mentioned, before January 12, 1910, the owners filed written agreements waiving objections and promising to pay in ten payments, the first one on

date of agreement and one each year for 9 years. Each of said agreements contained a paragraph as follows:

"This agreement is made with the understanding and upon the condition that the entire unpaid balance of said installments of principal may be paid at any time before maturity, together with interest on all deferred payments until the date of maturity of the installment next falling due."

After the notice of sale above mentioned and after having received the installment agreements, the tax collector reported to the board of trustees, and the board of trustees ordered issued, bonds worded as provided in section 18 of the statute above referred to. The bonds were dated January 2, 1910, and a sample copy was as follows:

"United States of America, State of California.

"No. 2. Town of Redwood City. \$1,000.

"Local Improvement Bond, District No. 14.

"Under and by virtue of an act of the Legislature of the state of California entitled 'An act to provide for local improvements upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities, such act to be known as the local Improvement Act of 1901' (which became law under constitutional provision without Governor's approval February 26th, 1901, Statutes of 1901, page 34), the town of Redwood City, out of the fund hereinafter referred to, will pay to the bearer the sum of one thousand dollars, United States gold coin of the same weight and fineness as that now issued from the mints of the United States of America, with interest thereon in like gold coin, at the rate of seven (7) per cent. per annum, all as hereinafter specified, and at the office of the treasurer of said municipality.

"This bond is payable exclusively from street improvement fund number 14, and neither the municipality, nor any officer thereof, shall be holden for payment otherwise of its principal or interest; and installments of principal and interest accruing hereon shall be payable out of any moneys in said fund at the date of their maturity, in order of presentation, and shall be secured by all agreements and liens provided for by this act and arising out of the improvement to which said fund relates. The term of this bond is ten (10) years from its date, and at the expiration of said time, the whole sum then unpaid shall be due and payable; but on the second day of January of each year after its date, an even annual proportion of its whole amount is due and payable, upon the presentation of the coupon therefor, until the whole is paid, with all accrued interest, at the rate of seven (7) per cent. per annum.

"The interest is payable semiannually, to wit: On the second days of January and July in each year hereafter, upon the presentation of the coupons therefor, the first of which is for the interest from date to the next second day of July, and thereafter the interest coupons are for semiannual interest, except the last, which is for interest from the semiannual payment next preceding and to the date of the final maturity of this bond. Should default be made in

the annual payment upon the principal, or in any payment of interest, the holder of this bond is entitled to declare the whole unpaid amount to be due and payable, and to have all liens and agreements which are security for said fund and are enforceable, immediately enforced in payment thereof. The principal hereof may be paid, at the option of said municipality, at any time before maturity. Notice of such redemption must be published by the treasurer of said municipality once in some newspaper of general circulation, published in said municipality, or at the county seat of the county in which the same is located, and at the expiration of one month from said publication, interest on all principal sums covered by such notice shall cease.

"At said town of Redwood City, county of San Mateo, state of California, the 2d day of January, in the year one thousand nine hundred and ten. George A. Merrill, President of the Board of Trustees of the town of Redwood City. [Seal] F. K. Towne, Treasurer of the Town of Redwood City."

As to both districts it is stipulated:

"That the said tax collector proceeded to and did collect all of said assessments and all the installments which have fallen due under the said installment agreements."

As to both districts it appears that many of said agreements were paid, both principal and interest, before maturity. It is stipulated that the first assessment included the cost of doing the work by the contractor and all the incidental expenses incurred in connection with the work, such as clerical, engineering, inspecting, printing, and advertising. This leaves the item of interest as the sole debatable matter.

Commencing on December 15, 1919, the board of trustees of the town of Redwood City commenced, and since then have proceeded to, and unless restrained by a judgment in this action will proceed to levy a second assessment to collect a deficit of \$4,590.66 and incidental expenses in collecting the same in the further sum of \$225, as and for district No. 13; and to collect \$2,008.94 and like incidental expenses in the further sum of \$205, as and for district No. 14. In so doing the municipal officers are acting under the assumption that it is their duty so to do by virtue of the provisions of section 20 of the Local Improvement Act of 1901. Stats. 1901, p. 42. That section provides as follows:

"In case the first assessment for any local improvement prove insufficient, a second may be made in the same manner as nearly as may be, except that no protest shall be entertained upon subject matter already decided in the first hearing, and so on until sufficient money shall have been realized to pay for such local improvement."

As just stated above, the record discloses that in neither district was any item of the cost of the improvements omitted; but that the assessment covered every single item unless it may be said that an item of interest was omitted. We confine our consideration

therefore to the subject of interest. No interest item mentioned in the statute was omitted. It is not claimed that any item of interest was omitted from the written agreements of the taxpayers or that the taxpayers have not fully paid all interest in accordance with their written agreements. If any item of interest arises, it arises therefore as on the face of the bonds as distinguished from the statute and all of the other proceedings had under the statute.

It requires but a reading of the statute to see that it provides two sets of written instruments: First, the taxpayer's written agreement, which is an obligation between him and the municipality; and, second, certain bonds which are an obligation between the bondholders and the municipality and the forms of which are prescribed by the statute. Moreover, it is clear, from the provisions of the statute and the provisions of the instruments just mentioned, that the municipality and its officers are acting merely as agents and are assuming no liability. Furthermore it is patent that the statute provides a liability as to the taxpayers which is stated in their written agreements just mentioned, and certain rights as to the bondholders which are stated in each bond. Although it is not expressly so provided, it is clear beyond the peradventure of a doubt that the right of the bondholder to receive interest is coextensive with the liability of the taxpayer to pay interest—no more and no less. Otherwise we would be holding that the taxpayer can be compelled to pay interest for the use of moneys covering a period of time that the district had no such use. If such power was to be conferred, the same must needs be expressed clearly and not left to implication. On this point the respondents contend that the statute gives authority to the board of trustees to fix the number of deferred payments in which the taxpayer must pay his assessment and that it likewise gives the board of trustees the power to fix the term of the bonds not exceeding ten (10) years and that the acts of the board of trustees done within such granted powers cannot be said to be in excess of its jurisdiction. The vice in the argument rests in the quantum of power assumed to be granted. The statute is one dealing with the power to construct local improvements and to pay therefor. Although the statute does not expressly state that the power to tax the property owner must be so exercised as to conform to and be limited by the amount of the costs and interest, nevertheless such was the clear meaning of the statute.

[1] For the payment, and to secure the payment, of principal and interest to the bondholders, the statute provides for the execution, acceptance, and preservation of the written agreements of the taxpayers. Those papers provide a special fund. The statute and the face of the bonds in the form prescribed

by the statute, makes the bonds, both principal and interest, payable out of said special fund. The maximum amount of the special fund cannot exceed the amount of the principal and interest thereon for the lawful term of the bonds. It may be less, because the taxpayer is expressly authorized to anticipate the payment of the principal of his obligation and thus terminate his future liability as to interest. There is no recital in the bonds that precludes a consideration of any of the above matters. The bonds on their face recite that they were issued under the statute mentioned. All of the proceedings and the statute were of record. A slight examination of the records would have disclosed that the bonds were issued for a term of 10 years, whereas, under the facts, the term should have been 9 years. As the taxpayers were given 9 years in which to make their payments, there was no authority for issuing bonds under terms that would create a greater burden on the taxpayers. The exercise of an unauthorized power imposes no obligation. And, under the facts presented by this record, it is clear that, to the extent that the bonds purported to bear interest for the tenth year, the bonds created no obligation. But the purported interest on the face of the bonds for the unauthorized year is a part, at least, of the ground asserted by the respondents as supporting their right to levy the alleged supplemental assessment. To the amount of the tenth year's interest there was no basis for the second assessment.

[2] The appellants contended that, when the property owners in paying their assessments exercised the right of making the deferred payments in advance, the moneys so paid in were allowed to lie idle and bonds were not presented nor called in for payment as the statute contemplated, and call attention to the last sentence contained in the statutory form of bond. The respondents in their briefs seem to admit the fact, but claim that the fact is immaterial. We do not agree with this claim. The municipal officers could not by failing to call in the bonds, and the bondholders could not by failing to present their bonds, create an additional burden on the taxpayers which the taxpayers did not by contract assume and which was not created by the provisions of the statute. The bondholders were presumed to know the statute and to know the provisions of the bonds. *Village of Wilmette v. People*, 214 Ill. 107, 73 N. E. 327, 329.

[3] The respondents interposed a plea claiming that a certain judgment was a bar. That judgment was rendered by the First Division of the District Court of Appeal in a mandamus proceeding commenced on the 18th day of October, 1919, by L. N. Jesson and E. R. Jesson, as bondholders, against Clark K. Mabie et al., as the board of trustees of the town of Redwood City, a municipal corporation. In the judgment rendered the court

held that the defendants should under the facts pleaded in the mandamus proceeding proceed to levy the second assessment which is involved in this case. It is not alleged that the appellants were parties to, or successors in interest by title subsequent to the commencement of the mandamus proceeding, or that the appellants are litigating for the same thing in the same capacity, or that they had notice, actual or constructive, of the pendency of the mandamus proceeding. The appellants were not bound thereby. Code Civ. Proc. § 1908. In the mandamus proceeding the town of Redwood City and its officers were proceeded against, not as the representatives of all of the taxpayers of said town, or of any taxpayers, but as the agents of district No. 13 and district No. 14, which districts, as entities, at all times stood as opposed to, and not as parties with, or the predecessors of, these appellants. The plea had no merit.

The purported second assessment had no basis to support it. The judgment is reversed, and on the agreed statement of facts the trial court is directed to enter judgment for the appellants for their costs.

We concur: LANGDON, P. J.; NOURSE, J.

65 Cal. App. 581

MARTIN v. MILLER, Superior Court Judge.
(Civ. 2800.)

(District Court of Appeal, Third District, California. Feb. 13, 1924. Hearing Denied by Supreme Court April 10, 1924.)

Appeal and error § 82(3)—**Certiorari** § 5
(1)—**Order held appealable, and review could not be had by certiorari; "special order made after final judgment."**

An ex parte order, setting aside a judgment on the ground that it had been entered through inadvertence upon representation that a stipulation was on file authorizing its entry, when in truth and in fact there was no such stipulation on file, but instead an offer of compromise which had not been accepted as provided by Code Civ. Proc. § 997, was appealable as a "special order made after final judgment," under section 963, and review could not be had by certiorari, in view of section 1068.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

Application by Alfred Martin for certiorari to review an order of the Superior Court of San Joaquin County; C. W. Miller, Judge. Application dismissed.

Hearing denied by Supreme Court.

Myers, C. J., disqualified, and not participating.

A. H. Carpenter, of Stockton, for petitioner.
Lawrence C. Kelley, of Los Angeles, for respondent.

FINCH, P. J. This is an application for a writ of review.

In an action pending in the superior court, wherein petitioner was plaintiff and Union Oil Company of California and others were defendants, judgment was entered on the 15th day of January, 1924, in favor of plaintiff and against said defendant company for the sum of \$428.44 and costs of suit. The judgment recited that—

"On the 14th day of March, 1923, the said defendant Union Oil Company of California, by and through its said attorneys, Cooney and Kelley, filed with the clerk of this court its written stipulation, wherein and whereby the above-entitled court was authorized and directed to render judgment herein in favor of the plaintiff, and against it, the said Union Oil Company of California, in the sum of \$428.44, and costs of suit."

On the 22d day of January, 1924, on the ex parte motion of the defendant company, the court made the following order:

"The motion of defendant Union Oil Company of California, for an order vacating and setting aside the judgment made and entered herein on January 15, 1924, came on regularly for hearing this day, and, it appearing to the satisfaction of this court that through inadvertence and ex parte a judgment was entered herein upon the representation of A. H. Carpenter, Esq., counsel for plaintiff, that a stipulation was on file herein authorizing the entry of said judgment, when in truth and in fact there was no such stipulation on file, but instead an offer of compromise, which had not been accepted as provided by section 997 of the Code of Civil Procedure of the state of California, and the matter being submitted to this court for consideration and decision—it is hereby ordered that the judgment heretofore made and entered herein on January 15, 1924, be and the same is hereby vacated and set aside."

Petitioner contends that the court was without jurisdiction to make the aforesaid order on an ex parte application. It need not be determined whether or not the court had such jurisdiction. The order is appealable as a "special order made after final judgment." Code Civ. Proc. § 963; *Livermore v. Campbell*, 52 Cal. 75; *Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476; *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473. Section 1068 of the Code of Civil Procedure provides that a writ of review may be granted when an inferior tribunal has exceeded its jurisdiction, "and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." In *Hildebrand v. Superior Court*, 173 Cal. 86, 89, 159 Pac. 147, 149, it is said:

"It has uniformly been held by this court, in accord with the provisions of section 1068 of the Code of Civil Procedure, that if a party has the right of appeal from an order in excess of jurisdiction, he cannot have such order reviewed in certiorari proceedings."

The proceeding is dismissed.

We concur: PLUMMER, J.; HART, J.

65 Cal. App. 617

Ex parte GILLE. (Cr. 1072.)

(District Court of Appeal, Second District, Division 2, California. Feb. 19, 1924. Hearing Denied by Supreme Court April 15, 1924.)

1. Bastards ⇨15—Mother entitled to custody of illegitimate unmarried minor, unless her character and surroundings make her unfit.

Under Civ. Code, § 200, the mother of an illegitimate, unmarried minor is entitled to the custody of her child, unless her character or her surroundings are such as to unfit her therefor, and the mere fact that respondents, who have possession of the child, possess more wealth than she, and for that reason are able to give the child better educational advantages, is not ground for depriving the mother of the right to the custody of the child.

2. Habeas corpus ⇨117(1)—To what extent final adjudication as to custody of child is res adjudicata.

The final adjudication on a writ of habeas corpus, brought to determine the right of a parent or guardian to the care and custody of a minor child, conclusively determines all questions necessarily involved as between the same parties and upon the same state of facts.

3. Habeas corpus ⇨99(3)—Parents' right to child must yield to child's best interest.

While the parent has the superior right to a child, that right must yield to the child's best interest, so that in all proceedings on a writ of habeas corpus to obtain the custody of a child the cardinal consideration is the welfare of the child.

4. Habeas corpus ⇨117(1)—Adjudication involving right to custody of minor child is binding only so long as facts remain same.

An adjudication in a habeas corpus proceeding, involving the right to the custody of a minor, is res adjudicata and binding upon the parties only so long as the facts are the same and the conditions affecting the child's welfare or the parents' rights exist as they were when the hearing was had and the order made.

5. Habeas corpus ⇨120—Former adjudication held not res adjudicata in subsequent proceeding because of changed facts.

Former adjudication in habeas corpus proceeding to obtain custody of petitioner's illegitimate minor child, in which the writ was dismissed, held not conclusive in subsequent similar proceedings for the same purpose, where, since the order dismissing first writ, respondents

sought to keep petitioner, the mother, in ignorance of their present place of abode so as to deny her the privilege of visiting and seeing the child, and formed a settled purpose to teach the child to shun her mother.

6. Bastards ⇨15—Mother of illegitimate unmarried minor held entitled to custody of child.

Mother of an illegitimate minor child, which was placed with respondents under an agreement to care for and board it, for a stated consideration per month, held entitled to custody of child under Civ. Code, § 200, on evidence that the mother's character, aside from fact of giving birth to child out of wedlock, was unimpeachable, and that she and her husband were able to give child a suitable home with fit and proper surroundings.

Original application for writ of habeas corpus by Theresa Marie Louise Gille against William S. Jenkins and wife. Writ granted.

Paul Blackwood, of Los Angeles, for petitioner.

Newby & Palmer, of Los Angeles, for respondents.

FINLAYSON, P. J. This is a proceeding in habeas corpus to obtain the custody of a 10 year old girl, the daughter of petitioner, who applied for the writ on behalf of the child. Certain unusual features set forth in the mother's petition, but which are not necessary to narrate, induced this court to exercise its original jurisdiction in this instance.

The child was born out of wedlock. Her mother, née Claudia Gille, is now married to Rudolph Hagberg, an artist, whose earnings are sufficient to support himself, his wife, and the child. In October of 1915 the mother placed the child in the care and custody of the respondents to the writ, William S. Jenkins and Edna A. Jenkins, husband and wife, who reside in the city of Los Angeles and who assumed the obligation to care for the child and to board it under an agreement whereby the mother agreed to pay respondents the monthly sum of \$13. The parties lived up to the terms of this agreement for a number of years following the arrangement. During this time petitioner, who was working in a laundry, frequently called at the home of Mr. and Mrs. Jenkins to see her little girl. Until about a year or a year and a half ago Mr. and Mrs. Jenkins permitted these visits without let or hindrance. At no time has petitioner evinced any intention to abandon her infant daughter or to part permanently with the right to her custody and control.

On July 10, 1922, petitioner made application to the superior court of Los Angeles county for a writ of habeas corpus, praying for the custody of her child. The writ was issued, Mr. and Mrs. Jenkins made return thereto, and the matter was heard, with the

result that an order was made on the 21st day of July, 1922, dismissing the writ.

Respondents, who possess more of this world's goods than does the mother or her husband, are deeply attached to the little girl. They have taken care of her for more than eight years, and earnestly desire to continue so to do. The child is happy and contented, and desires to remain with her foster parents.

Petitioner seems to have atoned for the one slip which resulted in the birth of this child of illicit intercourse, and her life since then appears exemplary in every particular. She is happily married to her husband, and the couple are living in a comfortable and well-regulated home. The mother's desire to have her child with her meets with the husband's approval. Though respondents would have us believe otherwise, we feel confident that the mother's wish to regain the care and custody of her offspring is prompted by no motive other than a genuine parental affection and the desire to discharge a duty imposed upon her by the laws of God and man.

[1] The mother of an illegitimate unmarried minor, unless her character or her surroundings are such as to unfit her therefor, is entitled to the custody of her child. Civ. Code, § 200. In the present instance the mother's character, aside from the one lapse which resulted in the birth of this child out of wedlock, seems to be unimpeachable. She is able to give her daughter a suitable home with fit and proper surroundings. The mere fact that respondents possess more wealth than she, and are for that reason able to give the child better educational advantages, affords no reason why the mother should be deprived of the right to the custody of her child—the bone of her bone and flesh of her flesh.

"A parent who is of good character and a proper person to have the custody of the child and reasonably able to provide for it is entitled to the custody as against other persons, although such others are much attached to the child, and the child is attached to them, and prefers to remain with them, and they are in all respects suitable to have the custody of the child and able to support and care for it, and even though they are of larger fortune or able to provide for the child more comfortably than the parent, or to care for it better, or to give it a better education than the parent can afford." 29 Cyc. p. 1590.

See, also, *Matter of Schwartz*, 171 Cal. 633, 154 Pac. 304.

It follows from what we have said that petitioner is entitled to have the custody of her child awarded to her in this proceeding, unless, as claimed by respondents, the order made by the superior court in the habeas corpus proceeding which was before that court in 1922 is res adjudicata and conclusive upon petitioner's parental rights.

[2-4] A final adjudication on a writ of habeas corpus brought to determine the right of

a parent or guardian to the care and custody of a minor child conclusively determines all questions necessarily involved, as between the same parties and upon the same state of facts. *Ex parte Holt*, 34 Cal. App. 290, 167 Pac. 184; *In re Frazier*, 50 Cal. App. 45, 194 Pac. 510. From its very nature the adjudication in such a proceeding can operate only upon those existing facts and conditions which affect the well-being of the child and the rights of the parent or guardian. In all such proceedings the welfare of the child is the cardinal consideration, and it not infrequently is controlling. The parent has the superior right to the child, but that right must yield to the child's best interests. *In re Jones*, 153 N. C. 312, 69 S. E. 217, 138 Am. St. Rep. 670; note to *Clark v. White*, Ann. Cas. 1914A, p. 750. The conditions which determine the welfare of a child are not necessarily permanent. They often change. For this reason it has been said that a judgment or decree awarding the custody of an infant child is in its nature temporary, and applies only to existing facts and conditions. Note to *Miller v. Gordon*, Ann. Cas. 1916D, p. 511; *Willis v. Bell*, 86 Ark. 473, 111 S. W. 808. Hence it is that an adjudication in a habeas corpus proceeding involving the right to the custody of a minor is res adjudicata and binding upon the parties only so long as the facts are the same and the conditions affecting the child's welfare or the parents' rights exist as they were when the hearing was had and the former order was made. So the authorities hold with practical unanimity. See *Watts v. Smylie*, 116 Miss. 12, 76 South. 684; *Martin v. Benzie* Circuit Judge, 200 Mich. 549, 167 N. W. 13; *People v. Mercein*, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256; note to *Miller v. Gordon*, supra, Ann. Cas. 1916D, p. 511.

[5] There is evidence before us to indicate that subsequently to the order of the superior court in 1922 dismissing the habeas corpus writ then before that court Mr. and Mrs. Jenkins sought to keep petitioner in ignorance of their present place of abode, that thus the mother might be denied the privilege of visiting and seeing her infant daughter. There also is evidence that respondents, since the adjudication in the former proceeding, have formed a settled purpose to teach the child to shun her mother's presence and to shrink from her in affright. Such conduct on the part of respondents ignores the mother's natural rights. Though denied the right to the custody of her child by the former order, the mother still had rights which the respondents to this writ were bound to respect while the child was in their custody and subject to their control and guidance. Respondents' conduct wronged the child as well as its mother. The child's present unfilial attitude is not natural. We can account for it only upon the

theory that it was engendered by words and acts on the part of respondents designed to poison the child's mind and to teach her to fear, if not to hate and despise, her own mother, who, though she may have sinned when a young woman, had gone down into the valley of the shadow of death that her child might be born.

The change which has occurred in the child's attitude toward her mother since the adjudication in the former habeas corpus proceeding—a change for which respondents unquestionably are responsible—and respondents' evident purpose to conceal the child, and to keep the mother in ignorance of its whereabouts, so far affect the mother's rights, to say nothing of the child's well-being, that respondents no longer should be permitted to occupy a status which enables them to mold the little girl's thoughts and feelings and to shape her future. For this reason we think that new facts have arisen, and that a change of circumstances has occurred materially altering the state of the case and the relative claims of the parties, and that, therefore, the judgment of the superior court in the former habeas corpus proceeding is not conclusive in the present proceeding. See *Martin v. Benzie* Circuit Judge, *supra*.

[6] It is ordered that the minor, Theresa Marie Louise Gille, be released from the care, custody, and control of William S. Jenkins and Edna A. Jenkins, and that Claudia Hagberg, the petitioner herein, have the care, custody, and control of said minor.

We concur: WORKS, J., CRAIG, J.

65 Cal. App. 661

CONNER v. GARRETT. (Civ. 2675.)

(District Court of Appeal, Third District, California. Feb. 21, 1924.)

1. Appeal and error ⇨931(1)—Truth of facts found by lower court assumed on appeal.

Facts found by lower court on conflicting evidence must be assumed to be true on appeal.

2. Mines and minerals ⇨70(2)—Rights of owner and operator as fixed by agreement remained unchanged on operator's continued operation after termination of agreement.

Where operator of mine, on expiration of term of contract with owner of land, providing for payment to the owner of a royalty depending upon the grade of ore removed, continued, with owner's consent, to occupy the mine without a new agreement as to the royalty, their respective rights as fixed by the agreement remained unchanged, in the absence of an agreement to the contrary, regardless of whether the agreement was a lease or a mere license to work the mining property on a royalty basis.

3. Appeal and error ⇨1051(1)—Error in admission of evidence held harmless, in view of inference justified by other evidence.

In action by owner of land against operator of mine thereon to recover gold extracted subsequent to expiration of agreement between the parties fixing the royalty to which owner was entitled, in which the evidence showed that the operator continued to operate the mine after expiration of such agreement with the owner's consent, without a new agreement as to royalty, admission of testimony that the owner stated that the operator might continue to mine under the terms of the lease, if error, was harmless, since, in the absence of evidence to the contrary, it was to be inferred that the parties understood that the gold produced thereafter was to be divided on the basis specified in the agreement.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Suit by James G. Conner against Charles Garrett. Judgment giving plaintiff insufficient relief, and he appeals. Affirmed.

Jesse W. Carter, of Redding, for appellant.

Orr M. Chenoweth and Chenoweth & Leininger, all of Redding, for respondent.

FINCH, P. J. The plaintiff sued to recover the value of one-half of the gold extracted by defendant from certain mining property belonging to plaintiff. He was given judgment for 15 per cent. of the gold so extracted, and he prosecutes this appeal from the judgment.

[1] In the year 1911 the defendant went into possession of the property under an oral agreement to prospect and mine the same and to pay to plaintiff a royalty of from 10 to 25 per cent., depending upon the grade of ore removed. Defendant conducted mining operations upon the property under this oral agreement until March 10, 1917, when he was given a written lease thereof for a term ending September 10, 1918. The lease provided that "the lessor, in consideration of the rents, royalties, covenants and agreements hereinafter reserved, let unto the lessee" the said mining property "together with the appurtenances to have and to hold," etc.; that the lessee should work the mine continuously and pay the lessor "15 per cent. royalty on all ores extracted from said mine; to timber the mine and repair old timbering when necessary; to not assign this lease, or any interest thereunder; * * * to deliver up to the lessor the premises with the appurtenances and all improvements in good order and condition * * * without demand or further notice, on said 10th day of September, 1918, at noon or any time previous, upon demand for forfeiture;" that "upon the violation by the lessee, of any covenant reserved the term of lease may, at the option of the lessor, expire and the lease and premises with the appurtenances shall become for-

feited to the lessor." The defendant mined the property under the lease until the end of the term thereof. Plaintiff testified that he then informed defendant that the lease "was unsatisfactory and it would not be continued," that plaintiff "would not tie up the property any further." The defendant denied this testimony and testified: "He told me when the lease expired just to continue in my work the same as always." There is no dispute as to defendant's occupancy and operation of the property after the termination of the written lease in the same manner as before, except as to the last four weeks thereof. The parties made no agreement as to the terms upon which the defendant was to operate the mine after the expiration of the written lease, but the plaintiff had full knowledge of the defendant's operation thereof, and it is clear that he acquiesced therein. There is no contention here to the contrary. Pursuant to an understanding between the parties, the plaintiff, from time to time, shipped the gold taken from the mine, and after deducting from the proceeds the royalty to which he was entitled, he deposited the remainder to the credit of defendant in a local bank. From September 10, 1918, to August, 1920, the defendant and another person working with him obtained gold to the total value of but \$78.80, although, according to defendant's testimony, he was engaged in prospecting and mining the property during all but about three months of that time. Plaintiff shipped this gold as usual, but gave all the proceeds to defendant and his associates. Plaintiff testified that he did not take out his percentage in this instance because he "thought they needed it." During the month of August, 1920, gold to the value of nearly \$1,600 was extracted, and the present controversy is over the division thereof. The whole of the month of August seems to have been consumed in taking out this gold. Plaintiff testified that he called defendant's attention to the pocket from which this gold was taken about the 1st of August, 1920, and that they mined it together. The defendant testified that he had discovered the pocket two or three weeks before the 1st of August, and that he had taken practically all of the gold therefrom before the plaintiff had knowledge thereof. Defendant admitted that plaintiff did four or five days' work in connection with the extraction of the gold found in this pocket and in timbering the tunnel, but testified that he did not request plaintiff to do the work, and that it was in part such as plaintiff had been accustomed to do at other times of clean-up. Since the court found in accordance with defendant's testimony, it must be assumed to be true on appeal.

[2] Appellant contends that the instrument referred to herein as a lease was not such in fact but was "a mere license to work the mining property on a royalty basis." The

character of the instrument, for the purposes of this case, seems to be unimportant. If it be called a lease, as in *Northern Light Min. Co. v. Blue Goose Min. Co.*, 25 Cal. App. 282, 292, 143 Pac. 540, a license, as in *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; or a contract of employment, as in *Hudepohl v. Mining & Water Co.*, 80 Cal. 553, 558, 22 Pac. 339, the result is the same. The agreement created a relation between the parties for a given time, out of which there arose reciprocal rights. When the parties, after the expiration of the time so limited, continued the relation by mutual consent, whether express or implied, it is to be inferred, in the absence of evidence to the contrary, that their respective rights growing out of that relation remained unchanged. This principle finds illustration in case of leases and contracts of employment. The question is not that of a renewal of the relation for a definite time, as in case of holding over and payment and acceptance of rent after the expiration of the term of a lease, but of the rights of the parties during the time they voluntarily maintain the relation after the expiration of the term agreed upon.

"As a general rule the tendency arising from the tenant's holding over with the consent of the landlord is presumed to be upon the same terms as the original lease, so far as they are applicable to the new tenancy. Thus it is generally held that the terms of the original lease as regards the amount and time of payment of the rent apply." 16 R. C. L. 1161; *Underhill on Landlord and Tenant*, § 143; *Tiffany on Landlord and Tenant*, § 210.

"If persons have contracted for the performance of certain services for a definite period at a fixed rate, and the employment continues beyond the period agreed upon, in the absence of any new contract it will be presumed that the employment continued under the same contract and upon the terms originally fixed." 18 R. C. L. 533.

"The rule of law applicable in such cases is, that where the person hired continues in employment without any new contract, the fair presumption is that both parties understood that the same salary is to be paid." *Nicholson v. Patchin*, 5 Cal. 475.

After the decision last cited was rendered, the Legislature embodied the rule therein stated in section 2012 of the Civil Code. If the contract here involved be treated as a mere license to conduct mining operations upon the terms therein provided, no reason appears why the foregoing rule should not be applicable to a voluntary continuation of the relation after the period originally agreed upon.

[3] It is urged that the court erred in permitting witnesses for defendant to testify that, at the time the written lease was executed, the plaintiff stated that defendant might continue to mine the property under the terms of the lease after the expiration thereof. If it be conceded that the admis-

sion of such testimony was error, the plaintiff suffered no possible prejudice therefrom, because, as stated, in the absence of evidence to the contrary, it is to be inferred that the parties understood that the gold produced by defendant's operation of the mine after the time provided in the written agreement was to be divided in accordance with the terms of that instrument.

The judgment is affirmed.

We concur: SHIELDS, Justice pro tem.;
PLUMMER, J.

declaring the forfeiture, was argued at some length in vendor's suit to eject vendee, the appellate court made such assumptions in defendant's behalf, on his appeal from a judgment for plaintiff, as would allow application of his statement of such questions to all questions toward which he conceivably intended to direct it, though it was not directed at any finding as without evidentiary support or any error of law and appellant did not so direct any of it in his argument.

3. Vendor and purchaser ⇨299(3)—Findings as to agreements to extend time for payments and as to demands for payment held supported by evidence.

In ejectment by vendor against vendee, evidence held to support findings that the parties never agreed on extensions of time to pay installments of the purchase price; that vendee did not plant and care for any crop pursuant to any such agreement; and that vendor demanded payment of amounts due at various times before declaring a forfeiture.

4. Vendor and purchaser ⇨95(2)—Vendor's acceptance of less than amount of installment due held not waiver of right to declare forfeiture.

Vendor's acceptance of less than the sum due on an installment of the purchase price held not a waiver of his right to declare a forfeiture for nonpayment of the balance and a subsequent installment.

Appeal from Superior Court, Imperial County; S. M. Marsh, Judge.

Action by Daniel W. Shoemaker against Ashton S. Cooke and others. Judgment for plaintiff, and defendant Cooke appeals. Affirmed.

Guy L. Rockwell and H. B. Stewart, both of Brawley, for appellant.

Burke & Tatlow, of Los Angeles, and Banta & Banta, of El Centro, for respondent.

(65 Cal. App. 576)

SHOEMAKER v. COOKE et al. (Civ. 4458.)

(District Court of Appeal, Second District, Division 2, California. Feb. 13, 1924.)

1. Vendor and purchaser ⇨299(2)—Issue whether vendor should have sued to foreclose crop mortgage before suing vendee in ejectment held not in case.

In ejectment by vendor against vendee, where existence of a crop mortgage which defendant agreed to execute to plaintiff was not alleged, evidence thereof was objected to, and no finding was made on the subject, plaintiff was entitled to judgment without having sued to foreclose the mortgage whether or not Code Civ. Proc. § 726, permitting but one action for recovery of a debt or enforcement of rights secured by mortgage, applied.

2. Appeal and error ⇨761—Assumptions indulged by appellate court to permit application of appellant's statement to certain questions argued at length.

Where the question whether vendor waived his right to declare a forfeiture by accepting less than the sum due on a certain payment, permitting defendant to continue farming the premises, consenting to wait for a payment due, and failing to demand performance before de-

WORKS, J. Plaintiff and defendant Cooke, on January 10, 1919, entered into a written contract whereby the former agreed to sell and the latter agreed to buy a parcel of land. The purchase price was \$15,000, and the sum of \$500 was paid at the execution of the agreement. The balance was to be paid in installments of \$1,500 on or before July 1, 1919, \$1,000 on or before December 1, 1919, and certain later installments not necessary to be mentioned. The agreement provided that the vendee should be let into the immediate possession of the property; that time was of the essence of the contract; that the vendee's failure to pay any installment where due should work a forfeiture of his right to the property and a forfeiture of all payments theretofore made; and that the vendee would immediately upon the execution of the agreement, make to the vendor a chattel mortgage upon all crops to be grown upon the property in 1919 and 1920 to secure the installments due during those years. The

vendee entered into the possession of the property on the day of the execution of the agreement for purchase and sale.

The present action, commenced for the purpose of ejecting defendant Cooke from the land described in the agreement of sale, was instituted by means of an ordinary complaint in ejectment; no reference being made therein to the agreement. The answer of defendant Cook denied the material allegations of the complaint. It also pleaded the agreement for sale and purchase and contained, among others, the following averments: That defendant was unable to pay in time the installment of \$1,500 due on the property on July 1, 1919; that on or about August 1, 1919, he paid \$800 on account of that installment, and that it was then and there orally agreed between him and plaintiff that it would be inadvisable to put a summer crop on the land in controversy during 1919, and that defendant Cooke might have such an extension of time as would enable him thereafter to grow a crop of barley on the land and to harvest and sell the same in order to enable him to pay the balance of the installment of \$1,500 and the installment of \$1,000 due December 1, 1919; that on or about October 1, 1919, and in good season, defendant Cooke sowed barley on the land, and thereafter caused to be grown a first-class crop of barley thereon; that at no time up to April 22, 1920, did plaintiff attempt to interfere with defendant Cooke's possession of the land, or attempt to collect any moneys under the contract of sale and purchase, or attempt to claim any forfeiture under the contract, but that up to that date he so conducted negotiations with defendant Cooke as to lead the latter to believe, and he did believe, that plaintiff intended to and would carry out the oral agreement for an extension of time, made on or about August 1, 1919; that on April 22, 1920, when the crop of barley on the land was ready to be harvested, plaintiff served on defendant Cooke a notice declaring a forfeiture of the contract because of his failure to pay the balance due of the installment of July 1, 1919, and the installment of December 1, 1919; and that the notice was the first intimation defendant Cooke ever had that plaintiff was dissatisfied with the arrangement made on or about August 1, 1919. Thereafter defendant Cooke filed a supplemental answer, and plaintiff filed an amended complaint. It is not necessary to state the nature of these pleadings. Judgment went for plaintiff, and defendant Cooke appeals.

[1] Appellant, having in mind the provision of the agreement between the parties binding appellant to execute to respondent a crop mortgage, contends that respondent was not entitled to judgment, for the reason that an action like the present could not properly have been maintained until after respondent had proceeded by action to foreclose the mortgage. In support of this contention, ap-

pellant cites section 726 of the Code of Civil Procedure, which opens with the provision, "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," the chapter being one relating to actions for the foreclosure of mortgages. We need express no opinion upon the question whether section 726 has a bearing upon such a state of facts as is shown here. It is enough to say in disposing of appellant's point that there is no crop mortgage in the case. It is not alleged in any of the pleadings that the mortgage was ever given, nor did the court find either that it was given or that it was not given. There was, it is true, some oral evidence in the record to the effect that the mortgage was executed, but, when a witness was asked whether he had the mortgage in his possession, respondent objected "to any evidence along this line, that if this is a defense, it should have been pleaded." Later, he made the objection to a preliminary question concerning the mortgage that it was "irrelevant, incompetent, and immaterial, not covering any issues in this case." When the mortgage was offered, the objection was made that "it is absolutely irrelevant and pertains to no issue in this case." The trial court, however, admitted the mortgage in evidence. A situation kindred to the one now before us was considered by the Supreme Court in *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 135 Pac. 502. That action was brought to secure judgment on a promissory note, and the trial court found that a conveyance had been executed as security for the payment of the note. After referring to the effect of section 726 of the Code of Civil Procedure in such cases, the Supreme Court said:

"But here the pleadings raised no issue regarding security for the debt, and the finding, being entirely outside of the issues, must be disregarded. * * * The rule just stated is subject to the qualification that a finding may be considered where the issue, though not formally raised by the pleadings, was tried in the court below without objection."

In the present case the pleadings were barren of allegation concerning the existence of the mortgage, the question was not tried without objection, and there was no finding upon the subject. It is plain that appellant's point is without merit.

[2] The next question presented by appellant is thus stated:

"The plaintiff, by accepting less than the sum due upon the July payment, and by his agreement to permit the defendant to continue farming the premises and to put in a crop, and by his further consenting to wait for the defendant to attempt to raise the December payment for 10 to 30 days after the same was due, and his failure to make demand of performance before declaring forfeiture, waived his right to declare any forfeiture."

It will be observed that this statement, combining both matter of fact and of law, is not directed at any finding of the trial court as being without support in the evidence, nor at any error of law which it is claimed that the court committed. Further, nowhere in his argument upon the many-sided question presented by his statement does appellant so direct any part of it. As, however, the question is argued at some length, we shall make in appellant's behalf such assumptions as will allow an application of his statement to all questions toward which we are able to conceive that he intended to direct it.

[3, 4] We shall assume that appellant intends the contention that findings to the following effect are not supported by the evidence: (1) That the parties never entered into any agreement whereby appellant might have such an extension of time in which to make payment of the balance of the installment due July 1, 1919, after payment thereon of \$800, as would enable appellant to raise a barley crop; (2) that the parties made no agreement to extend the time of payment of the installment due December 1, 1919; (3) that appellant did not plant and care for any barley crop pursuant to any agreement with respondent for an extension of time in which to make any payments under the contract; (4) that respondent, at various times before April 22, 1920, demanded payment of the balance remaining due of the installment which became payable July 1, 1919, and of the installment which fell due December 1, 1919. Is there evidence in the record to support these four findings? This question must be answered in the affirmative as to each finding. On the score of the first, respondent testified positively that there was never any agreement such as that mentioned in the finding, and that he and appellant never conversed upon the subject of such an agreement. As to the second, respondent on the stand denied the existence of the agreement mentioned therein, and denied any conversation concerning such an agreement. All question as to the third is disposed of by the testimony mentioned in the two sentences immediately preceding the present one. The fourth is supported by testimony of respondent showing that from December, 1919, to April, 1920, he made frequent and persistent demand for the payment of the installments due under the contract. This condition of the evidence as to the four findings assumed by us to be attacked by appellant effectually disposes of his point. The question presented by him culminates in the contention that respondent waived his right to declare a forfeiture of appellant's rights under the contract between them, this for the various reasons set forth in appellant's statement of his point. The state of the evidence leaves but one of those reasons, the acceptance of less than the amount due upon the installment

payable July 1, 1919, as a support for the contention made. It can hardly be said that the right to declare a forfeiture was waived because of that circumstance alone. Much more is necessary to produce such a result under the law. See *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(65 Cal. App. 649)

HUNCEKER v. LUTZ et al. (Civ. 2584, 2585.)

(District Court of Appeal, Third District, California. Feb. 21, 1924. Rehearing Denied March 22, 1924.)

1. Pleading $\S$ 418(2)—Error in overruling demurrer to petition held immaterial.

Where it could not be ascertained from complaint to quiet title to waters what quantity plaintiff used, error in overruling demurrer thereto became immaterial where defendants, after such ruling filed answers denying plaintiff's allegations and setting up affirmative defenses, thereby tendering issues.

2. Trial $\S$ 374(2)—In action to quiet title, court could disregard special findings of jury.

Where, in trial of action to quiet title to waters, special issues were submitted to jury, the court could adopt their findings or disregard them and make its own findings.

3. Judgment $\S$ 743(1)—Judgment establishing defendant's rights to waters of creek held res judicata.

Judgment in action in 1908 confirming rights of defendant's predecessors and grantors in the waters of a creek, and further adjudging that plaintiff did not own any of the waters and had no rights therein, held res judicata in plaintiff's action to quiet title to waste waters therefrom.

4. Waters and water courses $\S$ 138—No prescriptive right based on permissive use of waters.

No prescriptive right can be based on a permissive use or on what is generally known and called waste waters.

5. Waters and water courses $\S$ 137—Riparian rights divested by five years' adverse user.

Riparian rights cannot be divested by an adverse user unless such use has continued for full period of five years under such circumstances as the law requires to establish title in that manner.

6. Waters and water courses $\S$ 152(8)—Adverse user not shown.

In action to quiet title to 120 inches of the waters of a creek, evidence held insufficient to support trial court's finding of five years' adverse use by plaintiff, and applying the doctrine of relation and counting a period of time anterior to actual diversion to make up the five years was error.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Separate actions by Charles F. Hunceker against Luellah C. Lutz and Willis H. Stone, as trustees, and others. Judgment for plaintiff, and defendants Luellah C. Lutz and Willis H. Stone, as trustees, and Northern California Power Company, Cons., appeals. Reversed.

Carr & Kennedy and Chenoweth & Leininger, of Redding, for appellants.

McCoy & Gans, of Red Bluff, for respondent.

PLUMMER, J. The two actions, numbered as stated above, were consolidated for the purposes of trial and were presented to this court upon one transcript, heard as one cause and will be so considered in this opinion. The action involves the validity, priority, and extent of water rights claimed by the respective parties in the waters of Rock creek, a natural stream situated in the county of Shasta.

The action was brought by the plaintiff to quiet title to 120 inches measured under a 4-inch pressure of the waters running and being in said Rock creek. His claim or title thereto is based upon prescription or adverse use. The respondent's land consists of 40 acres situated in the vicinity of said Rock creek and susceptible of irrigation therefrom.

Prior to the commencement of this action and on or about the 19th day of June, 1908, a judgment was made and entered in the superior court of Shasta county adjudging and decreeing that the grantors and predecessors in interest of the appellants herein were the owners of and entitled to take and receive from said Rock creek, through a certain ditch known as and called the Stone ditch, 500 miner's inches of water prior to any right, title, or interest of the plaintiff in this action to any of the waters of said Rock creek and also enjoining and restraining the plaintiff from taking any waters from the said Rock creek until after the grantors and predecessors in interest of the appellants herein had first had and received such 500 miner's inches of water from said stream. It further appears that after the entry of this judgment the plaintiff in this action caught up and used upon his premises certain waste waters from a sawmill on Rock creek situated thereon above the take-out of any of the ditches involved in this action and continued to reclaim and use such waste waters with the permission of the owners and operators of said mill until it was closed down in the fall of 1913; that the water so caught up and reclaimed by the plaintiff was taken up at a point called the sawdust pile and conducted through a certain ravine called Swamp ravine down to the 40 acres of land owned by him and there

used for irrigation and domestic purposes. It also appears that the water used in the operation of said mill was obtained by an arrangement with the plaintiffs in the action referred to in which judgment was entered on or about June 19, 1908, said plaintiffs being the predecessors and grantors in interest of the appellants herein.

The supply of water thus caught up by the plaintiff being shut off in the fall of 1913, a ditch of about 30 rods in length was constructed by him in the month of January, 1914, and on or about the 11th day of March, 1914, the plaintiff herein filed a notice appropriating 120 inches of the waters flowing in Rock creek at a point on said stream below the mill herein referred to and in that year began the diversion of water directly from the stream. On or about the 5th day of October, 1918, upon proceedings instituted therefor and based upon the judgment hereinbefore referred to, the plaintiff was cited to show cause why he should not be punished for contempt for violation of said judgment during the seasons of 1917 and 1918, and after various hearings upon said order to show cause, the plaintiff in this action was on the 19th day of February, 1919, adjudged to be in contempt of the superior court of Shasta county by reason of his violations of the judgment and decree entered against him and in favor of the grantors and predecessors in interest in 1908, as hereinbefore stated. After the institution of the proceedings herein referred to and before judgment was entered therein, the plaintiff on the 13th day of February, 1919, began the actions now before this court.

The trial court awarded the plaintiff the relief prayed for, to wit, a prior claim of 120 miner's inches of the waters of said Rock creek.

[1] The appellants now assign ten separate reasons why the judgment of the lower court should be reversed, the first, second, third, and fourth of which are in substance to the effect that the decision of the trial court that the plaintiff is the owner of and entitled to the use of 120 inches of water measured under a 4-inch pressure prior to any of the rights of the appellants herein, and that said title was acquired by prescription and adverse use, is not supported by the evidence. Objections are also urged to the ruling of the court in relation to the admission of testimony; also that there is no evidence to justify the award of the continuous flow of the waters awarded to the plaintiff. One of the grounds assigned as the reason for an appeal herein is that the court erred in overruling appellants' demurrer to the plaintiff's amended complaint. This objection, at the time it was passed upon, would seem well taken. The seventh paragraph of the plaintiff's complaint, in which he attempts to set forth his title to the waters of Rock creek, is in the following language:

"That the water heretofore diverted by plaintiff from said Rock creek by and through said ditch on to the lands and premises of plaintiff, as aforesaid, would not exceed 120 inches of water measured under a 4-inch pressure, and that said plaintiff is the owner of and entitled to the possession, and claims the right to divert through said ditch and to use upon said land for stock and domestic purposes and for the purposes of irrigation, as aforesaid, 120 inches of water measured under a 4-inch pressure."

The defendants demurred specifically to the plaintiff's complaint and urged that the paragraph herein referred to does not state a cause of action, in that it cannot be ascertained therefrom what quantity of water the plaintiff used. It is apparent from a reading of the paragraph that this contention is well founded. This defect in the complaint is not cured by any allegations elsewhere contained therein. The defendants, however, after the overruling of their demurrers, proceeded to file answers, not simply denying the allegation of the plaintiff's complaint, but, proceeding to set up affirmative defenses, to wit, their right and title to the water of Rock creek, the land owned by them, the uses of the waters of Rock creek made by them and the manner in which they severally obtained title to the waters of said stream, and then prayed judgment of the trial court confirming their title as set forth in their affirmative defenses as against the plaintiff in this action, thus tendering issues for the trial court to hear and determine. Under such circumstances and in this state of the pleadings, the error of the court in overruling the appellants' demurrers became immaterial.

[2] If the plaintiff in this action has any prior right to the waters of Rock creek, it must be based upon some title acquired after the entry of judgment on June 19, 1908, in which it was adjudged and decreed that the grantors and predecessors in interest of the defendants in this action were the owners of 500 inches of the waters of said stream and were entitled to take therefrom that quantity of water prior to the taking of any water from said stream by the plaintiff herein. The cause was tried before the court sitting with a jury. Special issues were submitted to the jury, the court adopted the same, but subsequently made its own findings in which it disregarded, in some particulars, the answers given by the jury to the special issues submitted for their consideration. Under the law the court had a right to adopt the findings of the jury or to disregard them and make its own findings. No point is made for reversal by reason of the action of the trial court in disregarding the answers given by the jury to some of the special issues submitted to them, but they are called to the attention of this court for the purpose of showing some contradictory matters which we deem, however, un-

important and not necessary to be considered. Disregarding the minor objections urged by appellants, the crucial question on this appeal is whether the following findings made by the trial court are supported by the evidence, to wit:

"That for more than five years last prior to the commencement of this action, said plaintiff has diverted from said stream of Rock creek in and through said Hunceker ditch, mentioned in plaintiff's first amended complaint, 120 inches of water of the natural flow of said stream, measured under a 4-inch pressure, at the head of said Hunceker ditch and has conveyed the same through said Hunceker ditch, to, over, and upon the lands of plaintiff hereinabove described, and there used the same for beneficial uses and purposes, to wit, irrigation of crops growing upon said land, the watering of stock and domestic purposes, and that during all of said time said diversion and use was and has been continuous, and open, and notorious and uninterrupted, and under claim of right and in every way adverse to defendants, and each of them, and to their grantors and predecessors in interest."

And the further finding:

"That the above-named defendants, and each of them, claim an interest in the waters of said stream of Rock creek flowing at the head of said ditch, adverse to said plaintiff herein, as hereinabove found, and that said claim of said defendants, and each of them, is wrongful, unlawful, and without right."

[3] It is not questioned, and it cannot be seriously questioned, that the judgment of the trial court entered in June, 1908, is final and conclusive and at that particular time established the prior rights in interest of the appellants herein to the waters of said Rock creek as against the claims of the plaintiff, Charles F. Hunceker, in this action. That judgment not only confirms the rights in and to the waters of said Rock creek to the predecessors and grantors of the appellants herein, but further adjudges that the defendant in said action, Charles F. Hunceker, does not own any of the waters of Rock creek and has no rights therein. It is unnecessary to cite authorities showing that this judgment, at the date of its entry, was res judicata as to the rights of the parties to the waters of said Rock creek. Has the plaintiff acquired any title thereto as against the defendants in this action by adverse use of the waters of said stream for the statutory period of five years since 1908 and prior to February 13, 1919, the date of the commencement of this action? The testimony is practically undisputed that the use of the water by the plaintiff after June 19, 1908, down to the date of the closing of the mill, herein referred to, was simply permissive and that no adverse use was made of said waters by the plaintiff until on or about March 11, 1914. The mill referred to ap-

pears to have been under the management of one C. R. Forward and is known as the Forward mill. His testimony as to the manner in which he obtained the right to use said waters, as set out in the transcript, is as follows:

"Q. Prior to using this water for the purpose of carrying off sawdust and other waste materials at your mill, did you make any arrangements with any person for the use of that water? A. Yes, sir. Q. And with whom? A. With Ed Head. Q. And when you say Ed Head, do you refer to A. W. Head? A. Yes, sir. Q. Do you recall of an action brought in the superior court of this county by the following named plaintiffs: A. E. Head, V. B. Taylor, and Mrs. E. R. Stone, as plaintiffs, against Charles Hunceker as defendant, and who is plaintiff in this action? A. Yes, sir. Q. Were you a witness in that suit? A. No, sir. Q. But you know about the suit? A. Yes, I have heard of it. Q. And I will ask you whether or not the A. E. Head with whom you made the arrangements for the use of water out of Rock creek for carrying sawdust and other waste materials from your mill, is the same A. E. Head who was plaintiff in the action which I have just referred to? A. Yes, sir; he was. Q. Now, will you please state, Mr. Forward, what arrangement you made with Mr. Head for the use of water from Rock creek for carrying off sawdust and other materials from your mill? A. Well, I spoke to Mr. Head about the water, and he said yes, I might have the water, but that he wanted me to pay him something to protect his rights in the creek in case somebody else would claim it after it had gone to waste, knowing it would run away from the slope of Rock creek. Q. When you were not using the water to conduct sawdust and other refuse from the mill, what was done with the water? A. Well, as a general rule, it was turned back into the creek. Q. And state whether or not you had any arrangements with Mr. Head in reference to that feature of the use of the water? A. Yes, he asked me when I was not using it to turn it back into the creek, at nights and Sundays, and so forth. Q. And was that agreed and arranged with Mr. Head at the time you went to him about using water from Rock creek? A. Yes, sir. Q. And at night time what did you do with the water? A. Well, I turned it back into the creek as a general rule. Q. And what did you do on Sundays? A. We turned it into the creek. Q. And by what means did you turn the water into the creek? A. Well, we had a slip gate in the side of the flume above the mill, and we just pulled it out and it was long enough so the water couldn't none pass by, all dropped out through the opening when we lifted the board out. Q. Did you in any way compensate Mr. Head for the use of the water? A. Yes, sir. Q. And in what manner? A. Why, I gave him lumber for the use of it. Q. And over what period of time did you give him lumber? A. Through the entire time that I operated. Q. When did you cease the use of this water from Rock creek for carrying off refuse from the mill? A. Well, I think some time during the month of September in 1913. Q. And when you ceased operating your mill, what did you do with the water? A. Turned it into the creek."

This witness further testified that the mill was closed in September, 1913, but that he allowed the water theretofore used by him in connection with the operation of said mill to continue running for a period of about two weeks longer at the request of the plaintiff in this action; the testimony being as follows:

"Q. When did you cease the use of this water from Rock creek for carrying off refuse from the mill? A. Well, I think some time during the month of September in 1913. Q. And when you ceased operating your mill, what did you do with the water? A. Turned it into the creek. Q. And did you immediately turn the water into the creek after you had ceased operating your sawmill? A. No, I let it run for a while. Q. How long did you let it run? A. Perhaps for a week or two. Q. Why did you do that? A. Well, I did it for Mr. Hunceker. Q. And just state what the circumstances were that caused you to do this for Mr. Hunceker, the plaintiff in this action? A. Well, he needed the water for his garden and stuff, and I wanted him to have it, and I thought perhaps the other people could get along without it, and he had asked me to turn it down to him, and I did so. Q. When did he ask you to permit the water to run down to him? A. Well, that was probably a couple of weeks before I— well, very often, as far as that was concerned on Sundays and such times, he would say he was going home, he would work for me, he would like for me to leave the water run on the Sunday, and I did that a great many times. Q. And at whose request? A. His. Q. When you say his, you mean the plaintiff in this action, Mr. Hunceker? A. Yes, sir. Q. And when was it that he requested you to permit the water to run after you had ceased the operation of your sawmill in 1913? A. Well, it was just about a couple of weeks, I suppose, before I finally did shut it off."

Upon this same question the plaintiff testified as follows:

"Q. While you were up taking water from the sawdust pile after Ross Forward used it in his mill at that time, in those years from 1908 to 1914, you weren't claiming the right to take that water adversely to the people down the creek, who had previously sued you, were you? A. When she dumped over the hill, I had a right to it because it was considered waste water. Q. It was considered waste water? A. Waste water. Q. And you claimed you were taking waste water? A. That is what I was taking that water there—that way. Q. You also claimed in those years that the taking of that water through the mill didn't invade the rights of the parties who had sued for that injunction against you? A. Well, they didn't object. Q. You claimed that you didn't invade their rights, didn't you? A. No, Mr. Kennedy. Q. Now, Mr. Hunceker, it was after that injunction was issued against you by this superior court, that you went up to Forward's mill to get water, wasn't it? A. I did. Q. And because of that injunction, wasn't it? A. Yes, sir. Q. Subsequent to the entry of that judgment, Mr. Hunceker, which you remember, and when you went to take Mr. Forward's waste water from his sawdust pile, you considered that you were not

adversely taking away from these defendants who had an injunction against you, any water that belonged to them, didn't you? A. Oh, I didn't consider I was hurting anybody, Mr. Kennedy. Q. You didn't consider you were taking their water, is that it? A. No, sir; I was not taking their water at all. Q. You didn't consider then that you were invading their right to any water, did you? A. I did. Q. You did consider you were or you weren't? A. I didn't consider that I was invading their rights at all. Q. And you didn't claim to be? A. I didn't claim to invade their rights. Q. At all times after that when you took water either from Forward's mill or directly from Rock creek, you didn't consider you were invading their rights established by that decree? A. I didn't think I was interfering with their rights at all. * * * Q. And for the year 1913 where did you get your water? A. Same source. Q. That is, from the flume? A. From the mill. Q. And how long was water diverted through that flume? A. Till about the—the rainy season, about the first of October. Q. Now, Mr. Hunceker, when did the mill close down? A. Some time in the first of October. Q. October? A. Yes, the rainy season. Q. What was done with the water that continued to run in the flume? A. Well, I don't know, I wasn't there. Because we was getting water from other sources, from the hills then; the hills was saturated with rain."

[4] There is no question, and there can be no question, but that during all the period now being considered the plaintiff was using waste or abandoned water coming from the Forward mill and gathered up by him at the point known as the sawdust pile. Upon this it was first sought to base the plaintiff's claim to said waters. This claim, however, was abandoned during the course of the trial. The authorities are without conflict that no prescriptive right can be based upon a permissive use or upon what is generally known and called waste waters. *Davis v. Martin*, 157 Cal. 657, 108 Pac. 866; *Dannenbrink v. Burger*, 23 Cal. App. 587, 596, 38 Pac. 751; *Kinney on Water Rights* (2d Ed.) § 661; *Wiel on Water Rights*, § 57.

The undisputed testimony hereinbefore set forth shows conclusively that the plaintiff's right, if any, begins at a date subsequent to the year 1913. The testimony also shows that the use of the water by the Forward mill was a permissive use and for which compensation was agreed to be made and was not a nonuser or abandonment of the water so as to forfeit title thereto by the owners of the same.

[5] Has the plaintiff acquired any adverse rights to the use of said waters since the year 1913? The testimony is undisputed that the 30-rod ditch constructed by the plaintiff was built during the month of January, 1914, and that on the 11th day of March he filed a notice of appropriation of 120 inches of the waters of Rock creek and on that day began diverting through said

ditch the waters claimed by him. The notice is as follows:

"Notice is hereby given that I claim the flowing waters of Rock creek to the extent of 120 inches, measured under a 4-inch pressure; that the purpose for which I claim the said waters is for stock water, domestic purposes and irrigation (a description of the 40 acres of land owned by the plaintiff is herein set forth). The point of intended diversion is on the south bank of said Rock creek at a point near the east line of the southeast quarter of section 17, township 30 north, range 2 east, M. D. M. * * * Dated this, the 11th day of March, 1914."

This notice was thereafter recorded in the office of the county recorder of Shasta county. Upon this basis the respondent makes the following claims:

"This action was commenced by filing of the complaint on February 13, 1919, more than five full years after respondent had commenced the construction of his ditch out of Rock creek, where he made his present diversion. It is our contention, therefore, that the respondent's right was initiated at the time he commenced the construction of his ditch and that the five-year period would start to run from the time he openly and notoriously entered upon the creek and performed acts which unequivocally showed his intention of diverting the water from Rock creek, and his subsequent diversion and use of the water continuously and without interruption would, after the expiration of five years, ripen into a prescriptive right to the use of the water."

To sustain this contention the respondent relies upon the case of *Haight v. Costanich*, 184 Cal. 426, 194 Pac. 26. We will quote therefrom as follows:

"However, the quantity of water to which a person may become entitled by diversion is not necessarily limited to the amount of water actually used at the time of the original diversion. Inasmuch as plaintiff's diversion was not made under the modes prescribed by the California statutes, it is governed solely by the California law of possessory rights as it existed prior to the adoption of such statutory methods. The cases involving water rights acquired under this law lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete, and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same toward completion. * * * There is no case, arising prior to the enactment of the code, which holds that the party who thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water against the hostile diversions and claims of others by an appropriate suit for that purpose. * * * Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual

use, the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of these conditions his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works.'"

The facts of that case, however, are so dissimilar from the one at bar that a short analysis suffices to show the inapplicability of that case to the one now being considered. In the case of *Haight v. Costanich*, supra, the court was considering the right of an appropriator to refer an increase of irrigation back to the construction of his works, as against the intervening riparian owner. In the case at bar the rights of appellants were established prior to the time when plaintiff undertook to make an appropriation of the waters of Rock creek and thus could be divested only by an actual diversion and use of the waters of said stream in the manner and for the time required by the statute of limitations. The appellants' rights were not invaded until the actual diversion and use of the waters by the plaintiff herein. The question before the court is one of adverse use and has nothing to do with the doctrine of relation. As stated by appellants:

"Until the water was diverted into plaintiff's ditch the defendants had no cause of action against him; he did not commence such diversion until March 11, 1914, and until March 11, 1919, plaintiffs could bring an action for the trespass and toll the statute of limitations. Before this time expired respondent filed the present action, and he cannot now bolster up an insufficient claim of adverse use by the doctrine of relation."

[6] We do not deem it necessary to discuss the riparian rights of the appellant, Northern California Power Company, Cons., further than to refer to the cases of *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, and *Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, Ann. Cas. 1914A, 74, which set forth fully the law relating to riparian rights and from which it follows that those rights cannot be divested by an adverse user unless such adverse use has continued for the full period of five years under such circumstances as the law requires to establish title in that manner. The appellants also contend that there is no testimony to support the findings as to the right of the plaintiff to a continuous use of the waters of Rock creek and that there is no showing as to the period of time during the each 24 hours the plaintiff made use of the waters claimed by him, but from what has been heretofore said these questions become immaterial, because, if the plaintiff has not

established title by five years' adverse use of the waters involved, then and in that case all such questions become of no importance. From what has been said in this opinion it is evident that there is no testimony supporting the finding of the trial court of five years' adverse use by the plaintiff to the waters of Rock creek as claimed by him and that the court was in error in applying the doctrine of relation in this case and in counting a period of time anterior to the actual diversion of the water by the plaintiff in order to make up such five years.

This necessitates the reversal of the judgments herein, and it is so ordered.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

(65 Cal. App. 608)

THE DAILY TELEGRAM v. OCEAN VIEW OIL CO. (Civ. 3945.)

(District Court of Appeal, Second District, Division One, California. Feb. 18, 1924. Hearing Denied by Supreme Court April 15, 1924.)

1. Licenses ⇐39—Fiscal agent's contract for advertising held not void though expenditure would exceed percentage allowed by permit under Corporate Securities Act.

A stipulation in a permit to sell stock, issued by corporation commissioner to corporation under the Corporate Securities Act, allowing the expenditure of not to exceed 20 per cent. in effecting the sale of the stock, held not to invalidate a contract for advertising entered into between the corporation's fiscal agent and a newspaper on the theory that the contract called for an expenditure exceeding in amount the percentage allowed by the permit.

2. Corporations ⇐79—Fiscal agent authorized to sell corporation's stock held empowered to employ expert assistance in planning, writing, and placing advertising.

Under Civ. Code, § 2349, a fiscal agent who had a contract with the corporation for the sale of its stock, empowering the fiscal agent to incur indebtedness on behalf of the corporation to a certain amount, could employ expert assistance to plan, write, and place advertising under the fiscal agent's supervision, such employment not constituting an unlawful delegation by the fiscal agent of his powers to an agent.

3. Corporations ⇐79—Evidence held to prove that newspaper relied on credit of corporation in extending credit for advertising ordered by fiscal agent.

In newspaper publisher's action against a corporation for amount due under advertising contract entered into by fiscal agent authorized by corporation to sell its stock under a contract authorizing the fiscal agent to incur indebtedness on behalf of the corporation, evidence held to show that the newspaper relied on the credit of the corporation in extending credit for the advertising.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge pro tem.

Action by The Daily Telegram against the Ocean View Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George W. Bush, of Los Angeles, for appellant.

Daly, Daly & Todd, of Long Beach, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of plaintiff and against the defendant, Ocean View Oil Company, on a cause of action arising out of certain advertising in the newspaper of plaintiff and its assignor, alleged to have been done at the instance and request of said defendant.

In accordance with certain provisions of the Corporate Securities Act defendant procured a permit to sell 100,000 shares of its stock on the condition that not more than 20 per cent. of the selling price thereof should be paid as a commission for its sale. The defendant then entered into a contract with one C. F. Martin by which it was agreed, among other things, in substance, that Martin, party of the second part, was appointed the "fiscal agent" of the defendant, party of the first part, to sell the said 100,000 shares of stock for a compensation of 20 per cent. commission, "wholly in accordance with the permit." Also:

"In addition to the above commission, the party of the first part agrees to raise by subscription not to exceed 5,000 shares of the capital stock of said corporation which shall be sold by the party of the second part without commission.

"Said party of the second part shall make an accounting to the party of the first part for all moneys expended by him in overhead and should said overhead be less than said \$5,000, then said money remaining shall be and belong to the party of the first part. In the event that the overhead shall exceed said \$5,000, said expense shall be borne by said party of the second part.

"It is further agreed that the party of the first part shall immediately advance towards said overhead expense the sum of \$600 which shall be credited by the said party of the second part as a credit on said \$5,000.

"It is further stipulated and agreed that the party of second part shall have the use free of expense of two of the offices in the Stock Exchange Building now being occupied by the party of the first part, for the uses in this agreement set forth."

For the purpose of carrying on the sale of the stock on behalf of defendant, Martin entered into a contract with a publicity agency to "plan, write and place advertising campaign as may be directed." The advertising was done by plaintiff and its assignor, and no payment having been made therefor, an action was commenced which resulted in

a judgment being rendered against defendant for the sum of \$712.16.

While the contract is not entirely free from ambiguity, the testimony of Mr. Martin which was offered for the purpose of explaining the ambiguity, and which testimony was evidently believed by the trial court, was to the effect that up to the sum of \$5,000 the defendant was to pay the necessary expenses of making the sale of the stock; that copy of the advertising was mailed to the office of appellant; that the president of the corporation had knowledge of all the facts in connection with the advertising while it was being done; and after the advertising bills were due and demand had been made for the payment the president of the defendant corporation had asked Martin "to stall them off a little longer." He also said that if no stock could be sold it would be necessary to declare an "Irish dividend" and pay the bills. The interpretation placed upon the contract by the parties thereto clearly appears to have been that such expenditures as are here in question were to be included in the agreement, with the necessary agency in Martin to incur indebtedness on behalf of the corporation therefor.

[1] Appellant contends that because the permit issued by the corporation commissioner allowed the expenditure of not to exceed 20 per cent. in effecting the sale of the stock, any contract by which that percentage was to be exceeded is void as against public policy. Such a contention might possibly avail as between the parties to the contract, but it would seem inequitable that innocent third persons should be made to suffer pecuniary loss for such a reason. Even assuming plaintiff's knowledge of a limitation upon expenditures, plaintiff very properly might have assumed that the corporation had resources arising from the operation of its business and had an independent right to order advertising to be done without reference to the terms of the permit.

[2] The third point raised by appellant is to the effect that, assuming that Martin personally was authorized to incur an indebtedness for newspaper advertising, he had no authority to delegate his powers to an agent. The evidence showed that Martin supervised the advertising, and the fact that it was thought necessary or advisable to employ expert assistance to "plan, write and place" it does not constitute a delegation of powers by an agent. There was nothing within the terms of the contract between plaintiff and defendant specially forbidding the employment of such an assistant for such purpose, and consequently the right to do so would seem to fall within the regulation of such matters as is provided by section 2349 of the Civil Code.

[3] It is also urged that neither plaintiff nor its assignor relied upon the credit of the appellant in extending credit for the adver-

tising. The evidence, however, shows to the contrary, in that the various items in the account are charged to the Ocean View Oil Company. The credit manager for plaintiff's assignor testified that he went to see Martin regarding the proposed credit to be advanced to the Ocean View Oil Company, and that Martin said, "Yes; I am the agent here in Long Beach, but I am merely the tool of the Ocean View Oil Company itself. I fully believe that they are solid and that they will pay their bills." Apparently acting on such statement, plaintiff extended credit to appellant.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

(65 Cal. App. 534)

WHYTE et al. v. CITY OF SACRAMENTO et al. (Civ. 2616.)

(District Court of Appeal, Third District, California. Feb. 9, 1924.)

1. Pleading ⚡18, 19—Averment as to impossibility of streets held demurrable for uncertainty and ambiguity.

In a suit to enjoin enforcement of a municipal traffic ordinance restricting use of trucks over a certain weight to certain streets in a designated district, an averment in the complaint, that the streets on which trucks were permitted were in an "unpaved condition," and for that reason it was "virtually impossible for plaintiff's trucks to be operated" on such streets, held demurrable as unintelligible, uncertain, and ambiguous.

2. Appeal and error ⚡195—In absence of request below refusal to allow amendment cannot first be raised on appeal.

Where a demurrer to a complaint was sustained without leave to amend, the point that plaintiffs were not allowed to amend cannot first be raised on appeal, they having made no request or motion therefor.

3. Municipal corporations ⚡703(1)—Designation of territory affected by traffic ordinance held sufficient.

In a suit to restrain enforcement of a traffic ordinance regulating the use of motor trucks in a certain district described in the ordinance as the "old city limits," held, that such description was sufficient, particularly in view of designation of the streets affected by name.

4. Municipal corporations ⚡626—Police power may not be applied so as to be discriminatory.

The police power conferred on cities, towns, and townships by Const. art. 11, § 11, must be fairly and reasonably applied, and can never be invoked and applied so as to discriminate in favor of or against particular classes of persons as to whom no reasonable basis of discrimination can be said to exist.

5. Municipal corporations ⚡63(2) — Courts may determine reasonableness of ordinance.

The question of reasonableness of a municipal ordinance, whether, in enacting it, the governing board of the city proceed under the police power conferred by Const. art. 11, § 11, or that conferred directly by the city charter, is open to inquiry by the courts.

6. Municipal corporations ⚡57—Under freeholders' charter municipality cannot without express authority pass ordinance outside of "municipal affairs."

A municipal corporation governed by a freeholders' charter passed under Const. 11, § 8, cannot pass any ordinance or adopt any regulation with respect to any subject or matter which does not come peculiarly within the legal description of "municipal affairs" unless the authority is expressly delegated to it by the Legislature either through its charter or some general law.

7. Municipal corporations ⚡703(1)—Streets may be used by citizens subject to legislative control.

The streets of a city belong to the people of a state, and the use thereof is an inalienable right of every citizen of the state, subject to legislative control of such reasonable regulations as to the traffic thereon or the manner of using them as the Legislature may deem wise or proper.

8. Municipal corporations ⚡703(5)—City held not authorized by charter to regulate use of street by trucks.

The Legislature has not, through the charter of the city of San Francisco passed under Const. art. 11, § 8, granted to the city or its governing board the authority to enact an ordinance forbidding trucks of a carrying capacity of one ton or more to use certain streets within a designated area of the city.

9. Municipal corporations ⚡703(5)—City held authorized by general law to regulate use of streets by trucks.

St. 1917, p. 406, § 22, vesting freeholders' chartered city with full control over and right to regulate the use of streets within their limits, held to confer authority on the city of San Francisco to pass a traffic ordinance restricting the use of trucks of a carrying capacity of more than one ton to certain streets within a designated area of the city.

10. Municipal corporations ⚡703(1) — Right to regulate use of streets may be conferred by general law.

The power to adopt a traffic ordinance limiting the use of motor trucks of a certain carrying capacity to certain streets may be delegated to a city by the Legislature by general law as well as by express charter grant.

11. Evidence ⚡5(2)—Judicial notice taken of use of automobile for freight and business purposes.

The courts will take cognizance of the fact that the automobile has become a method for transportation, locally, of freight and passengers, and for business purposes generally, as well as for the purpose of pleasure, and that an unrestricted use of them in large cities

would render the streets practically useless for other purposes.

12. Municipal corporations ☞703(1)—Regulation of automobile traffic within police power.

It is within the police power to regulate the use of streets by automobiles so as to reduce to the lowest possible minimum the dangers and inconveniences which naturally are the consequences thereof.

13. Constitutional law ☞81—Limits of police power may be extended to include changes incident to progress of science and invention.

The limits of the police power cannot be defined, and may be extended to meet the exigencies or new conditions arising from time to time as essential incidents of the progress of science and invention.

14. Constitutional law ☞81—What is reasonable exercise of police power depends on conditions.

What is a reasonable exercise of the police power depends on the character or nature of the conditions to be met or overcome.

15. Municipal corporations ☞703(5)—Ordinance regulating motor trucks held not discriminatory.

A municipal traffic ordinance restricting the use of motor trucks of a carrying capacity of one ton or over to certain streets within a designated territory in a city, passed in accordance with Motor Vehicle Act 1917, § 22, and applicable to all persons engaged in use of vehicles of such capacity, is not void as discriminatory; the classification on the basis of weight, the load carried, and injurious effect on the streets involving a real and substantial distinction.

16. Constitutional law ☞235—Ordinance regulating motor trucks held not to deny equal protection of law.

A municipal ordinance passed in accordance with Motor Vehicle Act 1917, § 22, forbidding the use of motor trucks of a carrying capacity of one ton or over on certain streets in a designated area of a city, held not void as denying the equal protection of the law within Const. U. S. art. 14, § 1, it being based upon a reasonable classification.

17. Municipal corporations ☞703(1)—Incidental and necessary burdens held not to make regulation unreasonable.

The incidental and necessary burdens and inconveniences of traffic regulations do not of themselves render the regulations unreasonable.

18. Municipal corporations ☞703(5) — Ordinance held not to discriminate between users of motor trucks according to nature of load carried.

A traffic ordinance restricting the use of motor trucks of a capacity of one ton or over to certain streets held not discriminatory on the ground that trucks of the same capacity carrying freight other than rock, sand, or gravel were not restricted to the same extent, the ordinance when properly construed making no such distinction.

19. Municipal corporations ☞592(1)—Municipal ordinance held repealed by Motor Vehicle Act.

A municipal traffic ordinance restricting the use of motor trucks of a carrying capacity of one ton or over to certain streets within a designated area of the city held repealed by Motor Vehicle Act 1923, known as the Breed Motor Vehicle Act.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Suit by J. P. Whyte, etc., and others against the City of Sacramento and others, to enjoin the enforcement of a traffic ordinance. Judgment for defendants, and plaintiffs appeal. Affirmed.

Irving D. Gibson, of Sacramento, for appellants.

R. L. Shinn, City Atty., of Sacramento, for respondents.

HART, J. The plaintiffs, five in number, are either copartnerships or corporations, and are engaged in the general trucking business in the city of Sacramento, carrying and hauling, by means of motor trucks, articles of merchandise, commodities, materials, and other personal property of every kind and description, "which may be offered to plaintiffs generally to be carried and hauled" over, upon, and across the streets of said city, "both to and from points entirely within the territorial limits of said city and to and from points outside of the territorial limits of said city to and from points therein," and for that purpose the plaintiffs own and operate over, upon, and across the streets of said city motor trucks "having a carrying capacity of one ton and of more than one ton." In other words, the plaintiffs are, and for several years last past have been, engaged in the business of transporting freight from point to point within the limits of said city and from points outside of said limits to points within said limits, and vice versa, and for that purpose have used and are now using motor trucks of a ton and of more than a ton carrying capacity.

The defendants, other than the city of Sacramento, are members of the city council or governing board of said city, and certain other city officials directly charged with the duty of enforcing the local ordinances and regulations adopted or passed by said governing board.

On the 22d day of June, 1922, said city council regularly passed an ordinance for said city, known as "Ordinance No. 80, Fourth Series," the object of which is, as its title indicates, to regulate "travel, traffic and parking upon the streets and other public places laid out for the use of vehicles and pedestrians in the city of Sacramento," etc.; also prescribing a penalty for the viola-

tion of the provisions thereof. Said ordinance, among others, contains the following provisions:

"Sec. 2. All vehicles having a carrying capacity of one ton or over, when engaged in the business of hauling or conveying goods, wares, freight or merchandise of any description to any place in traffic districts Nos. 2 and 3, must travel either on I street or on L street to the cross street nearest the destination of such load; and such vehicles must depart from a place within said traffic districts Nos. 2 and 3 after loading, by the nearest intersecting street running in a northerly or southerly direction.

"Sec. 3. It shall be unlawful for any truck of more than one ton capacity to travel on J or K streets in traffic districts Nos. 2 and 3 for more than one block consecutively, and then only for the purpose of loading or unloading in the block traversed.

"Sec. 4. All motor trucks of over one ton capacity operating as carriers of freight, rock, sand, gravel, asphaltic mixtures or other dead weight materials to and from points within or within and without the city of Sacramento, whether operating on a regular schedule or intermittently or occasionally, shall enter and leave and while within the old city limits use the following streets and routes only:

"West of Thirty-First and south of the center line of M street all east and west traffic shall be upon Q street or Y street only, except within such single block upon any other east and west streets upon which such truck may have freight to deliver or receive, and any traffic entering or leaving the old city limits south of the center line of M street shall proceed to or from the line of such old city limits by the most direct route to or from Q or Y street, or, if stops are to be made on any other streets in the old city limits other than Q or Y street, trucks shall proceed to or from the line of the old city limits or Q or Y street to or from the point of such loading or unloading by the most direct north and south street.

"Such trucks shall cross traffic district No. 2 only upon Sixth street.

"In like manner, west of Thirty-First street and north of the center line of M street all east and west motor truck traffic of the kind in this section above defined shall be upon E street or H street only."

The penal clause of the ordinance makes the violation of the above provisions a misdemeanor, punishable by fine of not more than \$500 or by imprisonment in the city jail for not more than six months or by both such fine and imprisonment.

The complaint is a lengthy document and many of its averments involve (and in the nature of the case necessarily so) legal conclusions. The complaint, however, first admitting that the plaintiffs herein, in the conduct of their trucking businesses within the limits of the city of Sacramento use and operate trucks of more than one ton capacity, proceeds to set out in detail the character and extent of the carrying business of each of the plaintiffs, and in effect alleges that it is necessary to the convenient, proper, and

successful carrying on of said businesses that the plaintiffs should have the free, unrestricted, and unobstructed use of all the streets of said city over, upon, and across which to operate their motor trucks, subject, of course, to such reasonable regulations of such use as are general and uniform or applicable to all persons of the same class or making like use of said streets. It is alleged that sections 2, 3, and 4 of article 9 of said ordinance, as hereinabove set forth, are unreasonable in that they are discriminatory against the plaintiffs, for the reason that the latter are prohibited from making use of their motor trucks of more than a ton capacity "over and upon the same streets and highways and in the same method, manner and under the same circumstances that is permitted other persons, copartnerships, firms and corporations similarly situated and using said streets and highways for similar purposes and imposing upon said streets and highways traffic of similar weight and character; that said sections are unreasonable and invalid in that said sections or parts thereof make, or attempt to make, it unlawful for plaintiffs to exercise and pursue a lawful business, to wit, the operation of their said motor trucks in a lawful manner, and to make legitimate use of their property; * * * and also in that said sections restrict, or attempt to restrict and burden, the operation of said motor trucks by plaintiffs so as to compel said trucks to be operated over and along a circuitous route to and from their destinations within said city of Sacramento and unnecessarily and unreasonably increases the distance necessary to be traveled in the operation of said motor trucks in the conduct of the respective businesses of plaintiffs in said city," etc.; that said sections are invalid because they place a greater burden upon motor trucks of over one ton capacity operating as carriers of rock, sand, gravel, asphaltic mixtures or other dead weight materials while entering, leaving, and operating within "the so-called old city limits of said city of Sacramento" than is placed upon vehicles of the same carrying capacity by section 2 of said article 9. It is further alleged that section 4 of article 9 of said ordinance is also unreasonable and invalid "in that said section arbitrarily and without reason divides that portion of said city of Sacramento west of Thirty-First street into two districts and likewise arbitrarily and without reason fixes the center line of M street in said city as the dividing line between said districts, the effect thereof being to restrict any and all motor trucks of over one ton capacity entering or leaving said so-called old city limits west of Thirty-First street to the use of only two east and west streets within said respective districts so arbitrarily created, that is to say, all traffic of such character south of the center line of M street is restricted to

Q and Y streets only, and all such traffic north of said center line of M street is restricted to E and H streets only, for the purpose of traveling in an easterly or westerly direction; that said provisions of said section 4 were and are unreasonable and invalid for the reason that, because of the present unpaved condition of Q street and H street in said city of Sacramento, it is virtually impossible for plaintiffs' trucks to be operated over or upon either said H street or said Q street, and that said provisions of said section 4, therefore, virtually restrict plaintiffs' trucks to the use of but one street in each of said districts so created west of Thirty-First street, that is to say, E street while traveling north of the center line of M street and Y street while traveling south of the said center line of M street."

The other allegations of the complaint need not be referred to herein. The gist of the whole complaint is that the ordinance discriminates against persons of the same class, that the city council of said city, in enacting said ordinance, transcended its legal authority, and that for certain reasons stated in the complaint the provisions of said ordinance contained in sections 2, 3, and 4 of article 9 are in contravention of the mandates of the state and federal Constitutions.

The prayer was for a decree perpetually enjoining and restraining the defendants from enforcing or attempting to enforce the provisions of said ordinance, and from in any way preventing and interfering with plaintiffs, or either of them, etc., "from or in the use or operation of any motor truck or trucks of more than one ton capacity while operating as carriers within the territorial limits of said city, * * * and that sections 2, 3, and 4 of article 9 of said Ordinance No. 80, Fourth Series, be adjudged and decreed to be wholly invalid, void and of no effect."

The defendants demurred to the complaint on general and special grounds, and the same was sustained without leave to amend. The defendants also interposed and filed an answer specifically denying the allegations. Judgment was entered in favor of defendants after demurrer sustained, and the injunctive relief called for thereby denied. The plaintiffs appeal from the judgment and the order denying a temporary injunction.

Considering the ordinance in connection with the official map of the city of Sacramento, which is referred to in the complaint, and which it was stipulated at the hearing of the appeal might be used in passing upon and determining the points urged for a reversal of the judgment—that is, in considering the grounds upon which it is insisted that the ordinance in question is at variance with certain provisions of the Constitution—the districts within the limits of which the ordinance prohibits the use of the streets in said city by the persons mentioned therein

may thus be explained: In the first place, it should be stated that the streets of the city of Sacramento, while not directly running north and south and east and west, substantially or practically run in those directions, those running east and west being alphabetically named, and including all such streets from B on the north to Y street on the south, and those running north and south being designated by numbers, and including all such streets from First on the west to Thirty-First street on the east. The north and south streets are what may be called "cross streets." Traffic district No. 2, as established by the ordinance in question, extends, north and south from I street to L street, and east and west from Fourth street to Twelfth street. In this district, "cross-town" traffic is restricted to Sixth street, except that the trucks mentioned in section 2 are permitted to use any cross streets in said district from I or L street nearest to the destination of any load which is to be delivered within the district. The use of all the cross or north and south streets west of Fourth street and east of Twelfth street for any purpose is not limited or restricted. In other words, any truck over one ton capacity entering said city either from the north or the south is at liberty, so far as the ordinance in question is concerned, to cross the city in that direction upon or over any of the north and south streets between Twelfth and Thirty-First streets, and between First and Fourth streets.

Thus it will be seen that when delivery of a load in traffic district No. 2 is to be made the truck may enter the district either on I or L street, traverse either of those streets to the street running north and south which is nearest to the point of delivery, thence over that street to the street running east and west where the point of delivery is situated, and then follow the east and west street to said point. From the complaint, aided by the map of the city showing the several traffic districts, it is clear that, on entering the city from any point on the north side thereof where such entrance can be made, a truck, wherever in the city its point of destination may be, may travel from said point on the north and south street either to E or H street, and then turn east or west on either one of those streets, according to the direction in which the point of destination is situated to the cross or north and south street leading to its destination. In entering the city from the south by way of any entrance into said city from that direction, such truck would be required to proceed from its point of entrance to Y or Q street and then turn east or west to the nearest cross street to the point of its destination. According to the map, as well as to the complaint, M and I streets at First street are the only streets in the city whereby entrance thereto may be made from the west.

Likewise it appears that entrances into the city from the east at Thirty-First street may be made by several different east and west streets, including Y, H, and E streets.

It will be observed from the foregoing explanation of the traffic plan and regulations devised and prescribed by the ordinance that there are only certain occasions on which the trucks referred to therein may be required to travel more than two blocks out of their way to reach their destination, and they are when the starting point or point of destination of such trucks is from or to the termini of one of the east and west streets—either M or J or K street—in which case a detour of six or eight blocks from a direct course would perhaps be necessary to reach the point of destination.

The foregoing is a sufficient explanation of the scheme involved in the ordinance under attack to subserve the purposes of this decision.

There are several points, rather subsidiary and subordinate to the main contentions of the appellants, which may first be considered and disposed of.

[1] The complaint, it will be seen, alleges that Q and H streets, two of the streets to the use of which for their trucking business the plaintiffs are restricted by the ordinance, are in an "unpaved condition," and for that reason "it is virtually impossible for plaintiffs' trucks to be operated over or upon either of said" streets. As to that averment, the grounds of the demurrer are that it is unintelligible, uncertain, and ambiguous. We think the demurrer as to said averment was good. A street unpaved may be in as good a condition for use by all kinds of vehicles as a paved street. A street which has merely been graveled and rolled is very often as useful and convenient for all practical purposes as a street paved according to the modern idea of street and highway improvement. If it is not practicable to use the streets complained of by motor trucks or other vehicles because of their bad condition—that is, because they are uneven or filled with chuck holes or for any other reason—that fact should have been pleaded in a direct and specific manner so as clearly to indicate or show that they cannot be used by the plaintiffs in their freight and carrying business by means of motor trucks with safety or reasonable convenience. In other words, the complaint should have given some description of the condition of the streets in order to show that they are "virtually impassable," as the complaint alleges, which allegation, by the way, involves merely a conclusion from the preceding indefinite allegation that they were in an "unpaved condition."

[2] But an unanswerable reply to the consideration of the point here is that, since the record does not show that a request or motion was made by the plaintiffs in the

court below for leave to amend the complaint in any particular, said point cannot be raised for the first time on appeal. As is said in *Buckley v. Howe*, 86 Cal. 596, 605, 25 Pac. 132, 134:

"The privilege of amending, after trial of the issue of law raised by demurrer is not one of right, but one resting in the discretion of the trial court. Code Civ. Proc. § 472. If the plaintiff desired again to amend, she should have applied to the court below, and if refused, exception should have been taken. It is too late to make the point for the first time in this court, when nothing appears on the record to show an abuse of discretion."

See, also, *Durrell v. Dooner*, 119 Cal. 411, 413, 51 Pac. 628; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290; *Murphy v. Murphy*, 57 Cal. App. 182, 186, 207 Pac. 43, 44.

[3] The next of the points above referred to is this: That the ordinance confines the operative effect of its provisions to a territory in the city of Sacramento whose boundaries are described as the "old city limits," and that that description is vague and indefinite, or bears no such meaning as to convey to the understanding what particular districts or parts of the city of Sacramento the ordinance has reference to or within which its provisions are intended to apply or have force. The reply to that proposition is, though, that the description of the several traffic districts by specific reference to the streets and parts of the streets by which they are bound or limited and the specific mention of those streets or parts of streets which may be used and not used make the ordinance in those particulars certain and definite. No one reading the ordinance can fall into any misapprehension as to the particular streets or parts of streets that may be used by the trucks mentioned in the ordinance or the streets or parts of streets which may not thus be used.

Counsel for the respondent further contends that the restrictions as to the use of the streets as prescribed by section 4 of the ordinance apply not only to Q and Y streets but all cross or north and south streets east of Twelfth street. We do not so understand the language of the ordinance. Section 4 specifically refers to traffic on east and west streets west of Thirty-First, and the omission of north and south streets from said section necessarily excludes those streets from within the purview of the restrictions, except such north and south streets as are within the other two traffic districts.

We are now brought to the consideration of the grounds upon which the contention is based that the passage of the ordinance was in excess of any authority conferred upon the city council either by the Constitution or the Legislature; that the measure is discriminatory as against the plaintiffs and in favor of other persons engaged in

like businesses; that it imposes upon those upon whom its provisions, if enforced, will operate, unreasonable, onerous, and oppressive burdens; that it is in contravention of the provision of section 1 of article 14 of the federal Constitution, guaranteeing to every citizen within the jurisdiction of every state the equal protection of the laws.

[4, 5] The ordinance under attack represents the exercise of the police power, with the right to employ and enforce which, within their respective limits, the Constitution has expressly invested every county, city, town, and township, in the state, provided that the ordinance or regulations passed or adopted for that purpose do not conflict with general laws. Art. 11, § 11, Const. Of course, the power thus conferred upon cities, counties, towns, and townships must be fairly and reasonably applied, or not invoked or exercised in such manner as to result in imposing upon the inhabitants of any of those political subdivisions unreasonably burdensome duties or obligations. The power vested by said section of the Constitution is essential to the full and proper functioning, and consequently the complete accomplishment of the ends and purposes, of municipal corporations, and the other political subdivisions therein mentioned; but it can never be so invoked and applied as to discriminate in favor of or against particular classes or persons as to whom no reasonable basis of discrimination can be said to exist. See *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *In re Smith*, 143 Cal. 368, 77 Pac. 180; *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; *In re Foley*, 172 Cal. 744, 158 Pac. 1034; *In re Hines*, 33 Cal. App. 45, 164 Pac. 339. And, it may be added, the question of the reasonableness of an ordinance passed by a municipal corporation, whether, in enacting the ordinance, the governing board of the city proceed under authority conferred by said section of the Constitution or that conferred directly by its charter, is open to inquiry by the courts. *In re Smith*, 143 Cal. 368, 77 Pac. 180; *Lawton v. Steele*, 152 U. S. 133 et seq., 14 Sup. Ct. 499, 38 L. Ed. 385; *In re Junqua*, 10 Cal. App. 602, 103 Pac. 159; *Ex parte Throop*, 169 Cal. 93, 145 Pac. 1029; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

[6] While the Legislature cannot impair or limit the exercise of the power vested in municipalities by said section 11 of article 11 of the Constitution, the exercise of such power is by section 8, of article 11, of the Constitution, as construed by the courts, limited to certain particular subjects. The last-mentioned section declares that when a freeholders' charter of a city or a city and county (and the city of Sacramento is governed by and operates under such a

charter) has been approved by the Legislature, "it shall become the organic law of such city or city and county and supersede all laws inconsistent therewith." The language of said section which is in italics has been, and, in the very nature of the case, should be, held to apply exclusively to "municipal affairs," and, consistently therewith, it has further been held that a freeholders' charter does not supersede any general law which affects and applies to or involves matters involving the welfare of the people of the state as a whole. It follows, therefore, that a municipal corporation governed by a freeholders' charter cannot pass any ordinance or adopt any regulation with respect to any subject or matter which does not come peculiarly within the legal description of "municipal affairs"—that is, any subject which concerns and affects the people of the state generally or as a whole—unless the authority to do so is expressly delegated to it by the Legislature either through its charter or some general law. This proposition is so well settled and has been declared so often in the cases that authorities need not here be cited to prove its soundness.

[7] Among those subjects which are of general concern to the people of the state or which do not come within the purview of "municipal affairs," but in the regulation of which the inhabitants of a city have a peculiarly direct interest, are the streets of such city. It is settled that the streets of a city belong to the people of a state, and the use thereof is an inalienable right of every citizen of the state, subject to legislative control or such reasonable regulations as to the traffic thereon or the manner of using them as the Legislature of the state may deem wise or proper to adopt and impose. *Ex parte Daniels*, 183 Cal. 636, 639, 192 Pac. 442, 21 A. L. R. 1172.

[8] The Legislature has not, through the charter of the city of Sacramento, granted to said city or the governing body thereof the authority to enact the legislation involved in the ordinance under attack.

There is, however, or was at the time of the enactment of the ordinance in question, a general law vesting freeholders' chartered cities with full control over and the right to regulate the use of the streets within their respective limits. Section 22, Stats. 1917, pp. 406, 407. Said section reads in part as follows:

"Provided, further, that local authorities may by general rule, ordinance or regulation, exclude vehicles from any cemetery or ground used for the burial of the dead, or exclude vehicles used solely or principally for commercial purposes from any park or part of a park system where such general rule, ordinance, or regulation is applicable equally and generally to all other vehicles used for the same purpose; provided, that at the entrance, or at each entrance if there be more than one, to such cemetery or park from which vehicles are

so excluded, there shall have been posted a sign plainly legible from the middle of the public highway on which such cemetery or park opens, plainly indicating such exclusion and prohibition; and provided, further, that the local authorities of any city, town, or city and county may impose additional restrictions to those herein contained applicable to vehicles exclusively used in the carrying of merchandise or articles of freight and of a capacity in excess of one ton in weight and may designate certain streets whereon heavy laden vehicles may be excluded or declared to be 'one way' streets, may further, restrict, or prohibit, the use of trailers."

[9,10] It cannot be doubted that the foregoing provision confers upon municipalities, governed by freeholders' charters, plenary authority to adopt such regulations as to the use of the streets of such municipalities by the motor vehicle trucks therein referred to as are prescribed by the ordinance in question. It is, however, suggested in the reply brief of appellants that the power to adopt local regulations can be delegated by the Legislature to such municipalities only by express grant in their charters. In *re Galusha*, 184 Cal. 697, 193 Pac. 406, is cited as lending some support to this suggestion. But the proposition is obviously untenable and the case cited does not support it. We can conceive of no theory upon which it can for a moment be maintained that the force of a general law is not equal to that of a city charter or any other special act. The Constitution does not expressly declare, nor does it contain language which is susceptible of such a construction, that the Legislature can delegate power to a municipal corporation through its charter only or that power cannot be so delegated through the instrumentality of a general law.

We perceive no ground upon which the ordinance under attack may be held to be unreasonable in that it is discriminatory as against the plaintiffs or any other class of persons or that it imposes oppressive burdens upon the plaintiffs or that it is violative of the mandate of section 1 of article 14 of the federal Constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws.

[11-13] The conditions surrounding the use of the streets and highways of the state are vastly different now from what they were prior to the invention and the introduction of the automobile as a factor in the world's economy. It is so well known, as a matter of common and current knowledge, that the courts are forced to take cognizance of the fact, that the automobile has become a common method for the transportation, locally, of freight and passengers and for business purposes generally, as well as for the purposes of pleasure. Likewise, it is known that in cities of large populations the streets thereof often become, or would so become if the traffic thereon were left to the unre-

strained liberty of those using such machines, so obstructed and congested as to render those thoroughfares practically useless for any other purpose than that to which they are put by the owners or drivers of such vehicles. In fact, even under proper regulations by the authorities, the use of those machines on the streets and highways of the state is a constant menace to the life and the limbs of the people, as well as injurious to the streets and highways. If they were to be permitted to be used upon and over the public streets of the cities in the absence of any compulsory reasonable restraint whatsoever as to the manner of so using them it is readily to be seen that the result would be that the traffic thereon would be such as to impair, if not in some instances actually to prevent, the orderly and convenient transaction of the usual or ordinary business maintained and conducted in the business districts of such city. It is therefore proper that the legislative department of the government should take notice of that fact to the end that it may regulate such traffic so as to reduce to the lowest possible minimum the dangers and the inconveniences which naturally are the consequences thereof. Indeed it is safe to conjecture that the time will come and not in the far distant future when even a more drastic regulation of automotive traffic may be required than now and that the power of police may be drawn on by the state, of whose sovereignty it is an attribute, to accomplish such a result, cannot be doubted. The police power is elastic. Its precise limits cannot be defined. It may be so extended as to meet the exigencies or new conditions arising from time to time as essential incidents of the incessant and seemingly illimitable progress of science and invention.

[14] As before stated, the exercise of the power is subject to no restraint other than that its crystallization into practical or concrete application must be reasonable. But what is a "reasonable" exercise of the power is relative. It is dependent upon the character or nature of the conditions to be met or overcome. What may be a perfectly reasonable police regulation under certain particular conditions might be unreasonable under other and different conditions. The regulation, at the present time, of traffic on streets and highways requisite for the safety of the people and the protection against injury of their property, while reasonable under conditions now prevailing would undoubtedly have justly been regarded as unreasonable before the automobile became a prominent part of the industrial system and other activities of the world.

The controlling consideration prompting the enactment of the ordinance in question is, as we apprehend, to remove from the principal business districts of the city of Sacramento the inconveniences which would necessarily follow from the prosecution of a

motor truck freight business by means of large, heavily loaded and cumbersome trucks over and through said districts, thereby obstructing the convenient and orderly course of business and the ordinary traffic therein. We assume, from the description in the ordinance of the division of the city into traffic districts, that the specific object sought to be attained by this ordinance was to keep the traffic referred to therein from certain business blocks in J and K streets of said city for the reason suggested, as well as for the purpose of preserving those streets over which the traffic is not permitted to be carried on except in those instances in which portions thereof are necessary so to be traversed to reach the points of destination of such trucks.

[15] The ordinance before us, as will be observed, is strictly in accord with the authority vested in municipal corporations by section 22 of the Motor Vehicle Act of 1917. The ordinance applies to all persons in the city of Sacramento engaged in using vehicles of a capacity in excess of one ton in weight and exclusively used in the carrying of merchandise or articles of freight. Thus it is readily to be noted that the ordinance does not discriminate against any particular person. All of the class engaged in the business mentioned within the limits of the city of Sacramento are subject to the terms of the ordinance. In other words, the ordinance imposes no greater burdens upon one of the class mentioned than are laid upon others of the same class or engaged in the same calling under the same conditions. It is settled that when a regulatory ordinance applies equally to all engaged in one kind of business there is no discrimination. *Powell v. Commonwealth of Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. The classification made by the ordinance, to wit, upon the basis of the weight of the vehicle, the load it carries, and the injurious effect thereof upon the streets, involves a real and substantial distinction, "having a reasonable and just relation to the things in respect to which such classification is imposed." *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923.

[16, 17] The foregoing views answer the proposition that the ordinance denies to the plaintiffs the "equal protection of the law" within the meaning of that mandate of the federal Constitution. See *In re Kotta*, 187 Cal. 27, 31, 200 Pac. 957. It is true that the plaintiffs and all others whose motor truck freight business comes within the terms of the ordinance will, by reason thereof, be subjected to more or less inconvenience and perhaps some extra expense. But in the enforcement of nearly all regulatory provisions of police enactments there are added burdens or inconveniences. To these, when not so unreasonable as to be unnecessarily burdensome, all citizens must yield for the gen-

eral or common good. The incidental and necessary burdens and inconveniences of the regulations do not of themselves render the regulation unreasonable. Nor will the extra expense which obedience to the terms of the ordinance may entail upon those whose business falls within the purview thereof itself stamp the ordinance as unreasonable.

The cases of *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, *Clausen v. De Medina*, 82 N. J. Law, 491, 81 Atl. 924, and *Lossing v. Hughes* (Tex. Civ. App.) 244 S. W. 556, are not in point in this case.

The case of *Waters-Pierce Oil Co. v. Hot Springs*, involved an ordinance requiring fees of owners of vehicles for the privilege of using the city streets, and embraced a classification of vehicles "based upon no difference in kind, size, capacity, or weight, or of their relative tendency to injure the streets, and arbitrarily fixes a tax of \$50 on vehicles used for transporting oils, and a tax of \$10 or less on vehicles of the same kind, size, and capacity used for other purposes." The court held that the ordinance was unreasonable because it was discriminatory against the owners of vehicles used for transporting oil, also holding that there was no substantial grounds for a distinction between such vehicles used for transporting oil and those of the same kind and character not used for that purpose.

In *Clausen v. De Medina*, *supra*, a board of boulevard commissioners to whom the control of the roads in the county was committed adopted a rule excluding from the use of a certain boulevard any motor vehicle used for business purposes, except to deliver and receive its load, in which case it was required to leave the boulevard east and west at the nearest traveled cross street. The Supreme Court of New Jersey held that the rule was beyond the power of the board of commissioners and in conflict with the state statute, since the test for exclusion adopted by the commissioners was the use to which the boulevard was put, while the test prescribed by the statute was the weight and not the use.

In *Lossing v. Hughes* the statute required license fees and registration of motor trucks and tractors used by all private owners, except farmers, and prohibiting commercial motor vehicles with a greater capacity than 8,000 pounds to be used by any one except for agricultural purposes. The court of appeals of Texas held that the statute was discriminatory in that it was not based upon a proper classification, and that it was therefore repugnant to section 1 of article 14 of the federal Constitution, guaranteeing the equal protection of the laws to the citizens of every state.

We think it is quite plain that there is no analogy between the cases last considered and the case at bar. The ordinance here does no more than what the statute expressly de-

clares that municipal corporations may do with respect to the regulation of motor trucks of more than a ton carrying capacity used in such municipalities for the purpose of transporting as a business freight, merchandise, or other articles from point to point therein. We do not think that any one would undertake to maintain that the statute vesting the city with this power violates any provisions of our own Constitution or any mandate of the federal Constitution. Indeed, in view of the fact that the large auto machines are being constantly employed for all purposes in the cities and towns, as well as over the public highways generally in the state, it would well be regarded as evidence of marked impotency in the legislative department of the government if it was in the least degree hamshackled so as to prevent proper and reasonable control and regulation of the use of such dangerous business and pleasure instrumentalities. It has never been doubted that the local governments of the state, having that power vested in them by the Legislature, may establish parking zones in the cities and towns and otherwise regulate the use of the ordinary automobiles.

[18] But it is further contended by the plaintiffs that there is a discrimination as between the trucks that may be used for freight transportation purposes. It is said that there is a heavier burden imposed by section 4 of article 9 on motor trucks of one-ton capacity or over which carry rock, sand, gravel, etc., than is imposed upon the motor vehicles of the same carrying capacity by section 2 of said article. We do not think the ordinance intends any such discrimination. Section 2, it will be noted, refers to such trucks as are engaged in the hauling of "goods, wares, freight or merchandise of any description." Section 4 specifically refers to such trucks as are engaged in hauling "rock, sand, gravel, asphaltic mixtures or other dead weight materials." We think under a reasonable construction of the ordinance the articles which section 4 refers to may be regarded as articles of "freight" just as much as the "freight" referred to in section 2. In this view the trucks mentioned in section 4 would not be excluded from the right to use the streets which the trucks mentioned in section 2 are at liberty to use under the terms of the ordinance.

Our conclusion is that the ordinance involves a reasonable and just regulation of street traffic in the city of Sacramento.

[19] In justice to ourselves it should be stated that, although the proposition is not adverted to in any of the briefs on file herein, or was not mentioned by either of the attorneys for the parties when the case was called for oral argument, it occurred to the court, after this opinion had been almost completed, that the Motor Vehicle Act of 1923, known as the "Breed Motor Vehicle

Act" (St. 1923, p. 517), might have had the effect of repealing the ordinance under review. On examining the statute of 1923, it appeared to us that such was the effect thereof. Upon calling the attention of the city attorney to the proposition, that officer conceded that the ordinance had been wiped out by the said statute, but insisted that a decision of the case was required because of the large amount of costs involved. The question upon whom that burden must fall is, of course, dependent upon the result herein arrived at.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

(65 Cal. App. 569)

MCCARTHY et al. v. KURKJIAN et al.
(Civ. 4762.)

(District Court of Appeal, First District, Division 1, California. Feb. 13, 1924. Rehearing Denied March 13, 1924. Hearing Denied by Supreme Court April 10, 1924.)

1. Mortgages $\S$ 283(1), 298(4)—Subrogation $\S$ 14(1)—Second mortgage held not entitled to be subrogated to collateral security held by first mortgagee; purchaser of mortgaged premises is surety; payment by one primarily liable extinguishes mortgage.

Where the owner of an apartment building mortgaged it and as a further security for the debt pledged certain Liberty and Victory bonds, and then sold the realty to purchaser, who assumed the mortgage debt and who executed a second mortgage on the realty, second mortgagee was not entitled to pay the first mortgage and to be subrogated to the rights of first mortgagee in the bonds, since the purchaser through whom the second mortgagee claimed was principal and the mortgagor a surety, and a payment of the first mortgage by purchaser would extinguish it.

2. Marshaling assets and securities $\S$ 5—Second mortgagee not entitled to marshaling of assets where not in privity with original mortgagor.

Where the owner of an apartment building mortgaged it and as a further security for the debt pledged certain Liberty and Victory bonds, and then sold the realty to purchaser, who assumed the mortgage debt, and executed a second mortgage on the realty, the second mortgagee was not entitled to a marshaling of assets and to have the bonds held by first mortgagee applied on the mortgage assumed by purchaser before resorting to the land, since there was no privity of contract between second mortgagee and mortgagor, and, he not being a debtor of second mortgagee, one of the necessary elements of the marshaling of assets was wanting, and Civ. Code, $\S$ 2845 to 2850, relative to rights of sureties, had no application.

3. Marshaling assets and securities $\S$ 1—When equity will marshal securities between two persons.

Before equity will marshal securities between two persons, it must appear that they

are creditors of the same debtor, that there are two funds belonging to that debtor, and that one of them alone has the right to resort to both funds.

4. Mortgages §581(5)—Court may exercise discretion as to amount of attorney's fees.

The matter of attorney's fees, in suit to foreclose mortgage, is within the discretion of the trial court, and he may fix such an amount as in his judgment is reasonable and just.

5. Appeal and error §880(3) — Judgment against another defendant cannot be questioned by appealing defendant.

A judgment against a defendant who has not appealed cannot be questioned by another defendant.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by George H. McCarthy and others against Arakel Kurkjian and others. Judgment for plaintiffs and defendant J. M. Urrutia appeals. Affirmed.

Goldman, Nye & Surr, of San Francisco, for appellant.

B. S. Gregory, of San Francisco, and E. K. Taylor, of Alameda, for plaintiffs and respondents.

Cullinan & Hickey, of San Francisco, for defendant Rosseau.

Walter H. Robinson, of San Francisco, for defendant Gorman.

SHORT, Justice pro tem. This is an appeal from a judgment of foreclosure of a first mortgage on certain real property situate in San Francisco. Judgment was entered decreeing foreclosure and sale of the said realty. The appeal is from the judgment by defendant J. M. Urrutia, a second mortgagee. Review is herein sought of said judgment and certain orders and rulings made by the trial court.

The following facts appear from the record: On January 15, 1921, A. F. Rosseau was the owner of the real property described in the complaint, known as the Kenilworth Apartments, located in San Francisco; and on that date leased the same to one Mrs. E. F. Gorman for five years at a rental of \$1,325 per month, and to secure said rental took a chattel mortgage covering her furniture. On January 18, 1921, defendant Rosseau mortgaged said realty for the sum of \$100,000 to the Banco Popolare Fugazi, and as further security for the payment of this debt Rosseau pledged to the mortgagee certain Liberty and Victory bonds of the face value of \$30,000; said mortgage being a first lien on said realty and bonds. The note secured by said mortgage contained the following clause:

"This note is secured by a mortgage bearing even date herewith, and pledge of certain Liberty and Victory bonds."

On March 17, 1921, Rosseau sold the realty, but not the bonds, to J. B. Frinchaboy, and the said Frinchaboy, in the deed of conveyance, assumed and agreed to pay the mortgage debt, and signed the original note given to the bank. At the same time Rosseau assigned to Frinchaboy the lease and chattel mortgage securing the lease.

Frinchaboy immediately assigned said lease and chattel mortgage to Urrutia and also executed a second mortgage on the realty to Urrutia for the sum of \$50,500 to secure an antecedent debt. On August 22, 1922, Frinchaboy conveyed his interest in the realty to the defendants Kurkjian. On May 4, 1922, Banca Popolare Fugazi assigned the first mortgage on the Kenilworth Apartments and bonds to George H. McCarthy and Mabel E. McCarthy, his wife. Later they hypothecated their interest in the note and mortgage to the Bank of Alameda for a loan of \$67,500. On April 24, 1922, appellant brought suit to foreclose his second mortgage, plaintiffs' first mortgage, the chattel mortgage of defendant Gorman, and for an accounting between himself and Frinchaboy.

[1] On June 14, 1922, the plaintiffs commenced this action to foreclose the first mortgage.

The provision of the first mortgage relative to the liability of the bonds under this proceeding is as follows:

"In the event that the mortgagor shall make default in any of the covenants of this mortgage, the mortgagee shall, however, have the option of foreclosing this mortgage upon the real property herein described, and, in the event of a deficiency shall be entered in its favor, after the sale of said real property by sheriff or commissioner, it may then sell said bonds in open market without notice to mortgagor and apply the proceeds towards the satisfaction of such deficiency judgment."

On January 30, 1923, Urrutia filed his bill to redeem in a separate action, numbered 133193, in the same court.

Appellant claims the right to pay the plaintiffs their debt and be subrogated to all the rights and securities under the first mortgage; every proposal to pay being accompanied by the specific condition that the bonds should be applied thereupon, or, in lieu thereof, if and provided said bonds be also delivered to this (appellant) defendant.

Relying upon the foregoing facts, the appellant contends that he was entitled to pay the first mortgage and thereby be subrogated to the security of realty and bonds, or be subrogated to have a marshaling of securities and have the bonds as well as the realty applied to the payment of the mortgage.

Respondents do not deny appellant's right to redeem by paying the mortgage, but contend that the payment thereof would give appellant no greater right to the security covered by it than Frinchaboy had, under whom

he claims; that as Frinchaboy assumed and agreed to pay the debt of \$100,000, when the real property was conveyed to him, and thereby, as between him and Rosseau, his grantor, he became the principal debtor and Rosseau became the surety. *Williams v. Naftzger*, 103 Cal. 438, 440, 37 Pac. 411; *Fielding v. Iler*, 39 Cal. App. 559, 563, 179 Pac. 519; *Beach v. Waite*, 21 Cal. App. 304, 306, 307, 131 Pac. 880; *Braun v. Crew*, 183 Cal. 728, 731, 192 Pac. 531. That the real property then became the primary fund for the payment of the debt; that Rosseau did not sell the bonds to Frinchaboy, but the realty only; that Urrutia, having received his mortgage from Frinchaboy and claiming under him, was entitled to no greater rights than he (Frinchaboy) possessed; that as Frinchaboy had agreed to pay the mortgage debt when he received title to the realty, a payment by Frinchaboy, who had assumed the entire mortgage debt, would completely extinguish the mortgage; and as Frinchaboy could not be subrogated to the right of the mortgagee and keep the mortgage alive for any purpose, neither could Urrutia, who claimed under and through him, and that Rosseau's property, the bonds, could not be taken to pay Frinchaboy's debt to Urrutia.

In support of their contention respondents cite a number of authorities, among which are the following: *Cook v. Kane et al.*, 101 Misc. Rep. 97, 166 N. Y. Supp. 453, and *Miller v. Fasler*, 42 Minn. 366, 44 N. W. 256.

In *Cook v. Kane*, supra, one Bridget C. Kane, who was the owner of a parcel of land, mortgaged it for the sum of \$18,000, after which she conveyed it to one Matthew A. Kane, subject to that mortgage; thereafter Matthew A. Kane gave a second mortgage on the same land to one Herman Roth for \$3,500. The first mortgage was foreclosed and a deficiency judgment entered; the second mortgagee, Ford, asked the court to charge the Bridget C. Kane estate with the payment of said deficiency and pay the money in the hands of the receiver to him, to apply upon his second mortgage, or to assign the deficiency judgment to him; the court denied the request and held:

"That when Matthew A. Kane took the property by deed from Bridget C. Kane, subject to the first mortgage of \$18,000, Bridget C. Kane became entitled, as against Matthew A. Kane and any one claiming under him, as the defendant Roth, the second mortgagee, necessarily does in this case, to have the mortgaged property held primarily liable for the payment of the \$18,000 mortgage."

In *Miller v. Fasler*, supra, one F—, the owner of three several blocks of land which were incumbered by a mortgage, conveyed one block to Mrs. Schurch, subject to the payment of the whole mortgage debt, which by the terms of the deed was assumed by

the grantee, who also subsequently executed a second mortgage upon the block so conveyed.

"Held, that the effect of the stipulation in the deed was to charge the block in question with the payment of such prior mortgage, and the second mortgagee and his assigns are affected with notice of such charge or encumbrance upon the land mortgaged to them, and are bound by it; and they can acquire no title to the other blocks, under a redemption of the first mortgage from a sale upon foreclosure, which equity will permit them to assert against the first named grantor, F. * * *

"The effect of the stipulation in the deed * * * was to make the land thereby conveyed (block 4) the primary and exclusive fund for the payment of the mortgage as against her [the grantee], and as to her grantees and mortgagees of the same block, with notice, actual or constructive.

"That block thereby became charged with the payment of the debt by her contract as effectually as if she had given a new mortgage therefor upon it. And the plaintiff, as holder of the second mortgage, was bound by the equities appearing upon her title, as the same appeared of record. * * * He could not, therefore, contrary to the stipulation in the deed to his mortgagor, acquire or assert any rights to block 2 and 3 under the prior mortgage, as against the grantor in that deed, the defendant or his assigns."

And the following principles are laid down in regard to subsequent purchasers and successors in interest where the debt has been assumed by their grantor:

In *Pom. Eq. Jur.* vol. 3 (4th Ed.) § 1206, p. 2882, we find the following:

"As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of suretyship. As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them. Payment, therefore, by a grantee who has assumed the entire mortgage debt completely extinguishes the mortgage; he cannot be subrogated to the rights of the mortgagee, and keep the mortgage alive for any purpose."

See, also, section 1213, p. 2907.

The above principles are approved in the following cases cited, to wit: *Lamoille County Sav. Bank & Trust Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002; *Northwestern Nat. Bank v. Stone et al.*, 97 Iowa, 183, 66 N. W. 91, 92; *Irvine v. Perry*, 119 Cal. 352, 356, 51 Pac. 544, 949; *Crenshaw v. Thackston* (1880) 14 S. C. 437; *Haas v. Dudley et al.*, 34 Or. 355, 48 Pac. 168; *Poice v. Coffeen*, 158 Iowa, 705, 138 N. W. 857.

From the foregoing authorities it appears

that Frinchaboy is in the position of the principal debtor and Rosseau stood as his surety to the extent of the bonds, in which case neither Frinchaboy nor those claiming under him would have any interest in the bonds given as security by the surety; and it would be Frinchaboy's duty to protect the bonds, and those claiming under Frinchaboy would have notice of the liability. And as Frinchaboy was the principal debtor, a payment of the mortgage by him would extinguish it, so a payment by Urrutia, who claims under and through Frinchaboy, would not entitle him to be subrogated to the rights of the mortgagee, nor could it be kept alive for any purpose in his hands.

[2] The next contention of appellant is that he is entitled to a marshaling of assets, and to have the bonds held by original mortgagee first sold or applied on the mortgage of \$100,000 assumed by Frinchaboy, before resorting to the land upon which appellant has his second mortgage.

Replying to this, respondents claim that no marshaling of assets could be had in this case, since marshaling only occurs where both creditors who seek to marshal are creditors of the same person, and have demands against funds, the property of the same person; and that there was no privity of contract between appellant and respondent Rosseau and he not being a debtor of Urrutia one of the necessary elements of the marshaling of assets is wanting.

[3] That before a court of equity will marshal securities between two persons it must appear: (1) That they are creditors of the same debtor; (2) that there are two funds belonging to that debtor; (3) that one of them alone has the right to resort to both funds. These principles are sustained by the following authorities: *Quinnipiac Brewing Co. v. Fitzgibbons*, 73 Conn. 191, 47 Atl. 128, 130; *Robinson v. Lehman*, 72 Ala. 401, 404; *Stevens v. Church*, 41 Conn. 369; *Brooks v. Rice*, 56 Cal. 428; *Kent v. Williams*, 114 Cal. 537, 46 Pac. 462; *Blair v. Ward*, 10 N. J. Eq. 125.

In *Savings Bank v. Middlekauff*, 113 Cal. 466, 45 Pac. 841, the court say regarding section 3433, Civil Code:

"* * * That section applies only to a case where one creditor is entitled to resort to each of several funds of a debtor, and another creditor of said debtor is entitled to resort to some, but not all, the same funds."

Sections 2845 to 2850, Civil Code, cited by appellant, refer to rights of sureties and do not apply to appellant in this case.

It is clearly evident from the foregoing authorities that appellant is not entitled to a marshaling of assets.

Having heretofore determined that the appellant is not entitled to pay the first mortgage and thereby be subrogated to the security of both the realty and the bonds; and having further determined that said appellant is not entitled to a marshaling of securities, it follows that the court did not err in striking out the second defense in appellants' amended answer; nor in denying appellant's motion to file an amendment to the amended answer; nor in denying appellant's motion to file a cross-complaint; nor in denying appellant's motion for a continuance until such time as action No. 133193 should be disposed of, as each and all of said matters had reference to redemption and subrogation or marshaling of securities.

The complaint stated a cause of action and was sufficiently certain and unambiguous to apprise the appellant of the fact that they were foreclosing the land only by said action.

The evidence is sufficient to support the findings and the findings support the judgment.

The rents were applied as payments on the first mortgage in accordance with the stipulation of July 12, 1922, except the rent of the last three months, which was applied as payment on order of the court, and the amount found due was reduced by the amount of said three months' rent, and it does not appear that appellant has been injured by said order.

[4] The matter of attorney's fees was within the discretion of the trial court, who was familiar with the nature and extent of the services performed, and he could fix such an amount as in his judgment was reasonable and just, and we cannot say that there was an abuse of discretion.

[5] Defendant Gorman not having appealed from the judgment, we are of the opinion that appellant cannot question the correctness of the judgment against her.

From the foregoing conclusions it appears that there were no errors and that the judgment and orders should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, J.

65 Cal. App. 757

REALTY & REBUILDING CO. v. REA et al.
(Civ. 4656.)

(District Court of Appeal, First District, Division 1, California. Feb. 23, 1924. Hearing Denied by Supreme Court April 21, 1924.)

1. Corporations ¶129 — Statute requiring transfer of shares entered on books of company is mandatory.

Civ. Code, § 324, making a transfer of shares of stock invalid as between the parties thereto unless the same is entered on the books so as to show by whom and to whom the transfer was made, the number of the certificate, the number or designation of the shares, and date of the transfer, is mandatory, and not a mere rule for guidance of the corporation and stockholders.

2. Corporations ¶136—Creditors have right to rely on corporation books as showing who stockholders are.

Creditors of a corporation have a right to rely on the books as showing who the stockholders are, and the amount of stock held by each, and the failure to make a transfer on the corporation books requires that such transfer be disregarded in considering the rights of creditors.

3. Corporations ¶269(3)—Evidence held not to show transfer of stock so as to relieve owner from liability.

Where the owner of shares of stock delivered a certificate thereof duly indorsed to his sister, but had no knowledge that the certificate was ever subsequently delivered for transfer by the transferee or any other person to the secretary of the corporation and owner having it within his power to acquire such knowledge, held not to show that owner effected such a transfer of the stock as would relieve him from liability as a shareholder and to place him in a position of a mere involuntary record holder.

4. Appeal and error ¶1011(1) — Appellate court bound by findings of trial court where evidence is conflicting.

Where the evidence upon a subject is conflicting, appellate court is bound by the conclusion of the trial court.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Realty & Rebuilding Company against L. A. Rea and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

A. E. Shaw, of San Francisco, for appellant.

Moran & Heer, of San Francisco, for respondent.

TYLER, P. J. This is an appeal by defendant Ruef from a judgment for \$2,490 upon a stockholder's liability. The alleged liability arose as follows:

In the month of June, 1906, Rudolph Spreckels was the owner of certain real property situated on the west side of Fillmore street, in this city and county, and he leased the same to defendants Rea, Kehrlein, and Sullivan. On December 14 following the lessees assigned and transferred their leasehold interest in the same to defendant Fillmore Arcade Company, a corporation. This company accepted the transfer and entered into possession of the leased premises. Thereafter, on April 28, 1908, Rudolph Spreckels, as owner and lessor, conveyed the premises to plaintiff corporation. At the time of the transfer of the lease to the Fillmore Arcade Company Ruef was a stockholder in the latter corporation. Such corporation subsequently became indebted to plaintiff on account of certain rents due under the lease, and this indebtedness became the subject of this action.

The count upon which the cause of action is based is one to recover certain accrued rents which were alleged to be due from the Fillmore Arcade Company to plaintiff for the months of June, July, and August, 1911; and defendant Ruef was sued with other stockholders for his proportion of this alleged indebtedness.

The case has previously been before the Supreme Court, and the facts are fully set forth in the opinion rendered therein. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 Pac. 1024. One of the contentions relied upon by Ruef upon the former trial was that he had indorsed and delivered his certificate of shares in defendant Fillmore Arcade Company to his sister, Mrs. Henrietta Sittenfeld, in December, 1908, and was therefore not the owner of any stock in such corporation at the time when the indebtedness here sued upon was incurred or had accrued. The trial court had so found, but upon appeal it was held that the evidence concerning the transfer was insufficient to relieve Ruef from liability to the creditors of the corporation for the reason that it failed to show that Ruef had made proper or diligent effort to procure the removal of his name as stockholder from the corporate books, and the judgment rendered in his favor was accordingly reversed.

Upon the cause again coming on for trial after such reversal defendant Ruef testified to further facts surrounding the transfer. Judgment as above indicated was rendered against him, and this is an appeal from such judgment.

The sole question presented by the appeal is whether the additional testimony shows that Ruef effected such a transfer of his stock as would relieve him from liability and place him in the position of a mere involuntary record holder, it being conceded that his name still appears upon the books of defendant Fillmore Arcade Company as a stock-

holder therein. The testimony of Ruef is the only evidence in the case on the subject of the ownership of the stock and the circumstances surrounding its transfer. It is here claimed that such evidence shows without conflict that he had done everything in his power to cause the transfer of his certificates of stock to be made upon the books of the corporation, for which reason the judgment rendered against him should be reversed. Upon the former trial Ruef testified "that he had delivered a duly indorsed certificate representing his shares of stock to Henrietta Sittenfeld, and had requested the secretary of the corporation to issue the stock to the transferee." He further testified on that occasion that he had no knowledge as to whether the certificate was ever subsequently delivered by the transferee or any other person to the secretary of the corporation. It was this evidence that the Supreme Court held upon the former appeal to be insufficient to relieve Ruef of his personal liability. Upon the present trial this evidence was supplemented by further testimony on the part of Ruef to the effect that at the time he transferred his certificate he was incarcerated in the county jail, expecting within five days to be sent to the state prison for a term of 14 years, and, being refused permission to personally attend to his affairs outside of the jail he was compelled to rely upon others to properly effect a transfer for him. In this connection Ruef testified upon the present trial that he had been assured by the transferee shortly after the assignment of the stock that the certificate had been left by her with the secretary of the corporation for transfer, and that he had further been assured by the president and secretary, and also by the attorney of the corporation, that the transfer had been made.

Respondent claims that this additional testimony on the part of Ruef is highly improbable and at variance with his testimony given at the former trial, wherein he had stated that he had no knowledge as to whether or not the certificate was ever delivered by the transferee or any other person to the secretary. Accordingly it is insisted that the judgment should be affirmed. We are of a like opinion.

[1, 2] When shares of stock are transferred from one owner to another, it at once becomes an important matter to determine who is liable upon a stockholder's liability when such question is called into issue. The general rule is that a transferor is not released from this imposed burden until his transfer is duly registered upon the corporate books. Our Code provides in substance that a transfer is not valid, except as to the parties thereto, until the same is entered upon the books of the corporation so as to show the name of the parties by whom and to whom the transfer was made, the number of the certificate, the number or des-

ignation of the shares, and the date of the transfer. Civ. Code, § 324. This statute is mandatory, and not directory, and is not a mere rule for guidance of the corporation and stockholder. The section makes the transfer invalid, except as between the parties thereto, unless it is made in conformity with this statutory requirement. The transfer of shares of stock, therefore, to become effectual between transferor and creditors of the corporation, must be entered on the corporate books. *Spreckels v. Nevada Bank*, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. A provision of this character is a formality intended for the protection and security of the corporation and of third persons dealing with the same. Creditors of a corporation have a right to rely upon the books as showing who the stockholders are and the amount of stock held by each, and failure to make a transfer on the books of the corporation requires that such transfer must be disregarded in considering the rights of creditors. *Sherman v. S. K. D. Oil Co.*, 185 Cal. 534, 548, 197 Pac. 799, and cases cited.

It is conceded in the present case that no such transfer was ever made, and that the name of Ruef still remains on the books of the corporation as a stockholder. It is claimed, however, that, where a stockholder has made a bona fide transfer of his stock, and has done everything in his power to comply with all the statutory requirements regarding stock transfers, he ceases to be liable as a stockholder, either to the corporation or its creditors, where, through the fault or omission of the corporation, the transfer is not entered on the books.

[3, 4] Admitting this to be true, the evidence upon this subject is not without conflict. In this connection it appears therefrom that at or about the time of the transfer the officers of the corporation, who were the friends of Ruef, visited him in the jail where he was incarcerated. The secretary of the corporation was his personal employee. It was possible for him to have delivered the stock to any one of these officers with instructions to make the transfer. Ruef at this time, so the evidence shows, was chiefly concerned with transferring most if not all his possessions to members of his family, as he was sick, and of the opinion that he would not survive his term of imprisonment. The transfer of the stock to his sister was as between them perfectly valid by reason of his indorsement and delivery. There was nothing in the transaction which in any manner indicated anxiety on Ruef's part as to any future liability to creditors of the corporation by reason of his mode of transfer. The testimony given by him upon the former trial was read into the record wherein he had stated that he had no knowledge that the certificate was ever subsequently delivered for transfer by his sister, the trans-

ferree, or by any other person, to the secretary. This was a circumstance which the trial court was justified in considering when determining the question as to whether or not he had done all that a prudent man could do to effect a transfer. In other words, the evidence upon the subject as to whether or not Ruef was the legal owner of the shares in contemplation of law is conflicting; and, this being so, we are bound by the conclusion of the trial court.

For the reasons given, the judgment is affirmed.

We concur: ST. SURE, J.; SHORT, Justice pro tem.

(65 Cal. App. 779)

STEPHENS et al. v. BEAN. (Civ. 2699.)*

(District Court of Appeal, Third District, California. Feb. 26, 1924. Hearing Denied by Supreme Court April 24, 1924.)

1. Contracts ⇨117(5)—Contract to sell undertaking business and covenant not to compete held enforceable notwithstanding statutes.

One contracting to sell to his partners his "one-half interest in their named undertaking firm located" in a named city and county, and covenanting not to enter into business in competition to the above-mentioned firm "at any time in the future," could be restrained from thereafter competing, notwithstanding Civ. Code, §§ 1673 and 1674, prohibiting contracts restraining any one from exercising a lawful profession except within a specified county, city, or part thereof, since undertaking is essentially local business and the restriction of location should be implied from the initial reference to city and county.

2. Injunction ⇨61(2)—One entering competing local undertaking business in higher position than clerk restrained for breach of covenant not to compete.

Under Civ. Code, §§ 1673, 1674, prohibiting contracts in restraint of trade except agreements to refrain from carrying on "similar business within specified county, city, or part thereof, one employed in a higher position than clerk or servant in a local competing undertaking company, could be restrained for breach of a covenant not to compete with his former partners.

3. Good will ⇨6(2)—Contract broken by managing business for competitor.

A contract against engaging in a similar business is broken by conducting or controlling such business for another as manager or in similar capacity, but not if employed as clerk or servant, in view of Civ. Code, §§ 1673, 1674, prohibiting contracts in restraint of trade.

4. Injunction ⇨128—Evidence held to show defendant, covenanting not to compete, employed by competitor in higher position than clerk.

In a suit by vendees of an undertaking business to enjoin vendor, covenanting not to

compete, from continuing in the employ of a competing local company, evidence held to show defendant employed in higher position than clerk or servant.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Suit by L. O. Stephens and another, doing business as Stephens & Bean, against W. A. Bean. Judgment for plaintiffs, and defendant appeals. Affirmed.

Everts, Ewing & Wild and Jas. Gallagher, all of Fresno, for appellant.

Harris & Hayhurst and Harris, Johnson, Willey & Griffith, all of Fresno, for respondents.

FINCH, P. J. The defendant has appealed from a judgment restraining him—

"from further engaging in the undertaking business, or business similar thereto, in the city of Fresno, so long as plaintiffs, or any person deriving title to the good will of said business from plaintiffs, carry on said or like business in said city of Fresno."

There is no substantial conflict in the evidence. For many years the plaintiffs and defendant were partners in the business of general undertakers and funeral directors in the city of Fresno, under the firm name of Stephens & Bean. On the 31st day of May, 1919, the defendant sold his interest in the business and property of the firm to the plaintiffs for the sum of \$35,000 and executed the following instrument of transfer:

"State of California, County of Fresno—ss.:
"Know all men by these presents: That I, W. A. Bean, of the city of Fresno, county of Fresno, state of California, am the owner of one-half (½) interest in the undertaking firm of Stephens & Bean, located and doing business in the said city and county.

"Be it further known: That for, and in consideration of the sum of one hundred and no/100 (\$100.00) dollars, receipt of which is hereby acknowledged, I do sell, assign and transfer to L. O. Stephens and J. D. Stephens of the same place, my undivided one-half (½) interest in the aforesaid undertaking firm of Stephens & Bean, together with my interest in all stock, furniture, fixtures, securities, notes, book accounts, etc., now due said firm.

"Signed, sealed, and dated at Fresno, this thirty-first day of May, 1919. W. A. Bean.

"Subscribed and sworn to before me this 31st day of May, 1919. Gladys G. Watson, Notary Public in and for the County of Fresno, State of California.

"I further agree to not at any time in the future enter into business in competition to the above-mentioned firm of Stephens & Bean.

"[Signed] W. A. Bean."

The defendant testified that he had been in the undertaking business with the firm of Stephens & Bean for 25 or 30 years; that at the time of the trial, November 15, 1922, he was in the employ of the Mission Under-

taking Company, a corporation, undertakers and funeral directors in the city of Fresno, and had been in the employ of such corporation since the 1st of April, 1922; that he assists in cleaning up, in making death calls, and in conducting funerals, and, in the absence of the manager, he sometimes takes charge of funerals; that the business is transacted by the manager, a lady attendant, and defendant, all of whom are paid salaries and receive commissions on the amount of business transacted; and that defendant was consulted in the preparation of advertising matter which was published in the newspapers of Fresno. These advertisements may be said to "feature" the defendant. A description of one of them will serve to illustrate their nature. It contained pictures of the undertaking parlors, the defendant, the manager, and the lady attendant, underneath which appeared the following:

"Mission Undertaking Parlors, Announcing a Change in Name of the Powell Undertaking Company, to the Mission Undertaking Company. Mr. R. A. Powell having severed his connection with this undertaking concern, the directors wish to announce to the public that in the future it will be known as the Mission Undertaking Parlors, and associated with it are William A. Bean, J. Herman Kennedy and Mrs. Anna (Erickson) McIntyre, all of whom are licensed embalmers and experienced funeral directors.

"Wm. A. Bean: Mr. Bean was formerly with Stephen & Bean, and has had over 30 years' experience in the business, 28 years of which have been in the city of Fresno, having served as coroner of Fresno county for 12 years. During his 30 years' experience in the undertaking business he has established a reputation for himself as being one of the leading funeral directors of the state, having arranged and directed some of the largest funerals ever held in the city of Fresno."

This is followed by similar statements concerning the experience and standing of Mr. Kennedy and Mrs. McIntyre.

[1] Appellant contends that his covenant not to engage in the undertaking business is void because in restraint of trade, and, further, that he is not engaged in such business. Section 1673 of the Civil Code provides:

"Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

Section 1674 provides:

"One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein."

Defendant's covenant does not expressly contain the limitations of section 1674 as to

time, territory, or the nature of the business which defendant agrees not to carry on.

In *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995, the defendant had agreed not to carry on a butcher business, without limiting the agreement to the time the plaintiff or his assigns might conduct a like business. In holding the contract valid for the time during which plaintiff and his assigns might continue in a like business, the court said:

"The statute does not provide that such contracts, though not in accordance with the Code, shall be wholly void. It says that they shall be 'to that extent void.' It may be said, and perhaps that is the correct construction, that the restraint which is other than that prescribed shall be void. But it is a familiar rule of law that where there is a statute upon a certain subject it enters into and becomes a part of such contract upon such subject, if the contract can be so construed. The contracting parties are presumed to have had the law in view. Sometimes the terms of the contract will rebut this presumption, but in the present case it does not. One rule at common law applicable to this matter was that the restraint shall be no greater than is necessary to protect the purchaser. This rule would limit the restraint to the time during which the purchaser or his assignee is in business, for beyond that time there is nothing to protect."

The following cases are to the same effect: *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70.

Defendant's covenant is not expressly limited to the city or county in which the business sold was being conducted. No sound reason appears, however, why the intention of the parties may not be ascertained, as in other agreements, from a consideration of the terms of the contract as a whole, viewed in the light of the surrounding circumstances. The contract recites that the defendant, "of the city of Fresno, county of Fresno," is the owner of a one-half interest in the undertaking firm of Stephens & Bean, "located and doing business in the said city and county." The business, in its nature, is local. Any business other than local, therefore, in which defendant might engage, would not be in competition with that of plaintiffs. The case is unlike those of manufacturing concerns and wholesale merchants whose goods are sold and distributed over large territories. The court was justified in concluding that it was the intention of the parties that the restraint imposed upon defendant was applicable only to the city of Fresno. In *Brown v. Kling*, supra, it is said:

"In *Moore, etc., Co. v. Towers, etc., Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, defendants sold their business to plaintiffs, and agreed not to handle any more plowstocks or plowblades. There was no restriction as to time or place. It was objected to as unreasonable because unlimited. The court said, however, in substance, that a contract was to be construed with reference to the circumstances of the parties and

the object sought to be attained by the contract. That in fact the firm was dealing only within a limited territory, and the evident purpose was to protect the plaintiff in his business. The contract was, therefore, to be construed as limited to the territory covered by plaintiff's business. I think this case an advance upon former precedents upon the subject."

In *Grogan v. Chafee*, 156 Cal. 611, 615, 105 Pac. 745, 747 (27 L. R. A. [N. S.] 395), it is said:

"The tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade."

In the case of *City Carpet, etc., Works v. Jones*, supra, the defendant had agreed not to enter into any business of the kind sold to plaintiff in the city and county of San Francisco or in the counties of Alameda and San Mateo. The court said:

"In this case three counties are named in the contract, and I see no difficulty in upholding it as to the county in which the business was conducted, and declaring it void as to the other two counties. The boundaries of each are definite, and fixed by law. Neither includes any part of the others. If the city and county of San Francisco had alone been named the contract would have been good. * * * It is only to the 'extent' that the contract departs from the provisions of the Code that it is declared void."

Appellant contends that the contract considered in the case last cited differs from that in the instant case in that the former was divisible while the latter "is not divisible. It has not a divisible limitation." Even if it be assumed that the parties intended that the defendant should refrain from engaging in the undertaking business, without limitation as to territory, the question of divisibility of the covenant would be no different than that in the case of *Franz v. Bieler*, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466, where the covenant was to refrain from carrying on a business within a radius of ten miles from a point in the city of Oakland. The territory to which the restriction applied thus included a part of Contra Costa county and a part of the city and county of San Francisco, as well as a portion of Alameda county. It was there argued that the contract was not divisible. At page 181 of the decision (56 Pac. 250) it is said:

"I think, however, that the description of the territory is good as to all of it that lies within Alameda county, such boundaries being capable of exact ascertainment, the Code per-

mitting the restriction to extend to 'a specified county, city, or a part thereof.'"

Defendant's covenant is that he will not "enter into business in competition to the above-mentioned firm," without limitation as to the kind of business restricted. Since the firm is mentioned in the contract as an "undertaking firm," the covenant may reasonably be construed as an agreement not to engage in the undertaking business, but in any event the statute limits the restriction to a "similar business." In *Shafer v. Sloan*, 3 Cal. App. 335, 337, 85 Pac. 162, 163, it is said:

"It is true the contract is in excess of the rights conferred by section 1674, Civil Code, in that it undertakes to restrict the right to engage in business so long as the party of the first part may continue in business, omitting the words 'similar business' found in the section. This, however, would not render the contract thereby void, but only to the extent to which it attempted to enlarge the rights beyond the statute."

Since the foregoing decisions of this state are decisive of the questions thus far discussed, it is not deemed necessary to review the decisions of other jurisdictions cited in the briefs.

[2-4] Appellant's contention that he is not engaged in the undertaking business is so manifestly without merit that it requires but little consideration. "The provisions of the Code authorize the execution of a contract by which one agrees not 'to carry on' a similar business. It is too narrow a construction to say that this is limited to the carrying on of a business as owner or proprietor. To conduct, manage or operate it wholly or in part, as the agent of another, is equally within the purpose and language of the Code." 6 Cal. Jur. 142; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Johnston v. Blanchard*, 16 Cal. App. 321, 116 Pac. 973. "As a general rule a contract against engaging in a similar business is broken by conducting or controlling such a business for another as manager or in a similar capacity, but it is not broken by merely entering into the employ of one conducting such a business in the capacity of a clerk or servant." 13 C. J. 557. It certainly is clear that defendant's employment by the Mission Undertaking Company was not merely in the capacity of clerk or servant.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.



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